



Gimnyigei & another v Chumba (Succession Cause E065 & E006 of 2021 (Consolidated)) [2024] KEHC 12148 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12148 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE E065 & E006 OF 2021 (CONSOLIDATED)
RN NYAKUNDI, J
OCTOBER 11, 2024**

BETWEEN

JULIA GIMNYIGEI 1ST PETITIONER

ESTHER GIMNYIGEI 2ND PETITIONER

AND

GRACE JEPTUM CHUMBA RESPONDENT

RULING

1. The Petitioners herein filed summons for revocation of Grant issued on 26th January, 2023 given to Grace Jebet Saina and David Kimeli Leting of the Estate of the Late Alfred Kipkorir Gimnyigei who died o 28th March, 2021.
2. The deceased herein the Late Hanna Jebii Tum, passed on 22nd July, 2008 leaving behind an estate comprising of parcel of land known as Eldoret Municipality Block 24(kipkenyo) 88 measuring about 96 acres. The deceased was survived by one beneficiary namely Mary Cheboo Gimnyigei now also deceased. The late Mary is survived by the Petitioners herein together with the Objector who is a sister-in-law to the Petitioners since she is the wife to the late Alfred Kipkorir Gimnyigei who is the biological brother to the Petitioners in Succession E065 of 2021 and Objectors in Succession E006/2022.
3. The Petitioners herein moved this court for grant of letters of Administration of the Estate of the late Hanna Jebii Tum which were issued to them on 6th September, 2021. While the present proceedings were active, Grace Jebet Saina and David Kimeli Leting instituted separate proceedings in this court being Eldoret Succession Cause No. E006 of 2022 seeking to be issued with a confirmation of Grant in the estate of the late Alfred Kipkorir Gimnyigei and indicated the parcel known as Eldoret Municipality Block 24(kipkenyo) 88 measuring about 96 acres as belonging to the late Alfred Kipkrorir Gimnyigei.
4. Once the said proceedings came to the knowledge of the Petitioners, they filed summons for revocation of Grant dated 19th September, 2023 seeking orders as follows:



- a. Revocation and annulment of Grant given to Grace Jebet Saina and David Kimeli Leting of the Estate of the late Alfred Kipkorir Gimnyigei who died on 28th March, 2021 the same having been given on 26th January, 2023 be revoked.
 - b. That Eldoret High Court Succession Cause No. E006 of 2022; Estate of Alfred Kipkorir Gimnyigei be and is hereby consolidated with Eldoret High Court Succession Cause No. E065 of 2021; Estate of Hanna Jebii Tum.
5. The suits were consolidated and while at it the Petitioners reported a fake Certificate of Title in the name of the late Alfred Gimnyigei over their late grandmother's property Eldoret Municipality Block 24(kipkenyo)88 measuring about 96 acres vide OB NO. 23/11/3/2021.
 6. The grounds in support of the summons for revocation as filed by the Petitioners were that the Petitioners (in Succession cause No. E006 of 2022) made false statements and concealed material facts. That the land parcel known as Eldoret Municipality Block 24(kipkenyo)88 does not belong to the late Alfred Kipkorir Gimnyigei but is registered in the name of the late Hanna Jebii Tum.
 7. In Response to the summons for revocation, David Kimeli Leting, the 2nd Petitioner swore a replying affidavit dated 21st September, 2023 stating that prior to the Petition being filed, a citation in Eldoret Chief Magistrate's court Citation No. E257 of 2021. That the citation was allowed as the widow of Alfred Kipkorir Gimnyigei, Gladys Jebet Sang failed to seize the opportunity to seek letters of administration.
 8. He deposed that it is only after the law was complied with that he filed a Petition for Grant of letters of Administration to the estate of the late Alfred Kipkorir Gimnyigei and as such the Grant of letters of administration is therefore proper and competent.
 9. According to him, when he filed the Petition for Grant of letters of administration intestate to the estate of the deceased Alfred Kipkorir Gimnyigei, the property known as Eldoret Municipality Block 24(kipkenyo)88 was registered in the name of Alfred Kipkorir Gimnyigei.
 10. That the Grant of letters of Administration and the confirmation of the Grant to the Estate of Alfred Kipkorir Gimnyigei herein were properly and procedurally issued.
 11. That there was no fraud nor concealment of any material facts.
 12. That all the beneficiaries to the estate of the deceased Alfred Kipkorir Gimnyigei were included in the Petition and there is absolutely no basis for seeking revocation of the Grant.
 13. He stated that the Objectors (the Petitioners herein) have not tenable claim in the estate of Alfred Kipkorir Gimnyigei and they are strangers thereto. That the certificate of official search is questionable as it is not accompanied with the requisite payment receipt and its source is not verifiable. That when the succession proceedings were commenced, he obtained a certificate of official search and the deceased's ownership of the land is confirmed by the register of the parcel.
 14. That the two succession causes ought to be pursued separately as they are incapable of consolidation.
 15. The Petitioners filed submission dated 2nd September, 2024 in support of the summons for revocation. Learned Counsel Mr. Yego gave a background of the two causes and submitted that during the hearing of the suit both the DCIO-Langas Police Station confirmed that the Late Alfred Gimnyigei and the Petitioners herein had reported a fake Certificate of Title in the name of the late Alfred Gimnyigei over their late grandmother's property Eldoret Municipality Block 24(kipkenyo) 88 measuring about 96 acres. It was the DCIO's evidence that Alfred Gimnyigei died before conclusion of investigations.



