



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NYAMIRA**

**ELC CASE NO. 24 OF 2021**

**{Formerly of Environment and Land Court at Kisii Case No. 40 of 2015}**

**SAMWEL ARIGA BOSIRE.....PLAINTIFF**

**=VRS=**

**ABAGUSII OTENYO SELF HELP GROUP.....DEFENDANT**

**JUDGMENT**

By a Plaint dated 6<sup>th</sup> February 2015 and filed in court on 9<sup>th</sup> February 2015, the Plaintiff has sued the Defendant for an order of the cancellation of entries in the Register and cancellation of Titles issued on sub-division of Land Parcel No. EAST KITUTU/MWAMANGERA/2294 which was registered in the name of his late father Teresi Bosire Mokaya who died on 29<sup>th</sup> February 1997. The Plaintiff took out letters of administration in respect to his late father's Estate and is now the Administrator of the Estate of the late Teresi Bosire Mokaya. In his evidence, he produced a copy of the Death Certificate registered on 31<sup>st</sup> October 2007 with Serial Number 66926. The same is marked as Exhibit 1. The Succession Cause was filed on 24<sup>th</sup> March 2015 and the letters of Administration were issued by Nyamira Principal Magistrate and confirmed on 24<sup>th</sup> September 2014 in Succession Cause No. 19 of 2007 where he and his two sisters Banchiri Obwocha Jane and Rebecca Kwamboka Mokaya had the property EAST KITUTU/MWAMANGERA/2294 equally distributed to them. The Certificate of Confirmation of Grant was produced as Exhibit 2. The Plaintiff produced as Exhibit 3 a copy of the Application to be registered as the Proprietor by transmission of the suit land. The same is dated 17<sup>th</sup> January 2013 and was received for registration at Nyamira Lands office on 11<sup>th</sup> September 2014. According to the Plaintiff, it is upon presentation of the Application for Registration as Proprietor by transmission of the suit property that he was informed at the Lands office that the Register for the suit land was closed on 10<sup>th</sup> June 2008 on sub-division and 4 new sub-divisions viz. EAST KITUTU/MWAMANGERA/3045, 3046, 3047 and 3048 respectively were created. To prove this, he produced a copy of the Green Card marked Exhibit 7. He was then given a copy of a letter dated 10<sup>th</sup> November 2014 which was copied to the District Officer, Keroka (Exhibit 4) and addressed to the Defendant herein with instructions that the Defendant do surrender the Title Deed in respect to the suit land and the same was received by Mr. James Namu, the Defendant's Executive Secretary, on 13<sup>th</sup> November 2014. The same was not acted upon. The Plaintiff also got another letter dated 14<sup>th</sup> January 2015 advising him that his Application for Registration of the suit property could not be realized because Parcel Number EAST KITUTU/MWAMANGERA/2294 did not exist. The same had been sub-divided and new Parcel Numbers given i.e. EAST KITUTU/ MWAMANGERA/3045, 3046, 3047 and 3048 and that Parcel Number EAST KITUTU/MWAMANGERA/3048 had already been transferred to the Defendant. He was advised to seek a remedy in court. The letter was produced as Exhibit 5. The Plaintiff also produced in court as Exhibit 6 a copy of the mutation forms that helped sub-divide the suit land. He finally produced as Exhibit 8 four copies of the Certificates of Official Search that show the existence of Parcel Numbers EAST KITUTU/ MWAMANGERA/3045 to 3048 (inclusive) all of which were still in the names of the Deceased save Parcel Number EAST KITUTU/ MWAMANGERA/3048 which had now been transferred to the Defendant.

The Plaintiff testified that to achieve all these changes the Defendant used fraudulent means whose particulars are that the sub-divisions were carried out and registered after his father's death before and the process of succession was complete. The Plaintiff laments that he is unable to transfer the suit property in accordance with the Certificate of Confirmation of Grant issued by the court and that his prayer to the court is that the registered sub-divisions be cancelled and that he be given the costs of the suit.

