



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 459 OF 2012

JOSEPHINE EGWA MBELA (Suing as a personal Representative of the Estate of

ERIC WILLIAM MBELA (DECEASED).....PLAINTIFF

=VERSUS=

ELIZABETH WANJIKU MUCHIRA.....1ST DEFENDANT

KILINOGI LIMITED.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 28th June 2010 the Plaintiff seeks Judgment against the Defendants jointly and severally for:-

a) A declaration that the residential property L.R No. 209/8336/98 Loresho is family property and that the 1st Defendant was holding the same in trust for the Plaintiff and her 2 children.

b) A declaration that the residential property L.R No. 209/8336/98 was fraudulently transferred to the 2nd Defendant and that the said transfer and subsequent registration be cancelled.

c) An order that the suit property be registered in the name of the Plaintiff.

d) An order that the 2nd Defendant by itself, agent or servants be restrained by permanent injunction from evicting the Plaintiff and her children being the deceased dependents from their residential property L.R No. 209/8336/98.

e) Costs of the suit.

The Plaintiff's case

2. It is the Plaintiff's case that **L.R NO.209/8336/98** Loresho was owned by her late husband as it was jointly registered in his name and the 1st Defendant's name. She averred that together, they established their matrimonial home on the suit property and have lived therein from the year 2003 with their 2 children. She pleaded that she has made improvements to accommodate movement of her son who is living with disability. She also stated that she has built a one-bedroom extension which she has been renting out to supplement her income.

3. She contended that in the year 2011, the 1st Defendant fraudulently and without her consent and or knowledge her sold the suit property to the 2nd Defendant for Kshs.21,000,000/= leaving the Plaintiff at risk of being evicted from the suit property.

The 1st Defendant's case.

4. In her defence dated 30th March 2015, the 1st Defendant denied the allegations contained in the plaint and contended that she purchased the suit property on 14th June 2003 solely using her retirement benefits and there was no contribution whatsoever from the Plaintiff herein or Erick William Mbela towards the purchase.

5. She also contended that she elected to have the suit property registered in her name and that of Eric Mbela as joint tenants and allowed the said Eric to live on the suit property without paying rent since he was her son.

6. She averred that upon her son's demise, the suit property automatically vested solely in her thus the Plaintiff has no equitable claim on the property.

7. She pleaded that she sold and transferred the suit property to the 2nd Defendant on 17th August 2011 for a consideration of Kshs.21,000,000/=. She contended further that she did not require the Plaintiff's consent as the property was not part of the estate of the late Eric William Mbela.

The 2nd Defendant's case

8. The 2nd Defendant filed a defence and counterclaim dated 16th April 2013. It contended that the suit property was prior to 12th April 2011 registered in the name of Eric William Mbela and the 1st Defendant as joint tenants and that the entire property devolved to the 1st Defendant as sole owner upon the death of Eric William Mbela and the registration of certificate of death against the title of the property on 12th April 2011. It pleaded that it obtained a transfer upon purchase from the 1st Defendant.

9. In the counterclaim, the 2nd Defendant prays for judgement against the Plaintiff in the following terms:

a) That the Plaintiff's suit in the original claim be dismissed.

b) That the Plaintiff be directed to yield vacant possession of property L.R NO.209/8336/98 Loresho to the 2nd Defendant within 21 days of the making of the order for vacant possession, failing which the plaintiff be evicted from the property with the assistance of a court bailiff.

c) That the Plaintiff be directed by an order of mandatory injunction to vacate from property L.R NO.209/8336/98 within 21 days of the making of the order, failing which the Plaintiff be evicted from the property with the assistance of a court bailiff.

d) That the Plaintiff by herself, servants, agents or otherwise howsoever be restrained from remaining on, entering upon, trespassing upon remaining on and/or otherwise interfering with the 2nd Defendant's access to, use of and quiet possession of property L.R NO.209/8336/98 Loresho.

e) That the Plaintiff be directed to pay the 2nd Defendant the costs of this suit and of the counterclaim together with interest thereon for such period and at such rates as this Honourable Court may deem appropriate.

f) Any such other or further relief as this Honourable court may deem appropriate.

