



**Wanguhu & 2 others (Suing as Administrators for and on Behalf of the Estate of Fridah Wairimu Wanguhu) v Wangui (Environment & Land Case E20 of 2021) [2023] KEELC 21464 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21464 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E20 OF 2021  
LA OMOLLO, J  
NOVEMBER 9, 2023**

**BETWEEN**

**ALEX MWAURA WANGUHU ..... 1<sup>ST</sup> PLAINTIFF  
ANTHONY MICHAEL KINUTHIA ..... 2<sup>ND</sup> PLAINTIFF  
TONY KIARIE KAIME ..... 3<sup>RD</sup> PLAINTIFF  
SUING AS ADMINISTRATORS FOR AND ON BEHALF OF THE ESTATE OF  
FRIDAH WAIRIMU WANGUHU**

**AND**

**RUTH MARY WANGUI ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiffs commenced this suit vide a Complaint dated 17<sup>th</sup> February, 2021.
2. In the Complaint they aver that they are the administrators of the estate of the late Frida Wairimu Wanguhu and that the Defendant is an adult female of sound mind and a daughter of the late Frida Wairimu Wanguhu and a sister of the Plaintiffs.
3. It is their averment that the late Fridah Wairimu Wanguhu passed away on 27<sup>th</sup> March, 2012.
4. They further aver that upon demise of the late Fridah Wairimu Wanguhu, the Defendant lodged a petition for grant of letters of Administration to her Estate and listed the property known as Land Reference Number 6295/1/12 as part of the assets of the estate.
5. They also aver that by a consent order, the parties appointed Peter David Kaime (now deceased), Wilfred Manyara Wanguhu and Alex Mwaura Wanguhu as the Administrators of her Estate.



6. It is their averment that the Defendant later filed an objection against Land Reference Number 6295/1/12 (the suit property) being included as part of the assets of the estate of the late Fridah Wairimu Wanguhu.
7. They further aver that by a ruling dated 23<sup>rd</sup> May, 2018 in Nakuru Succession Cause Number 768 of 2012, the Honorable Justice A.K Ndung'u ruled that the suit property formed part of the assets of the estate of the deceased.
8. It is the Plaintiffs averment that on or about the month of June, 2018, the Defendant caused the suit property to be registered in her name despite the court having ruled that the same was part of the estate of the deceased.
9. They aver that on or about the month of December 2020, the Plaintiffs were informed that the Defendant was in the process of selling the suit property to a third party.
10. The Plaintiffs aver that the title, if any, that the Defendant is purporting to pass on to a third party is fraudulent, null and void ab initio. They have listed the particulars of fraud by the Defendant as:
  - i. Transferring the title for the suit property Land Reference Number 6295/1/12 irregularly and fraudulently in defiance of a court order.
  - ii. Procuring the transfer of the suit property to herself without the execution of the transfer documents by the Plaintiffs being the Administrators of the Estate of the late Fridah Wairimu Wanguhu thus rendering the same null and void ab initio.
11. The Plaintiffs aver that the Defendants actions have the effect of disinheriting the other members of the family of the late Fridah Wairimu Wanguhu who the court ruled has equal shares in the suit property.
12. The Plaintiffs pray for judgment against the Defendant for:
  - a. An injunction restraining the Defendant by herself, her servants, agents or any other person claiming through her from selling or offering for sale, leasing out, or in any way alienating the suit property known as Land Reference Number 6295/1/12.
  - b. An order for the Defendant to transfer the suit property known as Land Reference Number 6295/1/12 back to the estate of the Late Fridah Wairimu Wanguhu.
  - c. In the alternative the Registrar of Government Lands be ordered to cancel the entries transferring the suit property to the Defendant and the same to revert back to the estate of the Late Fridah Wairimu Wanguhu.
  - d. Costs
  - e. Any other relief the court deems fit to grant.
13. The Defendant filed her Statement of Defence on 28<sup>th</sup> October, 2021. She denies the Plaintiff's averments as set out in the Plaint.
14. The Defendant states that by virtue of the affidavit filed by Wilfred Manyara Wanguhu, the suit is a non-starter and should be struck out for violation of Section 79 of the [Law of Succession Act](#) and that she shall raise it as a preliminary objection.
15. The Defendant also denies each and every particular of fraud alluded to her and puts the Plaintiff to strict proof thereof. She states that there is no way has she ever disinherited any of her siblings.