On cross examination, the Plaintiff denied ever filling any mutation forms in respect to the suit land and that the copy of the mutation form he produced in court was given to him at the Lands office as evidence that the land had already been sub-divided. He also denied having ever signed the Sale Agreement dated 18<sup>th</sup> December 2007 showed to him by the Defendant's Secretary and that he was surprised to learn that the transfer of a portion of the suit land i.e. LR No. EAST KITUTU/MWAMANGERA/3048 was registered even before the Confirmation of the Grant was effected by the court since the Grant was confirmed on 24<sup>th</sup> September 2014 while the suit Title was issued on 10<sup>th</sup> June 2008, 6 years earlier. He also denied ever signing the Transfer forms and disowns the thumbprint appearing on the Sale Agreement. When asked how his photo appeared on the Transfer documents he said that he did not understand and that he had not interchanged his Identity Card Number in various documents.

In its Defence, the Defendant avers that the Plaintiff and his family were involved in the sub-division of the suit property and that he, the Plaintiff, signed the mutation forms in respect to EAST KITUTU/MWAMANGERA/2294 with intent to obtain money by false pretense and

that he had sub-divided the suit land EAST KITUTU/MWAMANGERA/2294 and created new numbers. The Defendant also averred that she assisted the Plaintiff to obtain Probate and the Defendant prays for the dismissal of the Plaintiff's suit with costs, a mandatory written apology from the Plaintiff for portraying the Defendant as a fraudster, cancellation of the Letters of Administration obtained by the Plaintiff on 17<sup>th</sup> January 2013 and a mandatory order against the Plaintiff ordering him to vacate and stop interfering with "the Defendant's land parcel."

On its part, the Defendant's evidence was adduced in court by Mr. James Namu, a member and also the Secretary to the Defendant. He testified that the Defendant is registered with the State Department of Social Services as a Self-Help Group. He went ahead to give evidence that when the Defendant decided to buy a piece of land, the Plaintiff approached the Defendant's officials on 18<sup>th</sup> December 2007 and signed a Sale Agreement which was produced as Exhibit D1. The Defendant advised the Plaintiff to take out Letters of Administration and to facilitate and expedite the process, two of its members namely Mr. Joseph Keraita and Mr. Semeon Michira Mariera signed the Guarantee forms (Affidavit of justification of proposed Sureties and Guarantee by Personal Sureties, Forms P&A 11 and P&A 57 respectively) both dated 16/11/07. He produced copies of the filed Petition for Grant of letters of Administration as Exhibit D2. Mr. Namu also testified that since the Plaintiff needed money quickly and the Defendant needed the property transferred to them soonest, they mutually agreed not to await the Confirmation of the Grant but, in his own words, to sign the transfer documents in the name of the late Teresi Bosire Mokaya, without the Plaintiff's siblings knowing and present them to the Lands Office, Nyamira as if it was the deceased who had signed them. Besides the agreed consideration of Kshs. 450,000/= for the parcel of land plot No. EAST KITUTU/ MWAMANGERA/3048 which measured approximately 1.1 Acres or thereabout, the Defendant agreed to pay the sum of Kshs. 35,950/= to the Surveyor directly for the entire process of sub-division and registration of Parcel Number EAST KITUTU/ MWAMANGERA/ 3048. In as far as the purchase price is concerned, the Defendant claimed to have so far paid to the Plaintiff the sum of Kshs. 421,870/= as part of the consideration. All the parties agreed that the Plaintiff's siblings would not be made aware of the on goings. The Defendant testified that every time the Plaintiff went to collect money which was paid in installments, he went in the company of his wife. Mr. Namu said that the Defendant made sure the Plaintiff's sisters did not get to know anything about this transaction since had they got wind of it, the whole transaction would have come a cropper. He clarified that although the transfer forms were signed by the Plaintiff as the Vendor, the same bore the name of the Deceased. Mr. Namu produced as Exhibit D3 the Application for Transfer, letter dated 18<sup>th</sup> November 2014 to the Land Registrar marked Exhibit D4, another one dated 20<sup>th</sup> August 2015 to the Assistant Chief Keroka as Exhibit D5 and the last one dated 20<sup>th</sup> August 2015 to the Land Registrar, Nyamira marked as Exhibit D6. All these letters were elucidating why the Defendant could not return the Title in respect of EAST KITUTU/MWAMANGERA/3048 for cancellation as demanded by the Land Registrar, Nyamira. He also produced the mutation forms as Exhibit D7, the Defendant's Extract of Minutes dated 18<sup>th</sup> November 2014 that sanctioned the purchase of the suit property being Exhibit D8 and finally a copy of the Defendant's Registration Certificate as Exhibit D9.

