



**Wahiu & 2 others v Wahiu & another (Environment & Land Case
239 of 2018) [2023] KEELC 17693 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17693 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 239 OF 2018**

AK BOR, J

MAY 4, 2023

BETWEEN

ALEXANDER ANTHONY WAHIU 1ST PLAINTIFF

SAMUEL MWAI 2ND PLAINTIFF

NICHOLAS MUIRURI 3RD PLAINTIFF

AND

JOSEPH KARIHA WAHIU 1ST DEFENDANT

THUMBI KAMAU 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs, who are the sons of the 1st Defendant, filed this suit on 23/5/2018 claiming that during her lifetime, their mother, Eunice Wangui Kariha acquired various properties with their father. The Plaintiffs' mother died on 28/12/2014. They averred that land reference number (L.R. No.) 209/13291 grant No. I.R 71057 situated at Kileleshwa in Nairobi ("the suit property") was allocated to their late sister, Irene Njeri but was registered in the 1st Defendant's name to hold in trust for the Plaintiffs. The suit property had a government house which was occupied by the Plaintiffs' parents who were both civil servants. They claimed that through the assistance of Hon. J.J. Kamotho, the suit property was allocated to their sister, Irene Njeri for the benefit of her siblings and the title was issued in the 1st Defendant's name.
2. They claimed that it was understood that the registration of the 1st Defendant as proprietor of the suit property was on the basis of a trust executed between the 1st Defendant, Irene Njeri and her siblings. Differences arose between the 1st Defendant and the Plaintiffs' late mother and they divorced vide Divorce Cause No. 174 of 2004 – Joseph Kariha Wahiu v Eunice Wambui Kariha. The decree nisi was issued on 23/6/2010 and made absolute on 23/1/2011. The acrimony that ensued after the divorce proceedings led to the filing of Miscellaneous Application No. 10/2006 (OS) and Nairobi HCCC No.



- 43 of 2010 over the sharing of the matrimonial property. ELC Case No. 251 of 2016 Joseph Kariha Wahi v Alexander Anthony Wahi, Samuel Mwai and Nicholas Mwiruri was also filed in relation to the suit property. The Plaintiffs averred that none of the suits were determined in favour of the 1st Defendant while emphasising that in those suits their late mother maintained that the registration of the 1st Defendant as proprietor of the suit property was subject to a trust created in their favour through the allocation of the suit property to their late sister Irene Njeri and that the trust continued.
3. The Plaintiffs averred that they were brought up on the suit property from when they were children and that they attended and completed school while living in the suit property. That even after their parents divorced, it was their father who moved out of the suit property and went to reside in Ngong in March, 2002. The Plaintiffs claimed that their mother developed the suit property from her own resources and that she erected three flats one of which the Plaintiffs occupied while the other two were leased to tenants.
 4. The Plaintiffs averred that while the suits were pending in court, the 1st Defendant transferred the suit property to the 2nd Defendant for Kshs. 70 million. They claimed that that was undertaken unlawfully, fraudulently and illegally with the sole purpose of evading due process. They gave the particulars of illegality including breaching the doctrine of lis pendens in undertaking the transfer without the knowledge of the Plaintiffs who have a beneficial interest in the suit property arising out of trust; and undertaking the sale in breach of the duty imposed upon the 1st Defendant as trustee of the Plaintiffs and Sandra Wambui, the daughter of the late Irene Njeri who they claimed was allocated the suit property but bestowed it upon the 1st Defendant.
 5. The Plaintiffs claimed that the 1st Defendant manifested mala fides by withdrawing the two suits without serving the Plaintiffs advocates until three months later. They claimed that they did not know about the sale of the suit property until they received notices from the 1st Defendant dated 30/04/2018 which were dropped in their house. They were only able to get an official search on 28/5/2018 confirming the status of the property.
 6. The Plaintiffs sought a declaration that the registration of the suit property in the 1st Defendant's name was undertaken in trust for the Plaintiffs and that the 1st Defendant held the title over the suit property in trust for the Plaintiffs. Further, they sought a declaration that the sale and transfer of the suit property by the 1st Defendant to the 2nd Defendant on 6/3/2018 was undertaken fraudulently, illegally and in breach of trust. They sought cancellation of the registration of the 2nd Defendant as proprietor of the suit property. They also sought an injunction to restrain the Defendants from evicting them, alienating, transferring, charging, entering upon, developing or otherwise dealing with the suit property in a manner which interferes with their quiet possession of the suit property.
 7. The 1st Defendant filed a Defence and Counterclaim on 2/4/2019 in which he denied the Plaintiffs' claim and affirmed that he was registered as the sole and absolute proprietor of the suit property for a term of 99 years from 1/8/1996 pursuant to Grant no. I R 71057 issued by the Government. He stated that in response to the Government's indication that it intended to dispose of some properties, he applied and was allocated the suit property following which he complied with the substantive and procedural legal requirements on the allocation. He gave a chronology of the events which led to the sub-division of the suit property including the payments he made and how he procured the title over the suit property.
 8. The 1st Defendant was adamant that neither the grant nor the letter of allotment mentioned the late Njeri as the allottee of the suit property. In any event, he was allocated the property as a Senior Civil Servant and by the time Irene Njeri died, he had been registered as proprietor of the suit property for over five years without his daughter laying any claim to the property. He pointed out that in 2001, his