16. The Defendant avers that the suit herein as brought by Alex Mwaura is a well calculated move to destabilize the harmony enjoyed in the family and an express violation of the wishes of their late mother.

**Plaintiff's Evidence.**

17. During the hearing of the Plaintiff's case, Alex Mwaura Wanguhu testified as PW1. It is his testimony that he brings this suit as an administrator of his mother's (Fridah Wairimu Wanguhu) estate.
18. He stated that he has recorded a statement dated 17<sup>th</sup> February, 2021 and prayed that it be adopted as part of his evidence-in-chief.
19. He also asked that the documents in the list of documents be produced in evidence. He stated that he had a search certificate for the suit property. The same was marked and produced as Exhibit P1.
20. PW1 also stated that he had a copy of the petition in Nakuru Succession Cause No. 768 of 2012. He explained that the petition is in respect of his mother's estate. He went on to narrate that the Defendant is one of the petitioners and that the suit property is listed as one of the assets. The petition was marked and produced as Exhibit P2.
21. PW1 went on to narrate that he has a judgment in Succession Cause No. 768 of 2012. He explained that the Judgment was delivered by Justice Ndungu on 23<sup>rd</sup> May, 2018. The same was marked and produced as Exhibit P3.
22. PW1 also stated that he has a ruling dated 4<sup>th</sup> April, 2019 in succession cause 768 of 2012. He explained that it is a review application. The same was marked and produced as Exhibit P4.
23. PW1 in his statement dated 17<sup>th</sup> February, 2021 states that upon the demise of the late Fridah Wairimu Wanguhu, the Defendant lodged a petition for grant of letters of Administration to her Estate and listed the property known as Land Reference Number 6295/1/12 as part of the assets of the estate.
24. He further states that by a consent order, the parties appointed Peter David Kaime (now deceased), Wilfred Manayara Wanguhu and himself as the Administrators of her Estate.
25. He states that the Defendant later filed an objection against Land Reference Number 6295/1/12 (the suit property) being included as part of the assets of the estate of the late Fridah Wairimu Wanguhu.
26. He states that by a ruling delivered on 23<sup>rd</sup> May, 2018 in Nakuru Succession Cause Number 768 of 2012 the court ruled that the suit property formed part of the assets of the estate of the deceased.
27. He further states that on or about the month of June 2018, the Defendant caused the suit property to be registered in her name despite the court having ruled that the same was part of the estate of the deceased.
28. He states that on or about the month of December, 2020 they were informed that the Defendant was in the process of selling the suit property to a third party.
29. He states that they duly informed the local chief and the prospective purchaser that the parcel formed part of the estate of the late Fridah Wairimu Wanguhu and was not available for sale.
30. He states that they were shocked to learn that the Defendant was trying to transfer the suit property to a third party the effect of which would be to disinherit the other beneficiaries who the court ruled have an equal stake in the same.



31. He goes on to state that the transfer would further frustrate the implementation of the orders in Nakuru Succession Cause Number 768 of 2012 and that if the sale is allowed to proceed, it would be a recipe for chaos.
32. He ends by stating that the title that the Defendant is purporting to pass on to a third party is fraudulent, null and void ab initio and prays that the fraudulent transfer be reversed and the property to revert back to the estate of the deceased Fridah Wairimu Wanguhu.
33. Upon cross-examination, PW1 was referred to Exhibit P2 and explained that it has assets numbered (a) to (e). He explained that (c) is Land Reference Number 6795/1 not Land Reference Number 6295/1/12. He confirmed that Land Reference Number 6295/1 does not appear on the list of assets.
34. He confirmed that there was fraudulent transfer and he had lodged a complaint in respect of the fraud but did not have any documents to confirm this.
35. He went on to state that investigations are ongoing and also confirmed that the allegations of fraud have not been proved. He also confirmed that his mother was taken care of by all of them.
36. He confirmed that his sister went to live with their mother and also confirmed that their mother lived with all of them prior to her death.
37. When referred to Exhibit P1, PW1 explained that the search has attached to it an indenture of conveyance. He explained that he is relying on it to prove the fact of fraudulent transfer.
38. He confirmed that his statement, does not state that the document is fraudulent. He explained that paragraph 10 of the plaint has particulars of fraud and he explained that the suit parcel was transferred fraudulently and in defiance of a court order. He stated that this is explained in paragraph 10 (a) of the plaint.
39. PW1 confirmed that he did not move the court for contempt and that he chose to file this suit which he confirmed is alleging fraud.
40. He confirmed that the Defendant caused the property to be transferred to herself without the consent of other administrators. He explained that the document produced in court proves fraud and also stated that their lawyer has the original title.
41. PW1 stated that as at 2021, the suit parcel was being utilized by all members of the family and the court ruled that they take equal shares.
42. Upon re-examination, PW1 explained that in the judgment at page 9 and 10 at paragraphs 34 the Judge refers to LR No 9428 and LR 6295/1.
43. He also explained that at paragraph 36 of the judgement, the judge states that the protestor states that LR. No. 6295/1 was an indenture made to her by the deceased and Paragraph 37 the judge gives reasons why the indenture is irregular.
44. Esther Wambui Karu testified as PW2 and it is her testimony that her relationship with Wilfred Manyara Wanguhu is that he was her husband and he is deceased. It is also her testimony that she has witness statement filed on 29<sup>th</sup> November, 2021.
45. She stated that everything contained in it is correct and prayed that it be adopted and the court relies on it entirely as her evidence-in-chief.
46. In her witness statement, PW2 states that her husband Wilfred Manyara Wanguhu was the 3<sup>rd</sup> oldest son in the family.