The Defendant concluded its testimony by Mr. Namu saying that they took possession of the suit property until 2020 when the Plaintiff came back to the suit land and felled 17 eucalyptus trees thereon which the Defendant had purchased from the Plaintiff at a cost of Kshs. 180/= each. This is when the Defendant stopped making further payments.

On cross examination, the Defendant's sole witness changed harmony and now said that the Defendant was worried and got concerned that the Plaintiff did not involve his siblings in the entire transaction.

Since both parties acted in person, I will frame the issues for determination as follows: -

- 1. Who was involved in the sub-division of Land Parcel No. LR EAST KITUTU/MWAMANGERA/2294?**
- 2. Was the plaintiff and/or his family involved in both the sub-division of and the transfer of EAST KITUTU/MWAMANGERA/3048 or in either of them?**
- 3. Was any of the parties in this suit involved in any fraud?**
- 4. Did the Plaintiff execute the Sale Agreement dated 18<sup>th</sup> December 2007?**
- 5. Is the Plaintiff entitled to the order of cancellation of the transfer of EAST KITUTU/MWAMANGERA/3048 and/or the sub-division of Land Parcel No. EAST KITUTU/MWAMANGERA/2294?**
- 6. Did the Plaintiff hatch a scheme to obtain money by false pretense from the Defendant?**
- 7. Is the Defendant entitled to a mandatory written apology from the Plaintiff for portraying the Defendant as a fraudster?**
- 8. Is the Defendant entitled to the order of cancellation of the Letters of Administration obtained in Nyamira PMCC No. 19 of 2007?**
- 9. Is the Defendant entitled to vacant possession of the parcel of land LR No. EAST KITUTU/MWAMANGERA/3048?**
- 10. Who should bear the costs of this suit?**

Having carefully listened to the evidence adduced in this case, I have arrived at the conclusion that indeed the parties herein initially purported to enter into a form of agreement where the Plaintiff agreed to sell and the Defendant agreed to buy a piece of land out of EAST KITUTU/ MWAMANGERA/2294 situate within Montine village in Masaba District. According to the agreement dated 18<sup>th</sup> December 2007 marked as Exhibit D1 both parties appreciated that the Plaintiff was the son of the late TERESI BOSIRE MOKAYA and that he was entitled to receive part of the said parcel. The agreement further gives the acreage of the land to be sold as 1.1Acres which is described as the Plaintiff's portion which I believe meant his inheritance. The purchase price was agreed as Kshs. 450,000/= and the Agreement of Sale

goes ahead to state that Kshs. 60,000/= out of this consideration was paid at the time of executing the agreement and that the balance of Kshs. 390,000/= would be paid as follows: -

**“(i) Kshs. 195,000/= within the month of May 2008.**

**(ii) Kshs. 195,000/= within the month of November 2008.”**

The Agreement also refers to the Succession Cause No. 19 of 2007 in the Senior Resident Magistrate’s Court, Nyamira. But what baffles me is that the said Agreement is thumb-printed allegedly by the Plaintiff herein. But the Plaintiff has signed all the other documents including the Verifying Affidavit dated 6<sup>th</sup> February 2015 accompanying the Plaintiff in this case and not thumb-printed any of them. The Plaintiff denies that the thumb print is his. Whereas the Defendant insists that the same was thumb-printed by the Plaintiff, the Defendant did not subject it to an expert to verify that the same indeed belongs to the Plaintiff. This would have settled the matter.