late daughter was employed as a messenger and did not qualify to live in the suit property and lacked the capacity to purchase it. He added that the late Irene Njeri was staying in a government house at Park Road in Nairobi at the time of her death. He emphasised that there was no trust which in any event ought to have been reduced to writing.

9. He averred that he was forced to withdraw HCCC No. 43 of 2010 on 22/1/2018 because it had become impossible to prosecute the case in the absence of his late wife or her legal representative. He explained that he was forced to move out of the suit property because his wife and the Plaintiffs physically and mentally abused him and claimed that his late wife organised to attack and kill him. He emphasised that he left the matrimonial property for his personal safety and security.
10. The 1st Defendant averred that after withdrawing HCCC No. 43 of 2010 (OS) and ELC No. 251 of 2016 there was no suit pending which could hamper the sale and transfer of the suit property to the 2nd Defendant. He therefore entered into negotiations and upon agreement sold the suit property to the 2nd Defendant for Kshs. 70 million which he claimed was paid as the parties had agreed. He confirmed that the 2nd Defendant was the registered owner of the suit property.
11. In the counterclaim, the 1st Defendant averred that the High Court made orders in 2014 for the rental income from the suit property to be shared between him and his late wife but his late wife frustrated the implementation of the court orders and made it impossible for him to get his share of the rental income as directed by the court. After the demise of their mother, the Plaintiffs ensured that he could not access any income derived from the suit property through their belligerence and disrespect for him, forcing him to institute contempt proceedings against the 1st Plaintiff. That despite collecting over Kshs. 230,000/= in rent from the suit property, the Plaintiffs had made no effort in taking up the administration of their late mother's estate by substituting her in the suit.
12. He urged that the Plaintiffs had blatantly disobeyed the court orders which directed that rent be shared equally from 1/4/2014. He sought monthly rent of Kshs. 115,000/= with effect from 1/04/2014 to 12/2/2018 from the Plaintiffs amounting to Kshs. 5,290,000/=. He also sought general damages, costs and interest.
13. In their Reply to Defence and Defence to Counterclaim, the Plaintiffs reiterated that the suit property was allocated to their late sister and that their father held it in trust for them. They averred that the 1st Defendant was not entitled to the whole rental income accruing from the suit property and that the question of ownership of the suit property had never been determined. They faulted the 1st Defendant for disposing of the suit property to the 1st Defendant while knowing that there were numerous suits pending between him and the Plaintiffs and his late wife.
14. On the claim for damages, the Plaintiffs denied that they were in any way liable to pay damages to the 1st Defendant while contending that he had not demonstrated any cause of action against them. They urged the court to dismiss the counterclaim.
15. The 2nd Defendant averred in his Defence that he was the duly registered proprietor of the suit property. He asserted that he was a bona fide purchaser for value without notice having bought the suit property from the 1st Defendant for valuable consideration without notice of any defect on the title vide the sale agreement dated 12/2/2018. He purchased the suit property for Kshs. 70 million and a transfer was executed by both parties with an entry made at the Lands Ministry on 6/3/2018 to the effect that the suit property was lawfully transferred to him.
16. The 2nd Defendant averred that he undertook thorough due diligence with the assistance of his advocates in the sale transaction at the Nairobi Lands Registry and the Nairobi County Rates Department before purchasing the suit property, which confirmed that the suit property was registered