47. She states that he was born after Nimrod Waweru Wanguhu and Peter David Kaime who have since passed on and explains that they passed on after the demise of their mother (her mother- in- law).
48. She goes on to state that she was surprised when her late husband teamed up with the Defendant in an attempt to sell the suit property.
49. PW2 was not subjected to cross examination .Counsel for the Defendant informed the court that he had no questions for her.
50. The Plaintiffs closed their case.
51. On 16<sup>th</sup> March, 2023, John Kamunya Karaga testified as DW1. It is his testimony that he is an advocate of the High Court of Kenya and added that he has recorded a statement dated 1<sup>st</sup> March, 2023. He prayed that the court adopts it as part of his evidence -in-chief, which prayer the court acceded to.
52. DW1 stated that he had also sworn an affidavit dated 5<sup>th</sup> July, 2018 and prayed that the same be admitted as part of his evidence. It was marked and produced it as Exhibit D1.
53. He testified that the affidavit was sworn in regard to Succession Cause No 768 of 2012 in Nakuru and it's in the matter of the Estate of Fridah Wairimu Wanguhu. He testified that the affidavit relates to LR No 6295/11 which is a subject of this suit.
54. It is his testimony that the affidavit refers to an indenture for the property (the transfer) and it is the Plaintiffs (Exhibit P1) and page 4 shows that he witnessed it on 4<sup>th</sup> November, 2011.
55. He testified that he is the one who drew it but they left with all the three copies of the document.
56. He further testified that Fridah Wairimu Wanguhu was an elderly lady and was in the car downstairs and he took her finger print and went up to the office to stamp and sign.
57. He testified that earlier that year, he had filed a case against District Officer Dundori Division who was preventing the lady (Fridah Wairimu Wanguhu) from selling her property. He stated that they did not conclude the suit.
58. DW1 testified that he knew the late Fridah Wairimu Wanguhu before coming to his office with the indenture. He explained that when she appended her thumb print, in his estimation, she was normal apart from the movement of her fingers and that she was on a wheel chair but was in full control of her senses.
59. DW1 in his witness statement dated 1<sup>st</sup> March, 2023 states that Fridah Wairimu Wanguhu had been introduced to her by her grandson, Roy Njoroge Kiniti, his longtime client and former senior schoolmate at the Nairobi School.
60. Upon cross examination, DW1 stated that the late Fridah Wairimu Wanguhu did not come up to the office and explained that he witnessed her put her thumbprint. He explained further that she was grandmother of Roy Njoroge Kiniti.
61. DW1 was referred to Exhibit P2 and he confirmed that it says the deceased died on 27<sup>th</sup> March, 2012.
62. DW1 also stated that page 1, 2 and 3 of the indentures of conveyance were not prepared by him and added that he only prepared page 4. He also confirmed that he witnessed page 4 and stated that he is Kamunya not Kimunya.
63. He further explained that the address on the cover page is correct and the name Kimunya & Company Advocates is not that of his law firm.



