



**Mwangi (Suing as the Administrator of the Estate of Paul Mwangi
Nderitu) v Nderitu & 2 others (Environment & Land Case
E252 of 2020) [2024] KEELC 573 (KLR) (6 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 573 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E252 OF 2020
OA ANGOTE, J
FEBRUARY 6, 2024**

BETWEEN

**ELIZABETH WANJIRU MWANGI PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF PAUL MWANGI
NDERITU**

AND

**IRENE MUGURE NDERITU 1ST DEFENDANT
BERNARD NDERITU MWANGI 2ND DEFENDANT
REGISTRAR OF LANDS, NAIROBI 3RD DEFENDANT**

JUDGMENT

Background

1. Vide a Complaint dated 30th October, 2020, the Plaintiff seeks the following reliefs against the Defendants jointly and severally;
 - a. A declaration that the Plaintiff is the lawful and bona fide owner/proprietor of properties numbers Nairobi/Block 209/9673 & Dagoretti/Riruta S 654.
 - b. A permanent injunction restraining the Defendants, their servants, agents, assignees, or anyone acting under their authority, from transferring, disposing off, alienating, charging, or in any manner whatsoever dealing with or interfering with the Plaintiff's quiet possession of the properties known as Nairobi/Block 209/9673 & Dagoretti/Riruta S 654.
 - c. A mandatory injunction directing and requiring the 3rd Defendant to forthwith register the Plaintiff as the bona fide and lawful proprietor of the said properties Nairobi/Block 209/9673 & Dagoretti/Riruta S 654.



- d. General Damages.
 - e. Costs and Interest.
2. It is the Plaintiff's case that she is a co-administrator of the Estate of her deceased husband, Paul Mwangi Nderitu, together with the 1st Defendant, her daughter and that she has at all material times been the bona fide and lawful owner of the properties known as Nairobi/Block 209/9673 and Dagoretti/Riruta S 654 (hereinafter the suit properties) which were bequeathed to her by her late husband vide his last will and testament dated 5th August, 2008 which was adopted in its entirety in the succession cause.
 3. According to the Plaintiff, the 1st Defendant, either with or without the connivance of the 2nd Defendant, intends to dispossess and disinherit her and that the suit properties were registered in the names of the 1st and 2nd Defendants to hold in trust for his deceased husband and subsequently his estate.
 4. The Plaintiff contends that the 1st Defendant is guilty of fraud, the particulars of which include threatening and attempting to divest her interest in the suit property and illegally conferring it on a stranger; abdicating her duty as a co-administrator and disinheriting her and acting in an unconstitutional and unlawful manner.
 5. The 1st and 2nd Defendants filed a joint Defence and Counterclaim on 22nd September, 2021, in which they denied the assertions as set out in the Plaint. It is their case that the property known as Nairobi/Block 209/9673 was transferred to the 1st Defendant on 17th August, 2001 whereas the property Dagoretti/Riruta S 645 was transferred to the Plaintiff and 2nd Defendant as tenants in common on 17th September, 2001.
 6. According to the Defendants, they hold legal indefeasible titles to the suit properties as aforesaid; that at the time the Will was written on 5th August, 2008, the testator did not have the locus to bequeath properties already transferred; that the adoption of the Will does not defeat the Defendants' title to the suit property and that there is no indication as alleged that the properties were held in trust for the Plaintiff. It is the Defendants case that it is the Plaintiff who is trying to disinherit and deny them their right to own property.
 7. Vide the Counterclaim, the 1st and 2nd Defendants sought for the following orders:
 - i. The Plaintiffs' claim against the Defendants be dismissed with costs.
 - ii. An order do issue that all that piece of property known as Nairobi/Block 209/9673 belongs to Irene Mugure Nderitu absolutely while that property known as Dagoretti/Riruta S 645 belongs to Elizabeth Wanjiru Mwangi and Bernard Nderitu Mwangi as owners in common.
 - iii. The Plaintiff be ordered to forthwith vacate all that piece of property known as Nairobi/Block 209/9673 and surrender the same to Irene Mugure Nderitu.
 - iv. A mandatory injunction do issue restraining the Plaintiff, her servants, agents or any individual acting under her authority from transferring, disposing off, alienating, charging or in any manner whatsoever interfering with the 1st Defendants quiet enjoyment of the property known as Nairobi/Block 209/9673 and the 2nd Defendants' share in all that piece of property known as Dagoretti/Riruta S 645.
 - v. Any such or other further order as this Honourable Court may deem appropriate in all the circumstances of the suit.