Secondly, the Defendant claims that the Sale Agreement was drawn by the Firm of Omariba & Co. Advocates’ Clerk and the said Clerk, by the name Ken witnessed it after he was paid the sum of Kshs. 3,000/= which was not receipted. Section 34 of the Advocates Act (CAP 16 Laws of Kenya) provides that: -

**(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument**

**(a) relating to the conveyancing of property; or**

**(b) for, or in relation to, the formation of any limited liability company, whether private or public; or**

**(c) for, or in relation to, an agreement of partnership or the dissolution thereof; or**

**(d) for the purpose of filing or opposing a grant of probate or letters of administration; or**

**(e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or**

**(f) relating to any other legal proceedings;**

**nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:**

Although there is a proviso to the above, the law does not allow the person employed by an Advocate to witness execution of such. This practice is not allowed by law, and any person who contravenes this provision is guilty of an offence. I’m sure if the parties had approached a qualified Advocate, they would have received appropriate advice that would have made them wait for probate to be completed before engaging in the exercise.

According to the Defendant’s witness, Mr. Namu, after the parties entered into the Sale Agreement and they all agreed that the process of Probate was taking long, the Plaintiff was now to camouflage as the late Teresi Bosire Mokaya, execute the Transfer Forms, place his photograph on the forms, sign the same and proceed to the Lands office to effect the transfer as if the late Teresi Bosire Mokaya was still alive. Mr. Namu said that this was done in 2008 and the urgency of it all was because the Plaintiff needed money urgently and the Defendant needed the property transferred to them urgently. I cannot think of any better way of perpetrating fraud. Both parties hatched a fraudulent scheme and successfully executed it either with the connivance of some officials at Nyamira Lands office or due to the latter’s’ negligence. But even more curiously the copy of Application of the Transfer Forms presented to the Lands office produced in court as Exhibit D3 does not indicate the PIN Number of either party. Equally surprising is the fact that nowhere has the Defendant mentioned that the consent of the Land Control Board was ever sought which is mandatory for any unexempted agricultural land such as the suit land. I do not buy the Defendant’s witness’ explanation that the reason they decided not to await the conclusion of the process of Probate was because the Plaintiff needed money urgently and the Defendant wanted the property transferred to it soonest. The only logical inference to be drawn from this change of mind is that the parties to the transaction must have feared that the other beneficiaries of the Estate of the late Mr. Mokaya would object to the transaction or they may even have moved the court to stop the same. Why do I say so? Although the Defendant avers under paragraph 4 of its Defence that the Plaintiff and his family members were involved in the sub-division of the suit property, its only witness testified in court that the Defendant did the best they could to ensure that none of the Plaintiff’s siblings came to know about this transaction. In order to completely guard the top secret, two of the Defendant’s members Joseph Keraita and Semeon Michira guaranteed the process of the Succession Cause by signing forms P & A 11 and 57 respectively as personal sureties of the Plaintiff.

To answer the question as to whether there was fraud in the sub-division of the suit property and the transfer of one of the resultant portions i.e. EAST KITUTU/MWAMANGERA/3048, the answer is in the affirmative. The sub-division and transfer were carried out by the Plaintiff in place of Teresi Bosire Mokaya who had died 10 years earlier on 29<sup>th</sup> December 1997. This fraud was facilitated by the Defendant. The parties acted as if Mr. Mokaya must have resurrected to carry out this function which he had not completed in his lifetime. He went back to his grave immediately the land was transferred to the Defendant without anybody else apart from the parties herein noticing that he was around.