64. He explained that the stamp on page 4 is his and reiterated that he does not know Kimunya and Company Advocates and clarified that his law firm is Kamunya and Company Advocates.
65. He went on to narrate that that after stamping and signing, they went with the document and added that he did not register it.
66. He stated that it is true that an advocate has to put his name on a document and the practice is that the person who draws the document or his agent presents it for registration.
67. DW1 explained that he does not know if stamp duty was paid and further explained that title passes after a conveyance instrument is lodged and stamp duty paid. He further explained that registration has to be complete for title to pass.
68. Upon re-examination, DW1 reiterated that he does not know Kimunya and Company Advocates but stated that the details on Exhibit P1 are his. He stated that the stamp appearing at page 4 is his and that he is the one who witnessed it.
69. Ruth Mary Wangui testified as DW2. She explained that she is the Defendant.
70. She stated that she recorded a statement on 16<sup>th</sup> December, 2022 and prayed that the court adopts it as part of her evidence.
71. DW2 stated that she also had an affidavit sworn by her on 25<sup>th</sup> April, 2016 and that the affidavit speaks to loss of original deed plan for the suit parcel and that the affidavit was sworn for purposes of seeking a re-issue of the deed plan. She produced it as Exhibit D2.
72. It is also her testimony that this suit at paragraph 10 of the plaint claims fraud on her part and stated that the allegations of fraud are not true.
73. It is her further testimony that she was taking care of her mother and her mother asked her to have the indenture of conveyance witnessed by an advocate. She explained that her mother could not go upstairs to the lawyer's office.
74. DW2's testified that the Plaintiff is her brother and explained that the transfer was done before her mother died. She denied that the transfer was done to disinherit her siblings.
75. She testified that her mother was of sound mind and she (her mother) wanted her to have the land because she took care of her adding that her brothers would frustrate her.
76. It is her testimony that the court should not treat her like a thief but as someone who took care of her mother until she died. She prayed that the suit be dismissed.
77. In her witness statement, DW2 states that her family had 2 parcels of land, one in Kitale and another one known as L.R. 6295 situated east of the Nakuru Municipality, Nakuru County measuring approximately 133.1 hectares.
78. She states that the farm in Kitale was under the name of her older brother, Nimrod Wanguhu, who was working on the farm with her father.
79. She goes on to state that upon her father's demise, Nimrod Wanguhu refused to give the farm back to her mother which resulted in a court case which was settled by the local elders. She explained that the elders decided that Nimrod should occupy the land since he had worked on it with her late father.
80. DW2 further states that the other parcel of land in Nakuru was divided equally after her father's passing with each one of them including her mother being allocated 24 acres. She goes on to state that



- throughout this period she worked together with her mother on both their portions of land and that thereafter, her mother Fridah Wairimu developed high blood pressure and her health declined and medical expenses became increasingly high.
81. Her statement goes on to narrate that the high cost of medication made it necessary for her to sell her portion of the Nakuru farm in order to cater for the medical expenses.
  82. She stated that during this period she was given power of attorney to act on behalf of her mother and that as a sign of appreciation for being by her side and working with her on the farm, her late mother decided to gift her portion of land.
  83. DW2 states that she later went to the land registry and transferred the land to herself following her mother's wishes and later on title deeds of the land were released and that her name was registered as proprietor of her 24 acre share and the 24 acres belonging to her mother.
  84. She states that she believes it is her right to occupy the parcel of land gifted to her by her late mother due to all the hard work and dedication she put towards the development of the land for over 40 years.
  85. It is her statement that the land should remain in her name because Nimrod Wanguhu was also given 500 acres after working with her father for 10 years and adds that the farm is her only source of income.
  86. Upon cross-examination, DW2 confirmed that the suit property was gifted to her and after the death of her mother, they filed a petition. She clarified that she has two sisters and six brothers.
  87. She stated that they had a lawyer who acted in the succession case (Petition) which was filed by herself, Nimrod and Wilfred. She further stated that it is Petition No 768 of 2012 and added that Peter David Karime is her brother and he was not party to the petition. DW2 stated that Margret Muthoni Kinuthia, Alex Mwaura Wanguhu and Jane Nganga did not sign the Petition.
  88. When referred to Exhibit P2, DW2 confirmed that the suit parcel formed part of the Estate of Fridah Wanguhu as at the time of filing of the Petition on 17<sup>th</sup> November, 2012.
  89. DW2 was referred to paragraph 3 of Exhibit D2 (Her affidavit sworn on 25<sup>th</sup> April, 2016) and she explained that it says she is the legal owner of the suit property. She confirmed that it is a contradiction and she blamed it on her lack of knowledge.
  90. She stated that she does not remember filing an objection in the succession proceeding and reiterated the suit land does not belong to the late Fridah Wairimu Wanguhu.
  91. When referred to paragraph 36-38 of Exhibit P3 (Judgment in Succession Cause No 768 of 2012), DW2 stated that her testimony was that the property was given to her by her mother by way of an indenture and confirmed that the court stated that the evidence on record is contrary to what she had stated.
  92. When referred to paragraph 55 of the judgment, DW2 confirmed that LR 6295/1 was to be distributed in equal share. She confirmed that the judgment is dated 23<sup>rd</sup> May, 2018.
  93. DW2 further confirmed that as at the date of the judgment the suit parcel was in the name of the deceased and the Learned Judge asked that it be distributed amongst all of them. She stated that she did not agree with the judgment.
  94. DW2 also confirmed that she filed an application for review but stated that she does not remember the ruling. She however confirmed that the ruling is Exhibit P4.