- in the 1st Defendant's name as the sole and absolute proprietor. Initially, it was a government housing project where civil servants were allocated houses depending on their job group. A caveat was registered against the suit property on 6/12/2004 by Eunice Wangui Kariha (now deceased) who claimed that the property was matrimonial. The caveat was removed on 5/10/2010.
17. The 2nd Defendant averred that pursuant to Section 26 of the *Land Registration Act*, he was the absolute and indefeasible owner of the suit property and that his certificate of lease should be taken as prima facie evidence that he was the proprietor. The 2nd Defendant denied that he was party to any fraud or misrepresentation or that he acquired the certificate of title over the suit property illegally, unprocedurally or through a corrupt scheme and that as such his title could not be challenged.
 18. He contended that this suit was frivolous, vexatious, an abuse of the court process and did not disclose any legitimate cause of action against him. He urged the court to dismiss it. He pleaded that he had invested heavily in the purchase of the suit property by taking a commercial loan of Kshs. 15 million from United Women Co-operative Savings and Credit Society and also liquidated his stake in various projects with Cytonn Investment Limited and therefore stood to suffer great injustice and insurmountable loss. He services the loan every month and any interference with the proprietorship of the suit property would expose him to suffer loss running into millions of shillings.
 19. The 2nd Defendant averred that the suit property was wasting away and the commercial value of the rental units diminishing by the day because there was no repair and maintenance works being undertaken on the property. He added that the Plaintiffs and the other tenants had refused to pay rent. He gave the monthly rental income as Kshs. 230,000/=.
 20. He relied on Section 66 of the *Land Registration Act* regarding the registration of a proprietor of land under a trust and termed the suit as fatally defective. If the court were to grant the orders sought by the Plaintiffs, he pleaded that he would suffer substantial loss having paid over Kshs. 70 million for the suit property and costs.
 21. The case proceeded to hearing. The 1st Plaintiff testified and confirmed that the 1st Defendant was their father and was previously married to their mother, the late Eunice Wambui Kariha who died on 28/12/2014. He produced a copy of the death certificate. His father sued their mother in HCCC No. 43 of 2010 after their mother contested his ownership of the suit property. He referred to the affidavits and pleadings filed in that case giving the background of the title over the suit property. In that suit, the Plaintiffs' mother maintained that the property was allocated to his late sister Irene Njeri by former President Moi for her benefit and that of her siblings. He was emphatic that the 1st Defendant did not acquire the suit property but was only registered as a trustee for Irene Njeri and the Plaintiffs.
 22. He explained that the plot in question and the original house which stood on it were Government property in which they were living because their parents were civil servants. The houses were sold pursuant to the conditions given by the World Bank for the restructuring of the country's economy during former President Moi's regime. His mother deponed in the affidavits that the late Irene Njeri was working in the office of Hon. J.J. Kamotho who was a Cabinet Minister in President Moi's Government and that the Minister assisted her to access the President who allocated the plot to Irene for her benefit and that of her siblings. He referred to the affidavit sworn by his late mother on 20/9/2013.
 23. Their father filed the Originating Summons dated 20/01/2006 over the suit property during their mother's lifetime and alleged that the property was acquired jointly with their mother whilst their mother denied that the 1st Defendant purchased the suit property. His late mother explained in the