**Who was/is responsible for the fraud?**

As is shown above both parties including others not before court such as some Lands officials are guilty. The Lands officials who

transferred the property EAST KITUTU/MWAMANGERA/3048 together with the Surveyors who carried out the process of sub-division of LR No. EAST KITUTU/ MWAMANGERA/2294 cannot escape blame. How could the Lands officials not be able to tell the difference between the Plaintiff and his late father from the ages in the Identity Card of the Deceased compared to the photograph pasted on the Application forms for Registration. On the part of the Surveyor, did he prepare the mutation forms, Exhibit D7 without noticing that he was dealing with the wrong person? The Deceased died in 1997 aged 83 years and therefore at the time of filling the transfer forms on 10<sup>th</sup> June 2008 he should have been 94 years old if he were still alive. The photograph on Exhibit D3 could not have been that of a 94-year-old man. Even the person who was appearing before them was not that old. It should have raised suspicion immediately. The Lands officials were also privy to the fraud for entertaining and effecting a transfer of an agricultural land without consent of the Land Control Board and also without the PIN Numbers of the Vendor and Purchaser in the transaction.

I wish the Land Registrar was made a party to this suit so that he could shed light of how he closed the Title Register of LR No. EAST KITUTU/MWAMANGERA/2294 and produced four new parcels of land without the surrender of the mother Title Deed which to date is still in the custody of the Plaintiff.

Having analyzed the evidence above and having come to the conclusion that the entire process was punctuated by fraud, what is the effect of a fraudulent transaction?

The applicable law during the pendency of the transaction above was the Registered Land Act (Cap 300 Laws of Kenya). Section 43 (1) of the said repealed Act provided that: -

**“(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”**

Subsection (2) is even more important. The same reads as follows: -

**“(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”**

In the present case the Defendant did not only have the knowledge of the fraud perpetrated to facilitate the transfer of Parcel Number EAST KITUTU/MWAMANGERA/3048 but also substantially contributed to the same and ensured that those who would have hindered the same did not come to know about it at all.

Section 143 of the Registered Land Act has been reproduced in the Land Registration Act, No. 3 of 2012 under Section 26 to even include misrepresentation as a ground for rectifying the Register.

In the case of *Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] e KLR* Justice Sila Munyao held that:

***“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation.*”**

Turning now to the law of succession, Section 45 of the Law of Succession Act (Cap 160 Laws of Kenya) 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.*”**

***(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.”***

Section 55(1) of the said Act provides that: -

***“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.”***

Section 79 provides that: -

***“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.” (Emphasis mine).***

The final duties of the Administrator of an Estate are those imposed on him under Section 83 of the Law of Succession Act which provides: -

**Personal representatives shall have the following duties—**

- (a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;***
- (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;***
- (c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);***
- (d) to ascertain and pay, out of the estate of the deceased, all his debts;***
- (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;***
- (f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;***
- (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;***
- (h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;***
- (i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”***

and more importantly Section 83 (g) and (i). Before then, he cannot dispose of any of the assets of the Deceased since he is only a personal representative of the Deceased and not the proprietor of the assets falling part of the Estate. From the time he is given the initial Grant of Letters of Administration to the time of the Confirmation of the said Grant under Section 83 (i) (and at times later than that where there is continuing trust (s)) an Administrator is not allowed to dispose of any part of the deceased’s property even if he is the sole beneficiary. He cannot even dispose of what the beneficiaries have agreed will be ultimately his. If he does so, he will be guilty of intermeddling with the Deceased’s Estate under Section 45 of the Law of Succession Act and is guilty of an offence under sub-section (2) punishable by a fine not exceeding Kshs. 10,000/= or to a term of imprisonment not exceeding 1 year or to both penalties.