8. The 3rd Defendant did not participate in the proceedings.

Hearing and Evidence

9. Vide a Consent entered into on 30th May, 2023, the parties agreed to adopt their witness statements and documents on record in lieu of a viva voce trial. The Plaintiff's testimony as per her statement dated 19th November, 2020 was that she is a joint Administrator of the Estate of the Late Paul Mwangi Nderito, her deceased husband and that her late husband bequeathed to her various properties, including the suit properties to her.
10. It is the testimony of the Plaintiff that at the time of the bequest, the properties were registered in the joint names of the 1st and 2nd Defendants and in her name and that of the 2nd Defendant; that the said registration in the Defendants' names other than herself and the deceased were to be held in trust for her and the Estate and that the deceased had commenced the process of re-conveyance of the properties from their children to himself.
11. It was her further statement that the 1st and 2nd Defendants willfully and without any coercion, promise or inducement executed the requisite consents for the distribution of the Estate as stated in the Will; that in doing so, they wholly accepted and acceded to the bequeath of the properties to her and that on 28th December, 2019, she discovered that the safe in her home where all the documents, deeds and testimonials in respect of the affairs of the properties had been broken into and documents stolen.
12. The Plaintiff stated that she is apprehensive that whoever took the titles was guided by ill motive and intent to dispossess her; that the 1st Defendant has on various occasions voiced her desire to disinherit her and has put the same down on emails and that it is imperative that the orders sought be granted.
13. Susan Wairimu Nderitu, the Plaintiff's daughter, swore a statement in support of her case on 3rd March, 2023. She stated that her, together with the 1st and 2nd Defendants, who are her siblings, have always known the property Nairobi/Block 209/9673 to be their family home and their parents matrimonial home which they have no claim over and that this was the consensus at the time of lodging the Petition for the grant of letters of Administration.
14. It was the testimony of the Plaintiff's daughter that the 1st Defendant freely executed documents affirming that the two properties were part of the Estate of the deceased, to wit, the Petition, Affidavit dated 11th March, 2013 and Affidavit in support of Summons for confirmation of Grant and Consent to Confirmation of Grant.
15. Vide her statement, Ms Wairimu averred that the 1st Defendant's statement is full of falsehoods; that she has drawn their brother who has serious challenges with alcoholism into her schemes and that what she alleges now is different from what she has severally communicated, including to how the matrimonial property/family home should be shared amongst the parties further affirming that she is aware that the property does not belong to them.
16. It was the evidence of the Plaintiff's daughter that the registration of the properties in the names other than the deceased and the Plaintiff was in trust for their parents and that the Plaintiff has been kind to the 1st Defendant and has supported her both financially and otherwise.
17. According to Ms Wairimu, the 1st and 2nd Defendants' Counsel in the present case are their Counsel in the succession matter and did not contest the Will nor distribution of the assets therein and that the 2nd Defendant admitted to having broken into the home and stolen the documents, deeds and testimonials with respect to the deceased's estate.



18. The 1st Defendant filed a statement on her own behalf and on behalf of the 2nd Defendant, her brother, on 2nd September, 2021. It was her statement that at all material times, the suit properties were neither bequeathed to the Plaintiff nor held in trust for her and that the deceased transferred to her L.R 209/9673 on 17th August, 2001 while the property known as Dagoretti/Riruta S645 was registered in the names of the Plaintiff and the 2nd Defendant as tenants in common on the same day.
19. It is the Defendants' case that the transfers occurred prior to the registration of the Will dated 5th August, 2009 and that further, nowhere was it indicated in the Will that they held the properties in trust for the Plaintiff which is any event not logical, them being her children.
20. It was their further statement that the consents to the Letters of Administration and their subsequent confirmation does not negate the fact that the Will contained properties that had already been bequeathed to them prior to the Will being recorded and registered and as such, the Plaintiff cannot lay claim to them; that an individual cannot bequeath property that does not belong to him and that a Will cannot supersede a legally registered document. It is the Defendant's case that the Plaintiff has no rights over L.R Nairobi/ Block 209/9673 and has only partial ownership rights of Dagoretti/Riruta S 645.