16. Learned counsel stated that the said complaint by the family of Hanna Jebii Tum upon realizing that there was a fake Certificate of Title is prima facie evidence that the suit property does not belong to the Late Alfred Gimnyigei as alleged by the Objector and her proxies/witnesses David Kimeli Leting and Grace Jebet Saina. He submitted that it is unfortunate that the statements by both the Petitioner were in the investigation file corroborating the assertions of the Petitioners but the crucial statement by the late Alfred Gimnyigei disowning the purported Certificate of Title in his name over the suit property was conveniently missing. Mr. Yego invited the court to take judicial notice of the fact that the DCIO-Langas had to be summoned as he refused to cooperate with the advocates for the Petitioners who had requested the findings of the investigation, which to date have not been released by the said DCIO.
17. It was submitted for the Petitioners that the County Land Registrar- Eldoret confirmed that the parcel file of the suit property had been tampered with. She came into this conclusion after realizing that the green card extract scanned in 2016 in the virtual parcel file states the late Hanna Jebii Tum as the sole proprietor of the suit property the same having been issued with the same on 19.7.1995 yet the Green Card Extract in the physical parcel file states the late Alfred Kipkorir Gimnyigei as the sole proprietor. The second Green Card Extract states that the late Hanna Jebii Tum transferred the suit property to the late Alfred Gimnyigei on 5.08.1996.
18. The Petitioners associated themselves with the sentiments of the County Land Registrar that the parcel file was tampered with for two reasons. Firstly, the Certificate of Official search issued to the 1st Petitioner on 22nd July, 2020, and which was confirmed by the County Land Registrar Categorically states at part B that the proprietor of the suit property is Hanna Jebii Tum who was issued a Title Deed on 19.7.1995.
19. Secondly, the certified copy of the register produced by the County Land Registrar also contains the Power of Attorney in which the Hanna Jebii Tum donates her power of attorney to her daughter Mary Cheboo Gimnyigei (the late mother to the Petitioners herein) in the year 2005. That the said Power of Attorney was received for registration on 28.8.2005.
20. In Counsel's view, there are reasons to believe that the purported Certificate Title in the name of Alfred Kipkorir Gimnyigei was obtained fraudulently since the Objector and her witnesses did not produce the transfer forms indicating how the land was transferred from Hanna Jebii Tum to Alfred Kipkorir. Similarly, the late Hanna Jebii Tum is not indicated as the transferor but rather a stranger by the name Anna Chebii and there is no affidavit by the late Hanna Jebii Tum confirming that she was also known by the name Annah Chebii or that both names belonged to her. In the absence of an affidavit to that effect the two names are deemed to belong to two different people. That the Respondent did not also produce the stamp duty receipts for stamp duty paid when the suit property was allegedly registered in Alfred's name.
21. He added that the area chief also confirmed that the parcel of land belongs to the late Hanna Jebii Tum, specifically the chief's letter dated 25.5.2021 and Mr. Chemngo K. Philip's letter dated 24.3.2023.
22. As to whether the court has powers to revoke the Grant of letters of administration granted to David Kimeli and Grace Saina, Mr. Yego submitted that this court does not have jurisdiction to hear and determine the issue of change of ownership which had been obtained fraudulently. However, under Section 47 of the *Law of Succession Act*, counsel submitted that the High Court has inherent powers to make appropriate orders in the interest of justice and for the preservation of the deceased's estate.
23. In urging the court to revoke the Grant, counsel invited the court to take note of the dates when the parallel suits were filed. Succession cause No. E065 of 2021 was filed on 28th June, 2021 and interestingly the Objector/Respondent filed Succession Cause No. E006 of 2022 on 29th August, 2022.