10. The 2nd Defendant contended that the Plaintiff became a trespasser on the suit property from 17th August 2011. It asserted that it is entitled to vacant possession of the property as the registered owner.

Evidence of the Plaintiff

11. The Plaintiff told the court that she married the late Eric William Mbela in 1994. She stated that the suit property was owned by her uncle Mr. George Mzera who approached them to buy it and they bought it in 2003. It was registered in her late husband's name and the 1st Defendant's name. She added that the 1st Defendant came in to support them financially as her husband was not working at the time and she was holding it in trust for the family.

12. It was her testimony that they moved into the suit property in the year 2003 and made it their matrimonial home. She added that they renovated it for 2 months before moving in for their comfort and also customized it for their son who has cerebral palsy and is on a wheel chair. She produced photographs of the current state of the house.

13. She further stated testified that even after moving in, they continued with renovations and the 1st Defendant was aware. It was her testimony that her husband passed on in 2010 at the 1st Defendant's house in Kileleshwa and that the 1st Defendant took all his documents and obtained his death certificate.

14. She further stated that in 2012, she was approached by a lawyer called Njenga Mwangi whom she knew and he informed her that the suit property had been sold. She stated that she searched the title and discovered that the suit property had been transferred to the 2nd Defendant barely eight (8) months after her husband's death.

15. She also stated that as at August 2011, she was not aware of the transaction transferring the suit property to the 2nd Defendant and she confirmed with her Advocates that they never received any communication from Mr. Adan, the 2nd Defendant's Director in 2011.

16. It was her testimony that suit property was acquired during her marriage and she played a role in its acquisition and renovation and her husband told her it was their matrimonial home. She added that she lived with her husband for seventeen (17) years therefore her children and herself could not be guests on the property that was their home. She stated further that the 1st Defendant has never lived on the suit property and to her knowledge, the suit property should have formed part of the estate of her deceased's husband.

17. The Plaintiff also told the court that death is permanent and now that her husband is no more, she is the sole breadwinner and her son has

cerebral palsy and does not have any other home. She asked the court not to render her homeless and grant her the prayers on the plaint.

18. When cross-examined, on her role in the purchase of the suit property, she stated that her name does not appear on the sale agreement but she is the one who introduced her late husband to her uncle and gave kshs.300, 000/= in cash to her husband though it is the 1st Defendant who issued a cheque to settle the purchase price of ksh.5, 200,000/=.

19. She also stated that she is unable to quantify the improvements they have made on the property over time. They spent about kshs.800, 000/= when they first moved in, a further kshs.400, 000/=, and that she took later took a loan of kshs.600, 000/= from Equity bank to undertake further renovations. She also stated that together with her husband, they paid ksh.120, 000/= being transfer fees.

20. When asked how the 1st Defendant obtained the original Title, she stated that they were robbed at some point and her late husband moved documents including the title document to his father's office safe thus the 1st Defendant may have gotten it from there.

21. She also stated that she has not paid any land rates and they only got demand notes after her husband's death since previously they used to go to the address of George Mzera. She stated further that the her late husband's certificate of death was registered on the title to the suit property on 12th April 2011, three months after his death which was too soon according to her since she was still in mourning.

22. She stated that her case against the 2nd Defendant is that he bought the property without vacant possession and he knew it was occupied by the Plaintiff thus his transactions with the 1st Defendant were fraudulent.

23. She testified that her interests on the suit property are not in writing at entry 1-8 of the title but if she was a member of the public dealing with the property, she would enquire who Eric Mbela was. It was also her testimony that she is not seeking compensation for the renovations.

The Evidence of the 1st Defendant.

24. DW2, Elizabeth Wanjiku Muchira told the court that the Plaintiff was married to her son and they had two children whom she last saw in January 2011. She stated that she bought the suit property from George Mzera and his wife Esther Mzera. She stated further that George was the Plaintiff's uncle thus the Plaintiff introduced her to him. She also stated that after buying the house, she spent about Kshs.1,000,000/= on renovations.