Submissions

21. The Plaintiff's counsel submitted that on 7th July, 2023, judgement was delivered HCSC No. 759/2010: In the matter of the Estate of Paul Mwangi Nderito, directing, inter-alia, the Executors to work together to conclude the distribution of the Estate within ninety (90) days and sign all the necessary transfer documents or instruments to facilitate the distribution of assets to the beneficiaries in accordance with the written Will dated 5th August, 2008.
22. It was submitted that the legal implication of the aforesaid judgement is that the question of the transmission of the assets of the Estate of Paul Mwangi Nderito, including the suit properties herein, being part of bequest spelt out in the Confirmation of Grant is settled and is, therefore, res judicata and has rendered this Court functus officio in as far as it can determine the fate of the suit property and this Court.
23. It was submitted that the case meets the elements of res judicata as set out in the case of Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited [2017] eKLR; that it is apparent from the evidence that the Plaintiff and the 1st and 2nd Defendants knew and understood that the terms Kileleshwa Home and Dagoretti Property were, in fact, in reference to the suit properties and that having taken the position in HCSC NO. 759/2010 that the suit properties are assets of the Estate of the Late Paul Mwangi Nderito, they are estopped from saying anything to the contrary.
24. Counsel submitted that the last Will and Testament of the deceased leaves no doubt whatsoever that he never intended the suit properties to be out and out gifts.
25. Counsel submitted that by his own hand, the deceased included the two properties in his Will, which meant that their registration in the names of his children was never intended to confer beneficial interest to them. Counsel cited the cases of Heartbeat Limited vs Ng'ambwa Heartbeat Community Children's Home & Rescue Center [2018] eKLR and Twalib Hatayan Twalib Hatayan & Another vs Said Saggah Ahmed Al-Heidy & Others [2015] eKLR, which outlined the basic elements of a trust.
26. It was submitted that the deceased as the owner of the land had authority to do whatever he desired with the Trust property without being accountable to the trustees or seeking the consent of the trustee and that as stated by the Court of Appeal in Bristol and West Building Society vs Mothew [1998] Ch 1, a trustee has a fiduciary duty to act as directed by the trustor, for the latter's benefit.



27. The 1st and 2nd Defendants' Counsel submitted that the sole issue for determination is whether the deceased had locus to bequeath properties already transferred in his lifetime to the 1st and 2nd Defendants and the 2nd Defendant and Plaintiff as joint owners in common respectively.
28. Counsel submitted that the deceased did not have the locus to bequeath properties already transferred by him in his lifetime; that Section 2 (1) of the [Law of Succession Act](#) provides that the provisions therein applies to all cases of intestate or testamentary succession to the estates of deceased persons and to the administration of estates of those persons and that an estate means the free property of a deceased person, that is, the property of which that person was legally competent free to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.
29. Counsel for the Defendants submitted that it is clear that prior to his death, the deceased was not free to deal with the suit properties as he wished, the same having been legally transferred to the 1st Defendant and the 2nd Defendant and the Plaintiff as owners in common respectively and that the Plaintiff has not in any way disputed the authenticity of the transfers to the Defendants, but rather has only indicated that the same were 'held in trust' on her behalf, with no substantial evidence provided to prove the same.
30. Counsel submitted that the rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the [Land Registration Act](#) 2012; that Section 24 provides that the registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

Analysis and Determination

31. Having considered the pleadings, statements and submissions, the following arise as the issues for determination;
 - i. Who is the bona fide owner (s) of the suit properties?
 - ii. What are the appropriate orders to issue?
32. At the onset, the Court notes that the Plaintiff asserts that this matter is res judicata and that the Court is functus officio. It is her position that on 7th July, 2023, judgement was delivered in HCSC No. 759 of 2010: In the matter of the Estate of Paul Mwangi Nderito and that the judgement directed the Executors to conclude the distribution of the Estate in accordance with the Will dated 5th August, 2008.
33. According to the Plaintiff, the question of the transmission of the assets of the Estate of Paul Mwangi Nderito, including the suit properties herein, being part of bequests spelt out in the Confirmation of Grant is settled and is, therefore, res judicata and has rendered this Court functus officio as regards the suit properties. However, the Plaintiff did not withdraw her suit despite that assertion.
34. There is no doubt that res-judicata is fundamentally a jurisdictional issue which must be resolved before the merit of the matter at hand is considered. It can indeed be raised at any stage of the proceedings. However, it must be raised in the proper manner. Submissions do not constitute a proper manner in the circumstances.
35. It has been held time without number that submissions are not pleadings. In the case of *Ngang'a & Another vs Owiti & Another* [2008] 1KLR (EP) 749, the Court persuasively held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which



may do no prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

36. The Court of Appeal crystallized this position in the case of Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another [2014] eKLR stating thus:

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

37. The Court of Appeal in Avenue Car Hire & Another vs Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997 held that no judgement can be based on written submissions and that such a judgement is a nullity since written submissions are not a mode of receiving evidence set out under the Civil Procedure Rules. The same Court in Muchami Mugeni vs Elizabeth Wanjugu Mungara & Another Civil Appeal No. 141 of 1998 found the practice of making awards on the basis of submissions rather than the evidence deplorable.

38. The dispute herein turns on the ownership of the suit properties which both the Plaintiff and the 1st and 2nd Defendants lay claim to. Each of the parties is therefore obligated to prove its case on the required standard of proof, being on a balance of probabilities. This principle is succinctly captured in Sections 107, 109 and 112 of the *Evidence Act*, CAP 80. Section 107 provides as follows:

"(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

39. Sections 109 and 112 of the same Act states as follows:

"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

"112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

40. The Plaintiff's case is that she is the lawful proprietor of the suit properties having been bequeathed the same by her late husband vide his written Will of 5th August, 2008. She contends that the suit properties were at all relevant times registered in the names of the 1st and 2nd Defendants to hold in trust for the deceased and subsequently for his Estate.



41. She adduced into evidence the Certificate of Confirmation of Grant and the Last Will and Testament of Paul Mwangi Nderito; the search certificate in respect of L.R 209/9673; the partially executed Transfer in respect of L.R 209/9673; the Affidavits and Consents sworn by the 1st and 2nd Defendants in support of the Confirmation of Grant in HCSC No. 759 of 2010 and emails from the 1st Defendant.
42. On their part, the 1st and 2nd Defendants assert that the parcel of land known as Nairobi/Block 209/9673 was transferred to themselves on 17th August, 2001 whereas Dagoretti/Riruta S645 was transferred to the 2nd Defendant and the Plaintiff as tenants in common on 17th September, 2001. It is the Defendants' case that the deceased did not have the locus to bequeath properties already transferred as aforesaid.
43. The 1st and 2nd Defendants adduced into evidence copies of the official searches for the suit properties.
44. To begin with, it is not disputed that the suit properties are registered in the names of the 1st and 2nd Defendants Nairobi/Block/209/9673 on 17th August, 2001 under the Registration of Titles Act (now repealed) and the Plaintiff and the 2nd Defendant-Dagoretti/Riruta S 645 on the 17th September, 2001 under the Registration of Lands Act (now repealed).
45. It is further undisputed that the respective properties belonged to the deceased who transferred the same in 2001, before he died in 2009. The legitimacy of the transfer and subsequently the titles is not in question.
46. The sole question to be answered is whether the properties were transferred to the Defendants to be held in trust for the deceased and his Estate as averred by the Plaintiff or whether they were outright gifts as contended by the 1st and 2nd Defendants.
47. The regimes under which the properties were registered recognized the rights of a registered owner of property. Section 23 (1) of the Registration of Titles Act (repealed) provided as follows:

“ 23

- (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

48. In the same vein, Section 27 of the Registered *Land Act* (repealed) provided as follows:

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”



49. This provision has been mirrored in Section 24 of the *Land Registration Act* 2012 which provides as follows;

“Subject to this Act(a)The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

50. Section 25 of the *Land Registration Act* recognizes overriding interests in registered land including trusts. It provides;

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

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

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

51. Whereas Section 28 of the same Act provides;

“28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a) deleted by Act No. 28 of 2016, s. 11(a);
- (b) trusts including customary trusts;
- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- (d) natural rights of light, air, water and support;
- (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- (f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
- (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;



- (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- (j) any other rights provided under any written law.”

52. The Plaintiff herein pleads the existence of a resulting trust. In the case of Heartbeat Limited vs Ng’ambwa Heartbeat Community Children’s Home & Rescue Centre [2018] eKLR, the Court of Appeal considered the issue of trust as follows;

“(26) This Court considered the law on trust in detail in *Twalib Hatayan & Anor vs. Said Saggat Ahmed Al-Heidy & Others* [2015] eKLR, and outlined the basic tenets as follows:

“According to the Black’s Law Dictionary, 9th Edition; a trust is defined as:

- “1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the *Trustee Act*, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong...It arises where the intention of the parties cannot be ascertained.