95. She further confirmed that the last paragraph of her statement says the suit parcel was gifted to her by her mother. When referred to page 3 of Exhibit P1 (the indenture of conveyance) DW2 confirmed it says that she paid Kshs. 5,825,000/= to her mother. She explained that the value of the suit property is double the stated amount and that it is as if it was given to her for free. She stated that she put the money in her mother's account but had no evidence.
96. She confirmed that the indenture was lodged before her mother died and the stamp duty was paid after the court judgment. She explained that she paid stamp duty in 2018 and her mother died in 2012.
97. DW2 confirmed that she instructed her advocate to file an application for review but stated that she does not remember the grounds for review and also does not remember that the application was dismissed.
98. Upon re-examination, DW2 testified that it is true that she had the power of attorney given to her by her mother and she took the power of attorney to the lands office before her mother died.
99. It is her testimony that the power of attorney was for her to take care of all her property and she does not know if the suit parcel was registered in her name on account of the indenture or power of attorney.
100. The Defendant closed her case.

#### **Issues for Determination.**

101. The Plaintiffs filed their submissions on 21<sup>st</sup> March, 2023.
102. They identify the following issue for determination:

**a. What is the effect of registering an instrument of conveyance in defiance of a court order, when a court has held that the property formed part of the estate of the deceased?**

103. The Plaintiff submits that it is evident that both Defence witnesses were not being candid with the court and in fact in some instances their evidence should be treated as perjury since it was given on oath.
104. The Plaintiffs point out that when the Defendant attributes the contradiction between what she put in the Petition and what she put in her Affidavit and Witness statement to lack of knowledge/ignorance, she is not being truthful.
105. They also submit that the attempt to exclude the suit property as part of the distributable property was clearly an afterthought in an attempt to disinherit the other siblings and for as long as she was one of the administrators in the succession petition, she filed with her two brothers Nimrod and Wilfred, she was happy to have the suit property as part of the inventory of assets, but the point she was dropped as one of the administrators, she decided she owns the suit property.
106. They further submit that when it was pointed out to her in cross-examination that the signatures of her siblings were forged in the Petition that she filed, she tried shifting blame to her older brother who is now deceased and the question is, why did she go along with the forgery that she was aware of?
107. The Plaintiffs submit that DW1 informed the court that he prepared the indenture of conveyance but when the contradictions were pointed out to him, particularly on page 3 where it says the document was executed on 4<sup>th</sup> May, 2012 which was two months after the demise of the supposed "vendor" he promptly disowned the document and only took responsibility for page 4 which is the execution page.