25. It was her testimony that she moved the Plaintiff and her late son from Buruburu Phase IV from a family house they were not paying rent for to the suit property and that she did that to assist her late son who was jobless at the time. It was not long before he got a job.

26. She told the court that the Plaintiff and her late son had marital problems and her late son told her to sell the suit property but the Plaintiff was not privy to that conversation. She stated that she called George Mzera and asked him to persuade the Plaintiff to allow her to sell the house and that by that time, she had a bad relationship with the Plaintiff. She stated further that she also sent her lawyer to the Plaintiff to discuss the issue of selling the suit property but the lawyer reported that the Plaintiff refused.

27. It was her testimony that the Plaintiff knew that she was selling the house but she did not know the details. She stated that her late son's lawyer handled the sale transaction and he is the one who informed the Plaintiff that the 1st Defendant had sold the house.

28. She also stated that the Plaintiff did not contribute towards the purchase of the house and if she gave kshs.300, 000/=, the 1st Defendant is not aware. She stated that her son died on 31st December 2010 and she sold the house in April 2011.

29. When cross-examined, she stated that she registered the suit property jointly with her son since she was saving her son from transfer expenses if she was to die before him. She also stated that her son Eric Mbela (deceased) ought to have told the Plaintiff the reason he wanted the house sold.

The Evidence of the 2nd Defendant.

30. DW1, Ahmed Sheikh Adan a director and shareholder of the 2nd Defendant testified that the registered owner of the suit property is the 2nd Defendant. It was registered on 17th August 2011 as per entry No.9 on the Register. He further stated that a search on the Title was conducted and at the time of sale, the registered owner was the 1st Defendant. The certificate of death of Eric William Mbela was registered against the Title on 12th April 2011.

31. He also stated that at the time of sale, there was a relative of the 1st Defendant, the Plaintiff who was living on the property. He added that the 2nd Defendant did not take immediate possession as the Plaintiff was constructing another home and she needed time to complete and she agreed to vacate in June 2012. He stated further that the Plaintiff's lawyer told him that she would deliver vacant possession in August 2012 but she is still in possession to date and does not pay rent. He requested the court to allow the 2nd Defendant's prayer for vacant possession.

32. When cross-examined, he stated that he saw the suit property and met the Plaintiff as she is the one who gave him access of the property. He stated further that like any other purchaser, he was only concerned with the title record and at the time of purchase, a search of the records showed that the 1st Defendant was the registered owner and there was no indication of any trust being held by her on behalf of the family. He was not concerned of the relationship between the Plaintiff and the 1st Defendant.

33. He also emphasized that the Plaintiff had given the 2nd Defendant an undertaking that she would move out only for her to obtain an injunction. He added that the Plaintiff knew that the property was on sale as she had also indicated in another case that the Property was the 1st Defendant's.

34. At the close of the oral testimonies parties tendered final written submissions.

35. It would also be appropriate at this point to address the Plaintiff's concern that she did not close her case. She has raised this issue severally.

36. I have gone through the court record and I find that on 24th July 2014 when the matter was before Honorable Judge P. Nyamweya, the Plaintiff was not ready to proceed. The court then made the following directions:-

"Hearing to proceed on 16th October 2014 at 9.30 am. The Plaintiff to ensure the witness is in court in default the hearing of the Plaintiff's case shall be close".

37. On the 16th October 2014 the Plaintiff indeed testified and after her testimony the court made the following directions:-

"The Plaintiff do file and serve their submissions within 14 days and the Defendant do file and serve their submissions within 14 days of service by the Plaintiff. Mention on 9th December 2014 to reserve a judgment date."

There is no doubt that the Plaintiff closed her case on 16th October 2014.

38. A look at the court record confirms that the Plaintiff has been accommodated on several occasions including being allowed to recall DW2 (1st Defendant) for cross examination.

The Plaintiff's submissions.

39. They are dated 13th September 2021. Counsel for the Plaintiff raised the following issues for determination:-

a) Is the property held in trust for the Plaintiff and her children?

b) The applicable law and whether cancellation of the title should be ordered.

c) Whether the Plaintiff is entitled to the injunctions sought.

d) Which party shall bear costs?