That as at 29th August, 2022 when E006 of 2022 was filed, the Respondents were well aware that Succession Cause 65 of 2021 existed and further that the suit property was the same. The Respondents in both files are represented by the same advocate. That Succession Cause E006 of 2022 was therefore an afterthought and was undoubtedly filed with the sole aim of undermining the proceedings in Succession E065 of 2021. Counsel also took note of the fact that in Succession Cause No. E065 of 2021, the Objector Gladys Sang did not file any formal objection alleging that the suit property was not part of the assets of the late Hanna Jebii Tum. As such, any allegation made in Succession Cause E006 of 2022 to the effect that the suit property belonged to the late Alfred Kipkorir Gimnyigei is clearly an afterthought and an act of mischief.

24. That Sammy Kipruto Gimnyigei the late Alfred Gimnyigei's son also deposed that the amended summons for confirmation of Grant amended on 23rd January, 2023 indicating him as a beneficiary under item 110 is a forgery as the said signature appearing purporting to be his is not his signature but a forgery. It was his testimony that he saw the document with his name and a forged signature during the preparation for the summons for revocation and annulment of Grant dated 19th September, 2023. As such it is not in doubt that the certificate of confirmation of Grant given to Grace Jebet Saina and David Kimeli Leting of the estate of the late Alfred Kipkorir Gimnyigei who died on 28th March, 2021 the same having been given on 26th January, 2023, was obtained by fraud and gross misrepresentation of facts and the same is null and void ab initio. To this end, learned counsel submitted that the Grant ought to be revoked.
25. It was counsel's argument that this Honourable Court is vested with the powers to cancel the purported Certificate of Title in Alfred Kipkorir Gimnyigei's name and revoke the Certificate of confirmation of Grant issued to Grace Jebet Saina and David Kimeli Leting. He cited the provisions of Section 47 of the *Law of Succession Act* and Rule 73 of the Probate and Administration Rules. He also cited the decisions in *Santuzzabilioti Alias Mei Santuzza (deceased) versus Giancarlo Felasconi* (2014) eKLR, *Re Estate of Alice Mumbua Mutua (deceased)* (2017) eKLR and *In the Matter of the Estate of L A K (deceased)* (2014) eKLR.

Determination

26. At the heart of this application is the sanctity of the title registered in the name of Alfred Kipkorir Gimnyigei (deceased). The combined effect of this necessitated the Petitioners/Applicants to file an application for revocation/annulment of the Certificate of Grant dated 26th January, 2023. The legal threshold to be met by an applicant seeking to revoke a confirmed Grant is well spelt out in the law. Section 76 of the *Law of Succession Act* states as follows:

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

That the proceedings to obtain the grant were defective in substance;

That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;



That the person to whom the grant was made has failed, after due notice and without reasonable cause either—

to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

- ii. to proceed diligently with the administration of the estate; or
- iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- e. that the grant has become useless and inoperative through subsequent circumstances.”

27. These provisions are one of the most litigated in Kenya as demonstrated from the avalanche of authorities from superior courts. It is then pertinent at this stage to highlight some of the classic cases in which Section 76 has been interpreted with a view to guide the courts in exercising discretion to decline or grant the prayers in consonant with Section 76 of the Act.

28. In discussing Section 76 the court in the case of *In re Estate of Seth Namiba Ashuma (Deceased)* [2020] eKLR stated as follows:

“Under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining the grant was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or lost the soundness of his mind or was adjudged bankrupt.”

29. Similarly, in the circumstances in which a grant can be revoked were discussed in the case of *In the Matter of the Estate of L.A.K. (Deceased)* [2014] eKLR: -

“Revocation of grants is governed by Section 76 of the Law of Succession Act. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.”