108. The Plaintiffs further submit that DW1 disassociated himself with the firm of Kimunya & Co Advocates notwithstanding the fact that the said firm shares an address with him, both physical and postal.
109. The Plaintiffs submit that the question, then, is who altered the indenture of conveyance that was eventually registered? Further, what should the court do after it emerged that the instrument that was used to effect the transfer was a forgery? They submit that their response is that the court has only one option, to annul the transfer.
110. It is the Plaintiffs submission that for any document to be registered at the Lands Office, the name of the drawer must be indicated. They submit that DW1 informed the court that he drafted the indenture of conveyance and witnessed its execution, after which he gave it to the Defendants son and does not know what they did with it. They submit that the question that follows is how was the indenture registered when it bears the name of his law firm? They question whether it is obvious that it could only have been registered by his law firm.
111. The Plaintiffs submit that the Defendant avers that the reason why the indenture of conveyance was registered in June 2018 despite being dated November 2011 was because the file disappeared. They submit that by some strange coincidence, the file resurfaced in June 2018 which was one month after probate court gave judgment dismissing the Defendants claim to the suit property because the indenture of conveyance was not stamped and registered and this, according to the Plaintiffs, was clearly an attempt to circumvent orders of the court though it was akin to shutting the stable door after the horses had bolted.
112. The Plaintiffs urged the Court to further take note of the fact that anytime the Defendant was faced with an uncomfortable question, she quickly developed selective amnesia.
113. They submit how is it that she cannot remember that she filed an application for review of the Judgment of the court dated 23<sup>rd</sup> May, 2018. The Plaintiff's question the instructions on which the application filed and the person who signed the supporting affidavit.
114. It is the Plaintiff's submission that the answer to these questions is readily available on page 1 of the ruling of the court delivered on 4<sup>th</sup> April, 2019 which clearly states the Defendant's application was supported by her affidavit and that of DW1 John Kamunya Karanja and the orders she sought from the court.
115. The Plaintiffs submit that when confronted with the disparity between the date when her mother passed away and the date when the indenture of conveyance was supposedly executed, she was not able to remember when the deceased passed away.
116. The Plaintiff further submit that the Defendant when asked for evidence that she paid any consideration for the suit property, testified that she paid the money into an account that she operated jointly with the deceased. They humbly submit that this is a clear case of giving by the right hand and taking with the left.
117. It is also their submission that it must not be lost on the court that the deceased in the sunset years of her life, was an old lady whose mobility was compromised and had to use a wheelchair with diminishing mental capabilities. They submit that it came out that the Defendant had a power of attorney at the time when the indenture of conveyance is reported to have been executed.
118. They further submit that the Defence witnesses were not truthful in their testimony and in certain instances made deliberate effort to mislead the court.



119. The Plaintiffs question what is the effect of registering a transfer of a property when there is an order in place vesting the property in the estate of a deceased? They submit that the purported registration in June 2018 in favour of the Defendant was an act in futility, null and void ab initio and an act in contempt of the court which issued the orders in question.
120. It is their submission that what is not in dispute is the fact that the Defendant knew of the existence of the orders given by the court in its judgment dated 23<sup>rd</sup> May, 2019 after which she filed an application for review since she was aggrieved.
121. They submit that no plausible explanation was given why she procured the registration of the property in her name one month after delivery of the judgment vesting the suit property in the estate of the deceased. They submit that the explanation that the documents were lost at the lands office and suddenly re-appeared one month after the delivery of the judgment she was not happy with cannot pass and is a lie that was not thought through.
122. They submit that having established that there was an order in place vesting the property in the estate of the deceased they are asking the court to examine the root of title and if satisfied that the same is fraudulent, order its cancellation and revert the same back to the estate of the deceased.
123. They submit that the reason is twofold: The Plaintiff has demonstrated the fraud surrounding the indenture of conveyance in the manner in which it was drawn and executed and this by itself would be reason to annul the transfer and further that the transfer was done in defiance of, or in disregard to, an order of the court whose existence the Defendant knew of and that courts of law do not act in vain.
124. They submit that when a court issues an order, it is not a suggestion and it must be obeyed to the letter and anything else would be a recipe for anarchy.
125. The Plaintiffs urge the court to take into account the conduct of the defence witnesses and not only grant the orders sought but also grant the prayer for costs.
126. The Defendant on 22<sup>nd</sup> May, 2023 informed the court that she shall not file any submissions.

### **Analysis and Determination.**

127. It is my considered view that the following issue arises for determination;
  - a. Whether the Plaintiff is entitled to the orders sought in the Plaint dated 17<sup>th</sup> February, 2021?
  - b. Who should bear the cost of this suit.