40. On the 1st issue, he submitted that a trust can arise from the conduct of a party and the court may infer a common intention therefrom that the property was to be shared beneficially.

41. He submitted that there was a common intention by the Plaintiff and the 1st Defendant that both of them had a beneficial interest in the suit property and therefore Plaintiff engaged in activities that added value to the property.

42. He submitted further that it was the Plaintiff's testimony that she and her deceased husband had exclusive total control and management of the property from the time of purchase. They maintained the property and renovated it to cater for the unique needs of their son living with disability and that they put up a rental unit to supplement their income all without the 1st Defendants interference or restriction. This can be inferred that the Plaintiff and her deceased husband have a beneficial interest in the suit property.

43. He also submitted that the deceased told the Plaintiff that the suit property was their matrimonial home and that the common intention was manifested in the possession and occupation of the suit property with total, exclusive control and management.

44. On the issue of the law applicable, he submitted that The Land Act 2012 came into force after all transactions relating to this matter had been completed therefore Section 23 and 64 of the Registration of Titles Act (repealed) is applicable. He submitted further that the 2nd Defendant testified that it knew that the Plaintiff was in possession of the suit property thus the protection accorded by Section 23 of the Registration of Titles Act is not available to the 2nd Defendant since it was not an innocent purchaser for value without notice. In that regard, he relied on the case of **Charles Kiraithe Kiarie & 2 Others V. Administrators of the Estate of John Wallace Mathatre (deceased) & 5 Others [2013] eKLR**.

45. He also submitted that particulars of fraud against the defendants have been proved since the dealings over the suit land were done without knowledge and consent of the Plaintiff and were a secret arrangement between the 1st Defendant and the 2nd Defendant in spite of the plaintiff's occupation and possession of the same hence the Title held by the 2nd Defendant should be cancelled under Section 64 of the Registration of Titles Act.

46. On the issue whether the Plaintiff is entitled to the injunction sought, he submitted that the Plaintiff had established her rights as a *c'estui*

que trust as against the 1st Defendant and damages will not be an adequate remedy. He submitted further that for the injunctions sought against the 2nd Defendant who is a stranger to the trust to be established between the Plaintiff and the 1st Defendant, the liability of strangers to a trust for breach of trust is determined by the principles of “dishonest assistance” and “knowing’ receipt explained in the text by **Alistair Hudson on Equity and Trusts, 4th Edition at page 732.**

47. He also submitted that the 2nd Defendant was aware that the Plaintiff was in occupation but it willfully closed its eyes to the breach of trust by the 1st Defendant and failed to conduct due diligence to establish that the plaintiff and her children one of whom has cerebral palsy stood to lose the only home they know.

1st Defendant’s submissions

48. They are dated 23rd June 2021. Counsel for the 1st Defendant identified the following issues for determination: -

- a) *Whether the suit property was solely purchased by the 1st Defendant.*
- b) *Whether the suit property vested on the 1st Defendant upon the death of the deceased.*
- c) *Whether the sale of the suit property to the 2nd Defendant by the 1st Defendant was unlawful.*

49. On whether the suit property was solely purchased by the 1st Defendant, counsel for the 1st Defendant submitted that with the agreed purchase price of the property being kshs.5,200,000/=, the 1st Defendant instructed her bank, Citi bank to draw a cheque of kshs.520,000/= being 10% of the purchase price and the balance of kshs.4,680,000/= was settled through a bankers cheque drawn on Citi bank thus the property was solely hers and any further action taken by her in respect of the suit property was done as a proprietor.

50. On whether the suit property vested on the 1st Defendant upon death of Eric William Mbela (deceased), he submitted that section 60 and Section 91(4) of the Land Registration Act provides that where property is in the name of joint owners, upon the death of one of them, the property automatically passes to the surviving joint tenant. He submitted further that the principle operates to exclude the property subject to contention from the purview of the law of succession upon the death of either of the joint tenants by dint of the doctrine of *jus accrescendi*. He placed reliance on the case of **Isabel Chelangat v Samuel Tiro Rotich & 5 Others [2012] eKLR** and the case of **re Estate of Donato Sciacovelli (Deceased)[2021] eKLR**.