If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury’s Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally



expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra).”

53. The doctrine of trust, though not a new concept, cannot be imposed on parties. However, a party has to produce sufficient evidence to enable the Court imply a trust. This was expressed by the Court of Appeal in the case of Kazungu Fondo Shutu & Another vs Japhet Noti Charo & Another [2021] eKLR which relied on its earlier decision of Juletabi African Adventure Limited & Another vs Christopher Michael Lockley [2017] eKLR wherein it held;

“The law never implies, the Court never presumes a trust, but [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

54. The law recognizes that a parcel of land may be transferred as a gift. In this respect, consideration does not need to be determined. Where a gift is made during the lifetime of a deceased, it is referred as a gift inter vivos.

55. The Court in In Re Estate of late Gedion Manthi Nzioka 2015 eKLR, had this to say regarding gifts inter-vivos;

“For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts..... Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid....”

56. Where a property has been gifted during the lifetime of a deceased and the gift perfected, the property no longer belongs to the deceased. As is a general principle, a deceased as with any other person cannot give away what is not theirs.

57. So, was the suit property to be held in trust by the Defendants or it was a gift inter vivos? According to the Plaintiff, the fact that the deceased had begun the process of re-transfer of the suit properties to himself points to the fact that the 1st and 2nd Defendants were holding the properties in trust for the deceased. The Plaintiff further alludes to the fact that the deceased bequeathed the properties to her. It is also her contention that the fact that the 1st and 2nd Defendants did not dispute either the Will or the entire succession process also supports this position.

58. The Plaintiff adduced into evidence correspondence by the 1st Defendant discussing the various ways in which the entire family can benefit from the suit properties, particularly Nairobi/Block 209/9673.

59. The 1st and 2nd Defendants on their part maintain that the properties were gifts. They do not dispute that they did not contest the Will and consented to the confirmation of grant. They further do not



dispute the correspondence adduced with respect to the properties showing that the same should be utilized for the benefit of all the family members.

60. The 1st and 2nd Defendants did not make any attempt to explain this substantial shift in position, only asserting that the suit properties were duly transferred to them and that the deceased did not purport to bequeath it to the Plaintiff and his Estate.
61. Apart from the foregoing, it has not been disputed that the Plaintiff is in possession of and resides on the property known as Nairobi/Block 209/9673. Indeed, the 1st and 2nd Defendants seek to have her evicted from the property.
62. Claims by the Plaintiff and her daughter that one of the property is a family home has equally not been disputed. If indeed the property was a gift, how is it that the 1st and 2nd Defendants did not take possession thereof after the transfer?
63. Considering the entirety of the circumstances herein as laid out in the foregoing analysis, the Court finds that the suit properties were not outright gifts given to the Defendants, but were held in trust for the deceased. Subsequently, he was at liberty to bequeath the same to his Estate.
64. This position is affirmed by the fact that the suit properties were included in the properties belonging to the Estate, a position the Defendants did not contest in the succession cause filed in the High Court. Ultimately, the Court finds that the Plaintiff has proved her case on a balance of probabilities.
65. Having found that the Estate of the deceased is the rightful owner of the suit properties, it follows that she is entitled to all the rights appertaining to the ownership thereof. Consequently, the Plaintiff's suit is allowed as follows:
 - a. The 1st and 2nd Defendants' Counterclaim is hereby dismissed.
 - b. A declaration does hereby issue that the Estate of Paul Mwangi Nderito is the lawful proprietor of parcels of land known as Nairobi/Block 209/9673 and Dagoretti/Riruta S 654.
 - c. A mandatory injunction is hereby issued directing and requiring the 3rd Defendant to forthwith register the administrators of the Estate of Paul Mwangi Nderito as proprietors of Nairobi/Block 209/9673 and Dagoretti/Riruta S654, and thereafter in accordance with the Confirmed Certificate of Grant.
 - d. Each party to bear his/her own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF FEBRUARY, 2024.

O. A. Angote

Judge

In the presence of;

Mr. Mutuku for Plaintiff

Mr. Thuo for 1st and 2nd Defendants

Court Assistant - Tracy