#### **A. Whether the Plaintiffs are entitled to the orders sought in the Plaint.**

128. The Plaintiffs, in summary, seek orders of injunction against the Defendant to restrain her from dealing with the suit property, an order that the Defendant transfers the suit property back to the estate of the late Frida Wairimu Wanguhu or that in the alternative, the Land Registrar be ordered to cancel the entries transferring the suit property to the Defendant and that the suit land reverts back to the estate of the late Frida Wairimu Wanguhu.
129. The Plaintiffs allege fraud on the part of the Defendant and have at Paragraph 10 of the plaint particularized Fraud on her part. The particulars are as follows:
  - a. Transferring the title for the suit property Land Reference Number 6295/1/12 irregularly and fraudulently in defiance of a court order.



- b. Procuring the transfer of the suit property to herself without the execution of the transfer documents by the Plaintiffs being the Administrators of the Estate of the late Frida Wairimu Wanguhu thus rendering the same null and void ab initio.
    1. It is trite law that he who alleges must prove. This is set out in section 107 of the *evidence Act*. It is as follows:
      - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove 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.
131. Fraud has been defined in Black's Law Dictionary 11<sup>th</sup> Edition as;
 

“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”
  132. It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. The Court of Appeal in the decision of Vijay Morjaria vs Nansingh, Madhusingh Darbar & another [2000] eKLR held thus;
 

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”
  133. Bearing the particulars of fraud in mind, it was incumbent upon the Plaintiffs to prove that indeed Land Reference Number 6295/1/12 was on account of fraud transferred to the Defendant.
  134. The evidence that has been tendered by the Plaintiffs is that vide a judgment delivered on 23<sup>rd</sup> May, 2018 by the of the High Court of Kenya sitting at Nakuru (Succession Cause No. 768 of 2012) the grant was partially confirmed and the estate of the late Fridah Wairimu Wanguhu was distributed in terms that the suit property was to be shared equally among the beneficiaries listed therein.
  135. Prior to the Judgment in the succession cause, the Defendant had filed an objection in opposition to the proposed distribution of the Estate of the late Fridah Wairimu Wanguhu. The Defendant argued that the suit property did not form part of the estate of the deceased.
  136. In the present suit, the Plaintiff's case is that in disregard and/or defiance of the judgment in the succession cause and the order emanating therefrom, the Defendant in June 2018 caused the suit property to be registered in her name. It is further their case that this registration procured by the Defendant was irregular and fraudulent.
  137. They also state that the transfer to herself was without the consent or knowledge of the Plaintiffs who are the Administrators of the Estate of the deceased and that this renders the said transfer null and void.
  138. The Defendant in her defence justifies the transfer to herself by stating that the suit property was gifted to her by the deceased as an appreciation for being by her side during her illness and also for working with her on the farm and taking care of her. The Defendant also claims that the transfer was done on account of a power of attorney held by her.



139. I note that these are the same arguments that were advanced in the proceedings in the succession cause. The Learned Judge took all these into consideration and found among other things that:
- a. The indenture of conveyance contains material inconsistencies.
  - b. The Learned Judge also noted that the Defendant in the year 2012 petitioned for grant and in the P&A 5 form listed the suit land as belonging to or forming part of the estate of the deceased.
  - c. The suit land was still registered in the name of the deceased, the suit property forms part of the estate of the deceased and there is no evidence that the suit property at any time passed to the Defendant.
140. The Learned Judge goes on to describe the claim by the Defendant as being of the weakest nature and many paragraphs later dismisses the protest/objection lodged by the Defendant.
141. As things remain there is an order of the court whose terms are that the suit land be shared equally among the beneficiaries.
142. The Plaintiffs have produced a certificate of search which lists the Defendant as the current registered proprietor of the suit parcel which is L.R number 6295/11 (Org No 6295/1/11).
143. The Defendant have attempted to state that there is a discrepancy in the judgment of the High Court in relation to the description of the suit parcel. In the judgment the suit land is described as 6295/1. I am not persuaded by this argument that seems to suggest that the parcel referred to in this suit and the one referred to in the succession cause are different. This is especially so considering that the indenture of conveyance which the Defendant relies on in support of her ownership describes the suit land as 6295/1. This is a classic example of the Defendant attempting to have her cake and eat it.
144. Apart from the observations of the Learned Judge who made elaborate findings on the indenture of conveyance, I note that the dates appearing on it are at variance. The first page indicates that it was prepared in the year 2016, page 3 states that the Defendant and her mother executed it 4<sup>th</sup> May, 2012 but the advocate witnessing it did so on 4<sup>th</sup> November, 2011.
145. The advocate who witnessed the indenture of conveyance had for all intent and purpose disowned it save for page 4 which he admitted to have witnessed.
146. The inconsistencies pointed out on the indenture of conveyance are material considering that the late Fridah Wairimu Wanguhu died on 27<sup>th</sup> March, 2012. I do not hesitate to say that if this document forms the basis upon which the suit land was transferred to the Defendant, the transfer was certainly irregular.
147. Section 26 of the *Land Registration Act* provides as follows:
1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
    - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
    - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (Emphasis is mine)