30. Notably, the power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the persuasive decision in *Albert Imbuga Kisigwa v Recho Kawai Kisigwa* Succession Cause No. 158 of 2000 where Mwita J stated: -

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

31. Fraud for the purposes of defeating the registered title so that a Certificate of Confirmation of Grant can be revoked means proof of actual fraud or dishonesty of some kind. The indefeasibility of the title of the registered proprietor except in cases of proven fraud, it restricts this court from exercising discretion to cancel the certificate of title statutory described in the instrument admitted before this court as evidence. In evaluating the evidence by the Objector and the Petitioners, I am of the view that for this court to revoke the Certificate of confirmation of Grant, there must be clear evidence that the registration obtained by Alfred Kipkorir (deceased) as obtained from Hanna Jebii Tum (deceased) was secured through fraud or mistake. The Land Registrar PW1 Alice Gisemba who oversees and has the mandate to the Uasin Gishu Land Registry, failed to come out strongly that the title in respect of Land Parcel Eldoret/municipality Block 24 (kipkenyo)88 was obtained on the basis of fraud or illegality which is one of the key grounds set out under Section 76 of the [Act](#) in which the court may be moved to interfere, review or set aside the Certificate of Confirmation of Grant. It is settled law in Kenya that allegations of forgery or fraud are of a serious nature within the realm of Criminal law and parties are called upon to strictly plead and prove each element beyond reasonable doubt and the case of Civil Law on a balance of probabilities. As at the time the evidence closed this threshold had not been met by the Objectors.

32. In *R.G Patel vLalji Makanji* [1957] EA 314 the former Court of Appeal for East Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

33. In the case of *Ndolo vNdolo* [2008] 1KLR (G &F) 742 the Court stated that:

“We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.....” “.....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

34. For this Certificate of Confirmation of Grant to be set aside, it was incumbent upon the applicant to bring themselves within the formulation of the principles outlined in the comparative dicta of *Royal*



“The principles are, briefly: first, there has to be a ‘conscious and deliberate dishonesty’ in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be ‘material.’ ‘Material’ means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court’s decision to give judgment in the way it did put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence.”

35. In terms of section 76 it is both our procedural and substantive law that a notice be issued to a party against whom an order which is likely to be made by this court has the potential of threatening, violating or infringing his/her rights to property as stipulated in our constitution and statute law.
36. The court takes cognizance of the need for formality in dealings relating to land. In this country however, notwithstanding the criterion that a contract of the sale or disposition of an interest in land be made in writing but largely oral agreements have also found their way to transfer interest and rights to land to a third party save for procedural compliance of transfer and consent forms as stipulated in the [Land Registration Act](#) of 2012. The most significant thing in commercial contract may it be for the sale of land or any other such transaction if one party to an agreement is stood by and let the other party incur expense or prejudice his position on the faith of the agreement being valid then he/she will not be allowed to assert that the agreement was unenforceable. The law on formalities of contract for the sale of land was meant to achieve an objective of minimising disputes, to establish reliable incontrovertible evidence of the existence and terms of a transaction for the very basic purpose to act as a reference for any later proceedings or usage which may be legitimately expected to arise in everyday human transactions. Notwithstanding that position it is equally important to be appreciated that the law as enacted should not be so inflexible as to cause an acceptable hardship to willing seller willing buyer to a property in cases of non-compliance. It is in those circumstances that the doctrine of equity may be said to arise in the claimant’s favour by estoppel if a land owner offers to dispose his/her interest in land and a purchaser in turn intimates to secure those interests actively by words of by conduct and an agreement is sealed it will be unconscionable for the land owner to go back on those representations. The essentials of this doctrine of equity that through the representation made orally or in writing by a land owner unless the fundamentals of fraud or forgery which taints the sanctity of interest in land, that proprietary interest acquired by the claimant cannot be taken away as of right by the land owner to defeat the rights of the purchaser for that matter.
37. The courts of equity come to the aid of a third party or purchaser who has acquired a proprietary interest to land by invoking an equitable remedy to prevent land owners who have failed to meet certain minimum registration guidelines and when it pleases them to take advantage of those defects by insisting on certain strict legal rights arising under the contract or any his/her title deed or by statute to occasion prejudice or injustice to a purchaser who has fulfilled his/her obligations to the contract for the sale of land. In my considered view, it will be inequitable for any land owner to do so having



regard to the dealings that have taken place between the parties. The court takes judicial notice that the custodians of repository of either electronic or manual information on all land transactions in Kenya is vested at the central registry in the Ministry of Lands and its subsidiary in the devolved units across the country. According to the prevailing policy guidelines on land transaction, a purchaser's duty is to establish the basic registrable information on the proprietary interest to the proposed parcel of land he/she intimates to make an offer of purchase. There is a legitimate expectation that any such information commonly known as the search certificate is prima facie authentic, credible and worthy of belief as to the particulars to the land owner as at the time he/she i to enter an agreement of sale