- affidavit that the late Irene Njeri opted to have the title issued in her father's name and therefore a trust was created in their favour in respect of the title which was registered in the 1st Defendant's name.
24. Mr. Alexander Wahiu stated that there were flats on the suit property which the 1st Defendant did not construct. The siblings of Irene Njeri had always lived in the suit property where they grew up. He stated that the 1st Defendant lived with them in the suit property until 2002 when he abandoned them and went to live with another woman in Ngong and never went back to the suit property. That at the time the 1st Defendant moved out, the houses which the Plaintiffs are occupying had not been constructed. He was emphatic that they were constructed later by his late mother to support them through school and college which she did single handed without support from the 1st Defendant.
25. The 1st Plaintiff testified that the 1st Defendant did never got any of the suits he filed determined and was aware that his registration as proprietor of the suit property was subject to the trust created in favour of the Plaintiffs as demonstrated by the responses which their mother filed the two suits. He maintained that they had a legitimate and valid claim to the suit property as can be discerned from their late mother's affidavit.
26. He told the court that on 1/3/2019 the 1st Defendant filed ELC No. 251 of 2016 – Joseph Kariga Wahiu v Alexander Antony Wahiu, Samuel Mwai and Nicholas Muiruri. He produced copies of the plaint and the other pleadings. His father served his advocates notices of withdrawal on 6/4/2018 which he maintained had not been adopted by the court and that the suit was therefore still pending. He received a notice dated 30/04/2018 requiring them to vacate the suit property from the 2nd Defendant claiming that he was now the registered owner. He responded to the letter on 15/5/2018. He produced copies of the letters written by the 2nd Defendant's advocate threatening to evict them from the land.
27. The search he got on 21/5/2018 showed that the suit property was transferred to the 2nd Defendant on 6/3/2018 in consideration of Kshs. 70,000,000/=. The Plaintiffs were not aware of the sale of the property to the 2nd Defendant, who he claimed never went to inquire why they were on the land. He suspected collusion between the Defendants in the sale of the land citing the reason that it was way below the market value. He contended that he 1st Defendant could not lawfully sell the suit property because he was aware of the cases pending in court over the land.
28. He concluded that they would be rendered destitute and homeless by the actions of the two defendants especially in light of the fact that his late sister Irene Njeri, who was allocated the suit property by the former President, left a daughter Sandra Wambui with special needs and who the 1st Plaintiff takes care of. Sandra, who is physically challenged, goes to a special school and requires constant medication and the 1st Plaintiff pleaded that it would be tragic if she were thrown out of the house which initially belonged to her mother and the Plaintiffs.
29. On cross examination, the 1st Plaintiff conceded that he did not have any documents to show that the suit property was allocated to his late sister. He also conceded that the letter of allotment and the title over the suit property were issued in his father's name without any indication that his father held it in trust for his sister. He explained that the sister lived in Ngara because she got a government house in Park Road. He was 38 years old and had lived in the house for 33 years since 1988. He claimed that his sister was allocated the house in 1985 when they were supposed to be chased from the house; and that she moved out of the suit property voluntarily because she wanted her freedom.
30. He confirmed that they did not take over the claim in HCCC No. 43 of 2010 (OS). He clarified that former President Moi allocated the house to his sister by word of mouth during the KANU era. His mother told him that former President Moi told Hon J.J. Kamotho that the property was allocated



for their benefit. There was no acrimony at the time Irene died. Sandra was physically challenged and his family takes care of her.

31. His mother's position in the affidavit was that the suit property belonged to the family and his father was only registered as trustee. He maintained that it had never been determined in any of those suits that the house belonged to his father. Although his father alleged that he had lost the title, he had the original title over the suit property and according to him his father knew where the title was.
32. The 1st Defendant gave evidence and adopted his witness statement, which is a replica of the averments set out in his Defence and Counterclaim. On cross examination, he stated that he was registered as the owner of the suit property which he voluntarily sold to the 2nd Defendant in 2018. He stated that he received the consideration of Kshs. 70 million and transferred the suit property to the 2nd Defendant. He got all the documents necessary to effect the transfer of the land which had no encumbrances. He disclosed to the 2nd Defendant that he was allocated the property in 1996 and was the registered owner.
33. He confirmed that there were several suits between him and his wife, some of which he filed and others his late wife filed regarding ownership of the suit property. His position in those cases was that he was the sole proprietor and did not hold the suit land in trust. His wife's position was that the suit property had been allocated to their daughter Irene Njeri by President Moi through Hon. Kamotho. He sold the property to the 2nd Defendant because his wife was not there after he withdrew the case. He confirmed that he got five children with Eunice and his late daughter was survived by Sandra Wambui, his granddaughter.
34. He explained that he moved out of the suit property in 2004 for security reasons but when he tried to go back he was termed a trespasser. After 2004, his former wife and the Plaintiffs lived in the suit property with Sandra who is on orphan. He reported the title lost when he could not trace it. He conceded that in one of the suits he stated that his former wife had confiscated the title. He did not know where the title was after his wife died. He disclosed to the 2nd Defendant how he acquired the suit property and that he was not living in it. He denied that the suit property was the Plaintiffs' home while maintaining that they have a home in Murang'a. As owner, he had the right to sell the land which he bought after paying the sums stated in the letter of allotment.
35. It was his evidence that at the time he was allocated the house, other civil servants were also allocated houses. The plot he was allocated was split into two and the second resultant plot was allocated to Dr. Davy Koech. He withdrew the suit he had filed against the Plaintiffs before selling the suit property to the 2nd Defendant. When he could not find his title he applied for a provisional title which was gazetted but did not elicit any objection. He withdrew ELC No. 251/16 on 23/1/2019 and HCCC No. 43 of 2010 was withdrawn on 22/1/2018. He explained that he withdrew the case against the Plaintiffs because he was sickly and did not have the money to enable him prosecute the case. He was emphatic that he had no problem supporting his granddaughter but that he feared for his life.
36. The 2nd Defendant testified and stated that he was the registered proprietor of the suit property which he purchased for Kshs. 70 million without notice of any defect on the 1st Defendant's title. He produced copies of the sale agreement and the executed transfer. He undertook due diligence before purchasing property. He stated that he had invested heavily in the purchase of the suit property by taking a commercial loan. His statement was more or less a replica of the defence which he filed.
37. He knew that 1st Defendant from 1970 when they were in college. He learnt from land agents that the 1st Defendant was selling the property and the agents sold him the property in late 2017. He stated that he went around the property and saw the condition it was in but did not interfere with the people he