51. He also submitted that the fact that the 1st Defendant was not a resident on the property cannot disqualify her from asserting her interest as the surviving proprietor in the joint tenancy and that she was not under obligation to consult the person residing on the suit property at the time.

52. On whether the sale to the 2nd Defendant was lawful, he submitted that sale of the suit property to the 2nd Defendant and corresponding transfer was conducted in compliance with the law. He submitted further that the Plaintiff’ allegations of fraud were not proved thus they remained mere allegations.

The 2nd Defendant’s submissions

53. They are dated 8th June 2021. Counsel for the 2nd Defendant submitted that the Plaintiff’s claim in law /equity on the property is unsustainable since death of a joint tenant of a property vests the property in the surviving tenant. He submitted further that the position is codified in Section 60 & 91 (4) (b) of the Land Registration Act No.3 of 2012 and emphasized by the courts in **Irungu V.Thayu(2004) e KLR & Re estate of Joseph Kangari Muhu(deceased)(2015) e KLR**.

54. He also submitted that the property was not part of the estate of late Eric William Mbela or his free property upon which the Plaintiff could lay a claim of title and possession.

55. On the Plaintiff’s contention that transfer of the suit property to the 2nd Defendant by the 1st Defendant was done fraudulently for failure to inform the plaintiff and for want of consent from the Plaintiff, he submitted that a survivor of a joint tenancy does not require the consent of the estate of the deceased owner to deal with the property since an owner has unrestricted rights over the property under Section 24 of the Land Registration Act, 2012.

56. On the issue of the 2nd Defendant’s entitlement to vacant possession of the property, he submitted that the court ought to grant the 2nd Defendant vacant possession on the strength of Section 24 of the Land Registration Act No.3 of 2012. He submitted further that the court of Appeal affirmed the power of a registered owner to evict a trespasser in **East Africa Railways Corporation V. Karangi (1988) KLR 108** and in **Moya Drift Farm Limited V. Theuri (1973) EA 114**.

Analysis and Determination

57. I have considered the evidence on record, the pleadings and the written submissions filed on behalf of the respective parties. I have also considered the authorities cited. The issues for determination are:-

- (i) *Whether the suit property was solely purchased by the 1st Defendant.*

(ii) *Whether the suit property vested on the 1st Defendant upon the death of the joint owner Eric Wiliam Mbela.*

(iii) *Whether the 1st Defendant held the suit property in trust for the Plaintiff and her children.*

(iv) *Whether the sale and transfer to the 2nd Defendant by the 1st Defendant was lawful.*

(v) *Is the Plaintiff entitled to the reliefs sought?*

(vi) *Is the 2nd Defendant entitled to the reliefs sought in the counterclaim?*

(vii) *Who should bear costs of this suit?*

58. It is not in dispute that the LR NO 209/8336/98 (hereinafter referred to as “the suit property”) was acquired by and transferred to Eric William Mbela (Deceased) and the 1st Defendant as joint tenants on 26th August 2009. The sale agreement is between George Mwagae Mzera & Esther Mzera as vendors and Eric William Mbela and Elizabeth Wanjiku Muchira as purchasers. The purchase price is Kshs.5,200,000/= where Kshs.520,000/= being 10% was paid on execution of the sale agreement. The transfer in favour of Eric W. Mbela and Elizabeth Wanjiku Muchira is dated 11th July 2009.

59. It is the 1st defendant’s case that she paid the purchase price herself, she produced bank transfers from her Citibank account in favour of George M. Mzera for Kshs.520,502/50 on 3rd July 2000 and for Kshs.4,680,520/50 on 10th July 2003. This confirms that the total purchase price was paid by the 1st Defendant. the suit property was then registered in the names of Eric W Mbela and the 1st Defendant as joint tenants on 26th August 2009.