38. Why is this relevant for the purpose of this case? There is incontrovertible oral and affidavit evidence that the impugned title referenced as Eldoret Municipality/block 24 (kipkenyo)/88 as at 5th August, 1996 is registered in the name of the deceased Alfred Kipkorir Gimnyigei. The deceased by this registration obtained the absolute interest under the Registered Land Act in the property giving rise to exclusive rights on the usage of the property rather than that of a trustee and a beneficiary.
39. Presumably in this case, the litigation history presents the following factual matrix. That on the 22nd July, 2008 the original registered proprietor of land parcel No. Eldoret Municipality/block 24 (kipkenyo)/88 the late Hanna Jebii Tum passed on necessitating Julia Gimnyigei and Esther Gimnyigei to petition for Grant of Letters of Administration intestate duly issued by this court on 6th September, 2021. As at the time of petitioning for the administration of the estate of the deceased, the alleged title of the suit property had been transferred to the late Alfred Kipkorir Gimnyigei way back in 1996. Prima facie, the late Hanna Jebii Tum Interest to that parcel of land were extinguished by reason of transmission and registration of the new proprietor by the name Alfred Kipkroir Gimnyigei. In further support to this proposition, Hanna Jebii Tum by the time of her demise she had conveyed all proprietary rights and interests to the aforesaid parcel of land to the late Alfred Kipkorir Gimnyigei in 1996 if the details in the green card is anything to go by to lay the foundation of ownership of this parcel of land. Some doubts have been expressed as to the nature and scope of acquisition of those rights by the late Alfred Kipkorir Gimnyigei. Unfortunately, the countdown of the new registered owner holding an absolute title was by dint of an entry in the Green card dated 5th August, 1996. Analysing the facts on record, it is clear that during the lifetime of the late Alfred Kipkorir Gimnyigei placing reliance on this proprietorship may have transmitted some of the rights to the suit land to the purchasers or claimants. On these facts, the principal of unjust enrichment lies at the heart of the transactions initiated and completed during the lifetime of the deceased. Ultimately, unless and until the impugned title deed is revoked not by a probate court given our distributive constitutional jurisdiction of courts the legality of that instrument remains unimpeachable.
40. I am more persuaded that these transactions to land as between the deceased Alfred Kipkorir and any other purchasers may find solace in the doctrine of proprietary estoppel and the constructive trust both being intended to provide relief against unconscionable conduct which may arise long after the intention of the parties to a contract has been sealed. The persuasive dicta in *Pallant versus Morgan* (2008) CLJ 265 remarked as follow on particular factual situation where a constructive trust has been held to have created a remedy to ward off unconscionable conduct:
1. An arrangement or understanding must precede the acquisition of the property by one party to the arrangement. This pre-acquisition arrangement colours the subsequent acquisition and leads to the defendant being treated as a trustee if he seeks to act inconsistently with it. Chadwick LJ observed that “the concepts of constructive trust and proprietary estoppel have much in common in this area.
 2. It is no bar to the equity that the pre-acquisition agreement is too uncertain to be forced as a contract nor that it is plainly not intended to have contractual effect.



3. The pre-acquisition agreement must contemplate that the acquiring party will take steps to acquire the property; and that if he does so the non-acquiring party will obtain some interest in that property. It is also necessary that the acquiring party has not informed the non-acquiring party before the acquisition (or before it is too late for the parties to be restored to a position of no advantage/ no detriment) that he no longer intends to honour the arrangement or understanding.
4. It is necessary that in reliance on the arrangement or understanding the non-acquiring party should do or omit to do something which confers an advantage on the acquiring party in relation to the acquisition of the property; or something that is detrimental to the ability of the non-acquiring party to acquire the property on equal terms.