- found on the land. The 1st Defendant informed him that his sons were living in the house. He did not talk to the 1st Defendant's sons because the title was registered in the 1st Defendant's name.
38. The 1st Defendant did not disclose to him that he had filed suits against his late wife and his sons. The 2nd Defendant was surprised to learn that there were problems with the suit property yet they conducted with due diligence. The 1st Defendant had a provisional title and told him that the original title was lost and the loss was gazetted. In his view, the Plaintiffs ought to pursue their claim against their father. He added that the 1st Defendant was to give him vacant possession of the suit property after paying the consideration.
39. On conclusion of the hearing, the court directed parties to file written submissions. Attempts were made to resolve the dispute pitting sons against their father through mediation but they did not bear fruit.
40. Parties filed and exchanged written submissions. The Plaintiffs submitted that the 1st Defendant's registration as proprietor of the suit property was undertaken subject to a trust in their favour. They invited the court to note that the existence or otherwise of a trust was a question of fact to be established from the facts of the case and by inference based on the circumstances in a particular case. They added that it was clear from the cases which the 1st Defendant filed against his late wife that the issue of whether the 1st Defendant was registered as owner of the suit property without any conditions was a live issue in HCCC No. 43 of 2010 and HC Misc App. No 10 of 2006.
41. They relied on the averments made by the late Eunice Wambui Kariha in her affidavit to the effect that the 1st Defendant unsuccessfully applied to be allocated the suit property and that it was their late daughter who sought the intervention of the late Hon. J.J. Kamotho to get retired President Moi to assist the family get the house allocated to them. They also alluded to the 1st Plaintiff's supplementary affidavit which refers to a note dated 2/6/1995 written by the late Hon. Justice J.M. Gachuhi to Hon. J.J. Kamotho following up on the application for allocation of the suit property. Unfortunately, Eunice Wambui Kariga, Hon. J.J Kamotho, Hon. Justice Gachuhi and their sister Irene said to have been allocated the suit property are not alive and could not give evidence. They urged the court to go by the evidence contained in the affidavit of Eunice Wambui Kariha, the Plaintiff's witness statement and the affidavits on record and infer the existence of the trust which the Plaintiffs rely on. They claimed that that position was never rebutted by the 1st Defendant and that the question of the existence of the trust had never been determined by any court despite the issue of trust being raised against the 1st Defendant since 2006.
42. The Plaintiffs urged that courts had over the year's dealt with the issue of trust and that it is recognised that a trust can be inferred from circumstances and may also result from the particular circumstances in a case. They argued that there was no law requiring that a trust must be in writing. They relied on the decision in *Isack M'Inanga Kiebia v Isaaya Theuri M'Lintari and another* [2018] eKLR where the court found that customary trust and other trusts were overriding interests which need not be noted on the register. Further, that to prove a trust in land one did not need to be in actual possession; and that the creation of a trust could take the form of an implied, resulting or constructive trust. The Plaintiffs maintained that the existence of a trust in their favour neither needed to be noted on the register nor that did it have to be in writing.
43. The Plaintiffs contended that there was nothing in the Registration of Titles Act (RTA) precluding the declaration of a trust against a title registered under that Act. That in any event, the [Land Registration Act](#) (LRA) which is applicable now explicitly recognises the kind of trust which they rely on.