148. The Judgment in the succession cause had the effect of retaining the suit land as part of the distributable estate of the late Fridah Wairimu Wanguhu. On the basis of this single evidence, the Defendant in having it registered in her name did so illegally and fraudulently. The Defendant knowingly concealed the fact of the Judgment of the court in the succession cause to the Land Registry and caused the Lands office to act to its detriment. This is fraud.
149. In *John Chemwolo Chemitei v Mary Cheruiyot* [2016] Eklr, the Learned Judge cited numerous decisions on disobedience of court orders and their legal and non-legal implications. Some of them are as follows;

In *Hadkinson v Hadkinson* (1952) 2 All ER 567, it was held that:

“It is plain and unqualified obligation of every person against or in respect of who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

In the case of *Teachers Service Commission v Kenya National Union of Teachers & 2 others* [2013] eKLR, Industrial Court at Nairobi, Petition Number 23 of 2013, the learned judge observed as follows;

“A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

In the case of *Kenya Tea Growers Association Vs Francis Atwoli and 5 Others* [2012] eKLR, the Learned

Judge cited with approval the case of *Clarke and Others Vs Chadburn & Others* [1985] 1All E.R (PC), 211 in which the court observed thus:

“I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed, willful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal.... (Emphasis Mine) even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.”

150. The *Law of succession Act* at Section 45 provides that:

1. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. (Emphasis mine).
2. Any person who contravenes the provisions of this section shall—
  - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and



- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration..

151. Section 45 of the [Law of Succession Act](#) speaks to the illegality of the acts of the Defendants and it further supports the proposition that the title to the suit land was illegally and fraudulently acquired by the Defendants who had no authority to deal with the property of the deceased.
152. In *Daudi Kiptugen Vs Commissioner of Lands Nairobi Lands & 4 others* [2015] eKLR, the Learned Judge speaks to the process culminating to the issuance of documents of title to land and stated thus;
- “The acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. (Emphasis is mine). If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein...”
153. Lord Denning in *Macfoy Vs United Africa Co Ltd* [1961] 3 All ER 1169 at page 1172 where he stated as follows: -
- “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there...”
154. It is evident that the Defendant illegally and fraudulently transferred the title to the suit land to herself in disobedience of a court order, without the authority of the Administrators of the estate of her deceased mother and further on the basis of a questionable indenture of conveyance. The resultant titles in the name of the Defendant is therefore null and void, cannot be said to be indefeasible and is fit for cancellation.
155. Section 80 of the [Land Registration Act](#) provides that this Honourable Court has power to order rectification of the register if it is satisfied that the registration was obtained, made or omitted by fraud or mistake. This section further gives guidance on mode of rectification by the court i.e. by directing that any registration be cancelled or amended.

## **B. Who should bear the cost of the suit?**

156. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the [Civil Procedure Act](#) (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

## **Disposition.**

157. In the result, the Plaintiffs' suit succeeds. Consequently, I enter judgment in the following terms:
- a. A permanent injunction is hereby issued restraining the Defendant by herself, her servants, agents or any other person claiming through her from selling or offering for sale, leasing out, or in any way alienating the suit property known as Land Reference Number 6295/1/12.



- b. The Defendant shall within 30 days transfer the suit property known as Land Reference Number 6295/1/12 back to the estate of the Late Frida Wairimu Wanguhu.
- c. In the event of failure to comply with (b) above, the Land Registrar shall rectify the register for Land Reference Number 6295/1/12 by deleting the Defendant's names and restoring the names of Frida Wairimu Wanguhu (deceased).
- d. The Plaintiffs shall have the cost of this suit.

158. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**L. A. OMOLLO**

**JUDGE**

**In the presence of: -**

**Mr. Osiemo for the Plaintiffs.**

**No appearance for the Defendant.**

**Court Assistant; Ms. Monica Wanjohi.**