“It is the existence of the advantage to the one, or detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it”
41. The important point to note for present purposes is the interrelation of the proprietary rights to this parcel of land as they existed upon registration of the deceased Alfred Kipkorir on the 5th August, 1996 when title was issued by the Land Registrar Uasin Gishu County. In the contractual sphere for the sale of land there is a presumption that the last known registered proprietor mirrors the legal title and the capacity to transfer, transmit and convey a portion or the whole of those rights to a third party. Clearly, it is in this context that the objectors are sounding the death knell to the rights presumably acquired by the deceased in 1996.
42. In *Halsbury's Laws of England*, 4th Edition, Volume 48 at paragraph 690 states as follows on constructive trusts:

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.

Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.



Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement. The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.”

43. In this context, predictably, approved sale between the deceased Alfred Kipkorir Gimnyigei to any third parties or purchasers in accordance with justice and equity, that part performance asserted some proprietary rights in favour of the purchasers with certainty of ownership of title. By dint of that registrable instrument from Hanna Jebii Tum to Alfred Kipkorir Gimnyigei there was a transfer of good title capable of transmitting property rights to any other person may it be a purchaser or beneficiary. Although there was some ambiguity on particular points raised by the objectors, that by itself does not discharge the burden of proof that the title issued to the late Alfred was fatally defective and voidable. There is no evidence that this was an outright gift unilaterally and generously gifted to the late Alfred Kipkorir Gimnyigei by her late mother Hanna Jebii Tum. One of the classical tests in registrable instruments unless there is a credible alternative explanation under the doctrine of legitimate expectation, any title in the custodian of the Land registries in Kenya is presumed to have gone through the integrity of the process of registration with completeness in compliance with the law. A further overlapping characterization of this estate is to look at it as whole from the first registered proprietor and as later transferred to her son Alfred Kipkorir Gimnyigei. The rights which accrue from this title are the same rights which were transferred by the late Alfred Kipkorir to other parties. As has been foreshadowed during the hearing of this cause, there are two fashions currently being agitated by the two parties. First and foremost, the widow’s typology in its widest sense, this parcel of land does not belong to the estate of the late Hanna Jebii Tum and she has gone ahead to demonstrate through documentary evidence. Secondly, in the broadest version of the objectors, this title is still in its virgin state in the name of their late mother. Thus, without cogent evidence it seems likely that this transfer between the mother and her son way back in 1996 has not gained acceptance with other beneficiaries whichever litigation landscape one looks at this title, the ultimate unconscionable conduct will flow from either reverting this title to the mother of Alfred Kipkorir for by their conduct, third parties in good faith and through confirmation of the proprietary rights in adherence to this title could not have foreseen that no good title was passed from Hanna Jebii Tum to Alfred Kipkorir Gimnyigei.
44. The predominant view is that if the objectors have their day in court and secure a remedy on this title on the basis that any transfer between their mother and the son was a fraud, the implicit scope of the doctrine of constructive trust would frown at that remedy for it will occasion a reformulation of the proprietary rights stated to have been acquired by the third parties. In the second category, in the event the widow to the late Alfred Kipkorir in administering the estate of the deceased without forecasting simultaneously the conferrer interest or rights which may have arisen during the lifetime of his late husband and acts in detriment to those third parties, equity will be invoked to restrain her against any unconscionable behaviour that may constitute unjust enrichment. For those reasons, the Objector’s application dated 19th September, 2023 under section 76 of the *Law of Succession Act* is rejected. As things stand, I am of the view that constructive trust fundamentally arises by operation of law to this estate for the circumstances are such that it will be unconscionable for the owner of the property usually but not necessarily the legal representative or administrator to assert his/her own beneficial interest in the property and deny the beneficial interest of another. The reciprocal of this is



that the title deed held by Alfred Kipkorir by its very nature and set of rights reflected by dint of that registration can only be extinguished by the Environment and Land Court.

45. The writ jurisdiction within this subject matter is never vested with the probate court pursuant to Art. 162 (2)(b) of the *Constitution* .

46. The costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 11TH DAY OF OCTOBER 2024

In the Presence of:

Mr. Wainaina, Advocate holding brief for Mr. Momanyi for the Objector/Respondent

Mr. Chebet, Advocate holding brief for Mr. Yego for the Petitioners/Applicants.

Mr. Wambua, Advocate holding brief for Mr. Kisuya

.....

R. NYAKUNDI

JUDGE