60. In her testimony the 1st Defendant told the court that she purchased the suit property using her personal emoluments. This has not been controverted. The Plaintiff told the court that she gave she gave her late husband Kshs.300,000/= which was their contribution towards the purchase of the suit property. She was however not able to prove this by way of documents. It is only her word, now that Eric Mbela is deceased. The 1st Defendant told the court that she intended to protect Eric Mbela from having any problems with respect to the suit property if she predeceased him.

61. I find that the 1st Defendant has proved to this court that she solely purchased the suit property. I find that she has discharged the onus of proof required under Section 107 and 018 of the Evidence Act. In the case of **Anne Wambui Nderitu vs Joseph Kiprono Rapkoi & Another [2005] IEA 334**, the Court of appeal held as follows:-

“As a general proposition under Section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act”.

62. It is not in dispute that the said Eric W. Mbela passed on, on 31st December 2010. This meant that the suit property devolved to the 1st Defendant as the sole surviving tenant. **Section 60** of the Land Registration Act, 2012 provides that:-

“If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate.”

Section 91 (4) of the Land Registration Act 2012 provides that;

“4. If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—

a) dispositions may be made only by all the joint tenants;

b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; or

c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.”

63. From the above provisions it is clear that once the certificate of death of Eric Mbela was registered which was done on April 2011 the 1st Defendant automatically became the absolute owner. I agree with the 1st Defendant’s counsel’s submissions that the principle of survivorship over jointly owned property operates to exclude the property subject to contention from the purview of the law of succession and upon the death of either of the joint tenants. In the case of **Isabel Chelangat vs Samuel Tiro Rotich & 5 Others [2012] eKLR** Munyao Sila J quoted texts from **Megary & Wade, The Law of Real Property, 6th Edition** and stated as follows:-

“A joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate share....” Further that “...there is a thorough and intimate union between joint tenants. Together, they form one person”.

Thus, the court proceeded to quote the tests on the discourse as hereunder:

“A joint tenant imparts to owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of single owner. Joint tenancy carries with the right of survivorship and “four unities”. The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on the surviving joint tenant. A joint tenant cannot pass by will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship take precedence. The four unities that must be present in a joint tenancy are:-

(i) The unity of possession.

(ii) The unity of interest.

(iii) The unity of titles.

(iv) The unity of time.

On unity of possession, each co-owner is entitled to possession of any part of the land as the other/s. [6] One co-owner cannot point to any part of the land as his own to the exclusion of the other/s. If he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other/s, so that an action for trespass cannot lie against another co-owner. Unity of interest means that the interest of each joint tenant is the same in extent, nature and duration, for in theory of law, they hold just one estate. [7] Unity of title means that each joint tenant must claim his title to the land under the same act of document. This is satisfied by having the joint tenants acquiring their rights by the same conveyance and being so registered as joint tenants. Unity of time means that the interest of each tenant must vest at the same time”.

64. The suit property vested on the 1st Defendant automatically upon the death of Eric Mbela. She produced a copy of the register as exhibit on this case. The Plaintiff as the deceased spouse is not entitled to the suit property as there was no severance of the joint tenancy.

65. In the **Re Estate of the late Dorica Lumire Mapesa alias Dorika Mapesa Lumire deceased [2018] eKLR** J Musyoka stated thus:

“Having concluded that East/Wanga/Lubinu/66 was held by the deceased and Silas Okumu Simeyo as joint proprietors, it follows then that following her demise on 6th February 1994, the principle of jus accrescendi applied, and her interest in the said property merged or united with that of the surviving joint tenant or joint proprietor, Silas Okumu Simeyo. The effect of this then would be that the said property ceased to form part of the estate of the deceased and was not available for distribution in her estate. Indeed, by virtue of section 118 of the Registered Land Act, Silas Okumu Simeyo, did not even need to initiate a succession cause to have the property transferred to his name, all he should have done was provide proof of the death of the joint tenant to the Land Registrar for him to act as envisaged by that provision.”