44. The Plaintiffs relied on [James M'Ngaruthi M'Rintari & Another v Muguna M'Rintari](#) [2017] eKLR in which the court cited a passage from a previous decision to the effect that registration of titles was a creation of the law and one must look into the consideration surrounding the registration of a title to determine whether a trust was envisaged. They urged the court to place a lot of weight on the note from the Late Justice Gachuhi to Hon. J.J Kamotho and the proceedings where it was contended that the 1st Defendant was registered as the owner of suit property to hold it in trust for his daughter Irene and her siblings, who are the Plaintiff in this case.
45. The Plaintiffs invited the court to take into account the fact that since 2004 the 1st Defendant had never lived in the suit property which they occupied with their mother. They argued that there was evidence to show that it was their mother who made the developments on the suit property. The Plaintiffs pleaded that the suit property was the only home they have known since childhood and urged the court to take the fate of Sandra, Irene's daughter into account based on her medical and special needs.
46. They reiterated that the existence of a trust was not affected by not being shown on the register and relied on section 28 of the LRA which stipulates that all registered land is subject to the overriding interests affecting the land which need not be noted on the register. These include spousal rights over matrimonial property, trusts, rights of way, natural rights of light, air, water and support, rights of compulsory acquisition, leases not exceeding 2 years, rights acquired by prescription and charges for unpaid rates. They added that the transaction which is the subject matter of this suit was done in February 2018 bringing it within the ambit of the [LRA](#).
47. Regarding the claim about the 2nd Defendant being an innocent purchaser for value, the Plaintiffs pointed out that the 1st Defendant confirmed during cross examination that he was aware of the challenge to his registration as the owner of the suit land. Further, that the 2nd Defendant was aware that the 1st Defendant's registration as proprietor of the suit property was riddled with issues but he stated that they did not bother him since the search did not show any encumbrances against the title held by the 1st Defendant. They faulted the 2nd Defendant for going ahead to complete the transaction while knowing that the 1st Defendant was not residing on the suit property and it was his sons who lived in it. They argued that had the 2nd Defendant conducted due diligence he would have appreciated the prevailing background.
48. They emphasised that the 1st Defendant transacted over the suit property using a provisional title after he reported to the Registrar of titles that he had lost his original title yet the report on the loss of title was not true because the 1st Defendant had sworn in an affidavit that he was aware that the title was with his wife. That by declaring on oath that he had lost the title over the suit property which he knew was not lost, it amounted to acquisition of the certificate of title illegally, unprocedurally and through a corrupt scheme within the meaning of Section 26 (1) (b) of the [LRA](#). They urged that the 2nd Defendant's position that he was an innocent purchaser for value was not tenable because the protection afforded to him under Section 26 (1) (a) of the LRA was not available in light of Section 26 (1) (b). They relied on [Elijah Makeri Nyang'wra v Stephen Mungai Njuguna & Another](#) 2013 eKLR on the interpretation of Section 26 (1) (b) of the LRA on whether they reach a title.
49. The Plaintiffs relied on the doctrine of lis pendens under Section 52 of repealed *Indian Transfer of Property Act* of 1882 (ITPA) which provided that during the active prosecution of a case in which any right to immovable property was in question, the property could not be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party under any decree which may be made except with the court's authority and on terms the court may impose.