66. I also rely on the case of **Cornelius Nyabuto Mogaka vs Fredrick Nyabuto Mogaka & 2 others [2011] eKLR; Re Estate of Josephine Mumbua Mehlaiff-Deceased [2015] eKLR**, where it was stated that following the death of one joint owner, the property reverts to the ownership of the surviving joint owner.

67. It is the Plaintiff’s case that she undertook extensive renovations to the house while in occupation. She annexed photographs showing the current state of the house. This court is of the view that this is not enough to demonstrate that she expended monies on the said renovations. She produced no documents in terms of receipts to show that she is the one who undertook the renovations.

68. It is also the Plaintiff’s case that the 1st Defendant held the suit property in trust for herself and her children. She told the court that the deceased informed her that the suit property was their matrimonial home. That she has a beneficial interest in the suit property which she shared with her deceased husband and the children. That the intention was made to her orally by the deceased and the 1st Defendant at the time of acquisition of the suit property.

69. In **Twalib Hatayan & Another vs Said Saggah Ahmed Al Heidy & Others [2015] eKLR**, the Court of Appeal examined and established the law on Trusts as follows:-

“According to **Black’s Law Dictionary**, 9th Edition

“A trust is defined as:-

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

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

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories;

constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing.It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's law of England supra at para 1453). As earlier stated, with constructive trust, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment....

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee.....This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention (see Snell's 29th Edition, Sweet & Maxwell p.175. Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume an infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at P.177) (Supra)".

70. I find that the 1st Defendant did not hold the suit property in trust for the Plaintiff and her children as it was not part of the Estate of Eric William Mbela.

Section 2 of the Succession Act, Cap 60 Laws of Kenya defines 'Estate' to mean *free property of deceased person*.

'Free property' is defined as

"In relation to deceased person means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death".

In the case of **Re Estate of Joseph Kangari Muhu (Deceased) [2015] eKLR** it was held:-

"18. From the material before me, it is clear that the deceased and Sera Kangari were registered as joint proprietors of Kajiado/Olekasasi/1108. That being so, Section 118 of the Registered Land Act applied, and now so does Section 60 of the Land Registration Act. Following the death of the deceased, the Land Registrar became obliged, upon being so satisfied of the death, to delete the name of the deceased. The deletion of the name of the deceased would leave Sera Kangari as the sole proprietor of the said property.

19. Consequently, it is my holding that the said property became the property of Serah Kangari upon the demise of the deceased on 14th October 2012. The interest of the deceased united with that of Serah Kangari by the principle of survivorship or jus accrescendi and the said property, or its derivatives, do not form part of the estate of the deceased."

I find that the Plaintiff's avenue for which she could claim the suit property does not exist.

71. It is also the Plaintiff's case that the 1st Defendant sold the suit property to the 2nd Defendant without her consent and/or authority. Further that the said sale and transfer was fraudulent. I have gone through the Plaintiff's case and I find the allegations of fraud have not been substantiated.

In the case of **Gichinga Kibutha vs Caroline Nduku [2018]** the Court of Appeal stated thus:

"Fraud is essentially a common law out of deceit and its essentials are:-

- (a) false representation of existing facts;*
- (b) with the intention that the other party should act upon it;*
- (c) the other party did act on it;*
- (d) the party suffered damage".*

72. It is now well settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt as was held in **Athi Highway Developers Ltd vs West End Butchery Ltd & 6 Others [2015] eKLR** where the court stated that:

"It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs Precedent of pleadings 13th Edition at page 427:-

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings and though it is not necessary that the word fraud should be used the facts must be so stated as to show distinctly that fraud is charged. (Willingford vs Mutual Society [1880] 5 App Case 685 at 697, 701, 709, Garden Neptune vs Occident [1989] 1 Lloyd’s Rep 305,308). The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence vs Lord Norreys [1880] is App Case 210 at 221) it is not allowed to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved (Davy v Garrett [1878] 7 Ch.D 473 at 489) “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.”

73. Allegations of fraud must be pleaded and proved. The Plaintiff failed to discharge this burden as required by Section 107 – 108 of the Evidence Act.