50. The Plaintiffs contended that even though the 1st Defendant maintained that he withdrew the suits before selling the suit property to the 2nd Defendant, the Notice of Withdrawal of ELC Case No. 251 of 2016 – *Joseph Kariba Wabiu v Alexander Antony Wabiu and 2 Others* was filed in January but was not served until 6/4/2018. The Notice of Withdrawal of HCCC No. 43 of 2010 (OS) was filed on 22/1/2018 and served on the Plaintiffs’ advocate on 6/4/2018.
51. The Plaintiffs contended that the notices of withdrawal of the suits were filed three weeks before the sale agreement of 12/2/2018 was executed but it took over 3 months for them to be served yet at that time there must have been active negotiations between the Defendants for the sale of land. They argued that the conduct of the 1st Defendant was deliberate to enable him enter into the sale agreement without their knowledge. They added that the practice was that after filing a notice of withdrawal of a suit, the notice is adopted by the court which did not happen in those cases.
52. The Plaintiffs contended that there was a conspiracy between the Defendants in conducting the sale transaction and pointed out that both the sale agreement and the transfer were dated 12/2/2018 yet payment of the purchase price went on until April 2018. They pointed out that clause 9 (7) of the sale agreement was a deliberate concealment of a material fact whereby the 1st Defendant declared that he had not received notification of any adverse claim on the property regarding ownership yet he was aware of the Plaintiffs’ claim that he held the suit land in trust. They emphasised that the conduct of the Defendants was calculated to defeat any claims they could have raised against the sale.
53. They argued that where a party transferred disputed property to a third party during the tendency of a suit, such transfer was null and void and that the purpose of the principle of lis pendens was to preserve the suit property until the suit was determined or the court gave other orders. They maintained that the 1st Defendant was presumed to have been aware of the issues affecting the suit property.
54. The Plaintiffs submitted that the 1st Defendant’s counterclaim was misplaced because he had already transferred the suit property to the 2nd Defendant. They urged that his recourse was to execute the court orders on the sharing of rental income. They concluded that the 2nd Defendant could get a refund of the money he paid for the suit property from the 1st Defendant who was aware that his registration as proprietor was contested.
55. The 1st Defendant submitted that prior to the suit property being registered in his name, it was public land whose disposal could only be done under the Governments Lands Act and other relevant statutes. He submitted that neither the late former President Moi nor the late Joseph Kamotho had power to allocate the suit property to the late Irene Njeri as the Plaintiffs claim. He argued that no evidence had been presented to the court to prove that he held the suit property in trust for the Plaintiffs. He maintained that his deceased daughter did not qualify to be allocated the suit property and could not meet the terms in the letter of allotment.
56. The 1st Defendant maintained that his acquisition of the suit property was clearly documented and that he complied with the substantive and procedural requirement of the relevant statutes in the acquisition of the land. He relied on the decisions in *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR and *Macharia Mwangi Maina and 87 others v Davidson Mwangi Kagiri* [2014] eKLR.
57. On the issue of lis pendens and its application to this suit, the 1st Defendant submitted that he withdrew HCCC No. 43 of 2018 on 22/1/2018 after it abated upon the death of his former wife pursuant to Order 24 of the Civil Procedure Rules and entered into the sale agreement with the 2nd Defendant for the sale of the suit property on 12/2/2018. He maintained that when he sold and transferred the suit property to the 2nd Defendant there was no pending suit in respect of the land and that the doctrine of lis pendens did not therefore arise in these proceedings.



58. The 1st Defendant submitted that it was instructive to note that the Plaintiffs' mother died on 28/12/2014 and despite being aware of the pendency of HCCC No. 43 of 2010, they did not obtain a grant to be substituted as the Defendants in that case. He pointed out that there was no counterclaim in ELC 251 of 2016. He maintained that the 2nd Defendant acquired a good and clean title to the suit property and urged the court to dismiss the suit and allow his counterclaim.
59. The 2nd Defendant submitted that based on Section 66 (1) of the LRA, he could not be deemed to have had knowledge of the existence of a trust as the Plaintiffs purported. He added that the Plaintiffs failed to produce cogent evidence to support their contention that the 1st Defendant held the suit property in trust for their late sister. He relied on Section 66 (3) of the LRA on the point that for registered dealings, the proprietor is deemed to be an absolute proprietor and no person dealing with the land is deemed to have notice of the trust.
60. The 2nd Defendant relied on *Mumo v Makau* (2004) 1 KLR 13 where the court held that trust was a question of fact which had to be proved through evidence, and that the law did not imply or presume a trust unless it was absolutely necessary to give effect to the intention of the parties to create the trust.
61. The 2nd Defendant argued that he was duly registered as proprietor of the suit property having obtained a title on 6/3/2018, and that his registration as proprietor of the land vested in him absolute ownership of the land with all the rights and privileges pursuant to Sections 24 and 26 of the LRA. Further, that the grounds for challenging a proprietor's title pursuant to Section 26 of that Act were not pleaded or proved against him in this matter. He added that he was not party to any fraud, misrepresentation nor did he acquire the certificate of title illegally, unprocedurally or through a corrupt scheme. He maintained that he undertook due diligence and even confirmed from the court that there was no pending suit before he purchased the suit property. He urged the court to dismiss the suit.
62. After hearing this case, the court in its ruling delivered on 9/8/2021, stayed the suit until HCCC No. 43 of 2010 and HC Misc. Application No. 10 of 2006 were heard and determined by the Family Division of the High Court on the share the Plaintiffs' late mother was entitled to in the suit property because the court was of the view that that was the share which the beneficiaries of her estate could lay claim to. The status quo was to be maintained to preserve the suit property until the Family Division determined the share which the Plaintiffs' late mother was entitled to in the suit property.
63. I was transferred from Milimani ELC to Nanyuki ELC on 15/9/2021. This matter came up for mention on 31/5/2022 during the virtual proceedings when the advocates in the matter informed me that Judge Ogutu Mboya had reviewed and set aside the orders I made on 9/8/2021 and forwarded the skeleton file to me for purposes of writing the judgment. The file was subsequently sent to Nanyuki by the ELC Deputy Registrar, Milimani.
64. In the ruling dated 23/9/2022, I reiterated the fact that it was the Family Division of the High Court to make a finding on the share the Plaintiffs' late mother was entitled to in the suit property since the claim by the Plaintiffs' late mother to the suit property survived her death and her children were the dependants of her estate. I restated the fact that the Plaintiffs needed to take out letters of administration to enable them substitute their late mother in the two suits filed in the High Court. I stayed the suit for six months to enable the Plaintiffs take out letters of administration so that they could pursue their late mother's assets including her share, if any, in the suit property.
65. The 2nd Defendant filed the application dated 18/11/2022 seeking review of the orders made on 23/9/2022. That application was eventually withdrawn on 17/4/2023 after it was overtaken by events and the parties urged this court to give a judgment date because it was appraised of the matter having heard the evidence of the witnesses while sitting in Milimani ELC.