I find that the Plaintiff has failed to prove the allegation of fraud against the Defendants.

74. The 1st Defendant as the registered proprietor, was under no obligation to consult the Plaintiff regarding the sale to the 2nd Defendant. Section 24 and 25 of the Land Registration Act 2012 provides that:-

Section 24

“Subject to this Act—

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

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

Section 25;

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

a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

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

75. It is the 2nd Defendant’s case that it conducted due diligence and confirmed that the said property was registered in the name of the 2nd Defendant. DW1 Ahmed Sheikh Adan, a director of the 2nd Defendant told the court that prior to the sale, a search was conducted to confirm the 1st Defendant was the registered owner. He told the court that the 2nd Defendant bought this suit property for Kshs.21,000,000/= and it became the legal owner on 17th August 2011. He produced the sale agreement and a transfer by the 1st Defendant in favour of the 2nd Defendant. He admitted that the Plaintiff was living on the suit property by then but had promised to vacate by June 2012. That by June 2012 the Plaintiff advocate informed him that she would vacate by August 2012. It is on record that the Plaintiff is still in possession of the suit property.

76. When cross examined by the Plaintiff’s counsel he told the court that the Plaintiff granted him access to the house at all the time of purchase.

77. The 1st Defendant was categorical that she had sold the suit property to the 2nd Defendant and that she complied with all legal procedures. From the totality of the evidence on record, I find that the 2nd Defendant acquired good title to the suit property devoid of any fraud and/or illegalities.

78. From the foregoing, I find that the Plaintiff has failed to prove her case against the Defendants on a balance of probabilities. I find that she is not entitled to the reliefs sought. Her suit is dismissed.

79. The 2nd Defendant on the other hand having acquired a good title from the 1st Defendant is entitled to the prayers on the counterclaim. In the case of **Peter Kamau Ikigu vs Barclays Bank of Kenya Ltd & Another [2003] eKLR** it was held that:-

“On whether the sale Plaintiff has any enforceable legal or equitable right over property LR No 2/653 Nairobi, having found that the 1st Defendant’s statutory power of sale had arisen, it would follow that the plaintiff had no enforceable legal or equitable right over the property and in the absence of a court order restraining his eviction, he was thereby rendered a trespasser in the

suit premises hence not legally entitled to be compensated as long as the 2nd Defendant used reasonable force. Accordingly, I associate myself with the decision in East African Railways Corporation vs Karangi (Supra) that a trespasser can be evicted from the premises using no more than reasonable force and that an award of damages in those circumstances is erroneous.

It follows that the 2nd Defendant was entitled to vacant possession of property LR No 2/653 Nairobi without an order, upon the sale and transfer of the property to him by the 1st Defendant.”

80. I find that the 2nd Defendant is entitled to vacant possession. In essence the 2nd Defendant’s counterclaim succeeds. I enter Judgment in its favour as follows:-

(a) That the Plaintiff’s suit is hereby dismissed.

(b) That the Plaintiff is hereby directed to give vacant possession of the suit property being LR NO 209/8336/98 Loresho to the 2nd Defendant within one hundred and twenty (120) days from the date of this judgment failure to which the Plaintiff be evicted from the suit property with the assistance of a court bailiff.

(c) That the order of mandatory injunction is hereby issued directing the Plaintiff to vacate the suit property known as LR NO 209/8336/96 within one hundred and twenty (120) days from the date of this judgment failure to which the Plaintiff be evicted from the suit property with the assistance of the court bailiff.

(d) That an order of permanent injunction is hereby issued restraining the Plaintiff by herself, servants, agents, or otherwise whosoever from remaining on, entering upon, trespassing upon and/or interfering with the 2nd Defendant’s access to use of and quiet possession of the suit property LR NO 209/8336/98 Loresho.

(e) I sympathies with the predicament in which the Plaintiff finds herself in. Consequently, I order each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 18TH DAY OF NOVEMBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Ngetich for Mr. Mitey for the Plaintiff

Mr. Mumia for the 1st Defendant

Mr. Havi for the 2nd Defendant

Steve - Court Assistant