66. The twin issues for determination are whether the court should make a finding that the 1st Defendant held the suit property in trust for the Plaintiffs; or whether it should allow the 1st Defendant's counterclaim against the Plaintiffs for Kshs. 5,290,000/= being his share of the rent derived from the suit property from 1/04/2014 to 12/2/2018.
67. It is not in dispute that the 1st Defendant was registered as proprietor of the suit property or that the Plaintiffs, who are his sons, lived on the suit land with their mother until her demise. The ownership of the suit property was the subject of litigation between the 1st Defendant and his late wife and also between the 1st Defendant and his sons. The other fact that is not contested is that the 1st Defendant sold and transferred the suit property to the 2nd Defendant. The sale precipitated the filing of this suit, where the Plaintiffs claim the sale of the suit property by the 1st Defendant to the 2nd Defendant was fraudulent and in breach of trust.
68. The common thread that runs through the dispute is that the land was allocated to the 1st Defendant's daughter, the late Irene but that she chose to have it registered in the 1st Defendant's name so that he could hold it in trust for her benefit and that of her siblings. No evidence was tendered by the Plaintiffs to prove that the 1st Defendant held the suit property in trust for the Plaintiffs. In the affidavits filed in those cases which the Plaintiffs placed a lot of reliance on, their late mother claimed that the suit property was matrimonial property and on this alone the Plaintiffs' claim would fail.
69. From the evidence adduced, it is clear that the 1st Defendant withdrew the suits that were pending in court and proceeded to dispose of the suit property to the 2nd Defendant while the Plaintiffs were in possession of the land. The court agrees with the 1st Defendant that the Plaintiffs should have substituted their late mother in the suits that were pending before the High Court and pursued her claim to the suit property as beneficiaries of her estate. The suits abated a year after the death of the Plaintiffs' mother.
70. On the issue of lis pendens, it is clear that by the time this suit was instituted, the other suits pending before the High Court had been withdrawn and the doctrine therefore is inapplicable to this case. The Plaintiffs did not apply to continue those suits after their mother died.
71. The Plaintiffs failed to prove that the 1st Defendant held the suit property in trust for them or their late sister. The 1st Defendant did not prove his counterclaim which in any event ought to have been pursued in the suit where the orders for the sharing of the rent were made.
72. The Plaintiffs and the 1st Defendant being sons and father respectively, it is only just that each bears the costs of the suit and the counterclaim. When the 2nd Defendant purchased the suit property from the 1st Defendant, he knew that it was occupied by the 1st Defendant's sons and must therefore shoulder his costs for the suit.
73. The court dismisses the suit and the 1st Defendant's counterclaim. Each party will bear its costs.

DELIVERED VIRTUALLY AT NANYUKI THIS DAY 4TH DAY OF MAY 2023.

K. BOR

JUDGE

In the presence of: -

Mr. Stanley Kingara for the Plaintiffs

Mr. D. Omondi holding brief for Mr. O. Kenyatta for the 1st Defendant



Mr. D. Mikwa holding brief for Mr. M. Gitonga for the 2nd Defendant