The upshot of the above is that whatever was done before the 24<sup>th</sup> September 2014 in respect to disposing of or even sub-division of EAST KITUTU/MWAMANGERA/2294 was intermeddling with the Estate of Teresi Bosire Mokaya and not lawful. Before 24<sup>th</sup> September 2014 the land parcel known as EAST KITUTU/MWAMANGERA/2294 was still the property of the Deceased and no living person had a good Title over the property. The sale, if any, was therefore a nullity and this court hereby nullifies:

- (i) The agreement made on the 18<sup>th</sup> December 2007 or thereabout;
- (ii) The closing of the Title of LR No. EAST KITUTU/MWAMANGERA/2294 effected on 10<sup>th</sup> June 2008;
- (iii) All the sub-divisions excised out of the said parcel of land, to wit EAST KITUTU/MWAMANGERA/3045, 3046, 3047 and 3048;

I hereby invoke the provisions of Section 80 (1) of the **Land Registration Act No. 3 of 2012** which provides as follows:

***(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.***

And since the proviso under sub section (2) is not applicable to the Defendant as he was a party to the fraud, I hereby enter judgement for the following orders: -

- (a) A rectification of the register with regard to the property known as Title NO. EAST KITUTU/MWAMANGERA/2294 by directing the Land Registrar, Nyamira to ensure that the entry made therein on 10<sup>th</sup> June 2008 and any subsequent entries**

are cancelled and the proprietorship section of the said property reverts back to the name of TERESI BOSIRE MOKAYA forthwith.

(b) All the sub-divisions emanating from the parcel of land known as EAST KITUTU/MWAMANGERA/2294 i.e. EAST KITUTU/ MWAMANGERA/3045, 3046, 3047 and 3048 are hereby cancelled.

(c) The transfer of EAST KITUTU/ MWAMANGERA/3048 to the Defendant is hereby cancelled forthwith.

As to the Defendant's prayers, there is no counter-claim filed and moreover even if there was one we cannot make an order that the Plaintiff offers a mandatory written apology to the Defendant for accusing or portraying the Defendant as a fraudster because from its own witness, its officials facilitated the Plaintiff to execute and present transfer forms to the Lands office pretending to be his Deceased father. There can be no greater fraud than to make a person who died 11 years ago to wake up, clothe himself with tendons, ligaments, muscles and a human skin, walk to the Land Registrar's office to present documents and then rebury himself without disturbing the soil over his skeleton and without his 2 beloved daughters or any other person getting wind that he was around. Fraudsters can only benefit from their fraud if the fraud is undetected but once caught all the gains made under the fraudulent transactions are lost. The court cannot also order the cancellation of the Letters of Administration issued to the Plaintiff in the Succession Cause since the court has no jurisdiction to do so and even if it had such jurisdiction no good reasons whatsoever or at all have been advanced to warrant such orders. Consequently, the court declines to grant order number (e) in the Defendant's Defence dated 24<sup>th</sup> March 2016 since the Plaintiff is not only an Administrator but is also a beneficiary of the Estate of the late TERESI BOSIRE MOKAYA, the registered proprietor of the suit land until this fraud took place.

As to any other relief that this court would deem fit to grant, I find none. Fraudsters cannot benefit from their acts of fraud. The Defendant should have waited a little longer to purchase the suit property. The only relief that could have been tenable in an ideal situation is the refund of the purchase price exchanged but for the avoidance of doubt, the court was not persuaded that any monies were ever paid in respect to the purchase price of the alleged sale transaction. Other than saying that the Defendant paid to the Plaintiff a total of Kshs. 421,870/= in instalments as part of the consideration, no details of when and how the same was paid nor was evidence of the acknowledgment of the monies provided to court. In any case no refund has been prayed for. Besides, this transaction is tainted with illegality, hence unenforceable in law. And as Justice Nyarangi held in *Patel vs Singh Court of Appeal in Nairobi Civil Appeal No. 64 of 1985* quoting Devlin L.J (as he then was) in *Archbalds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374, at page 388 on the issue of illegality,

***“The effect of illegality upon a contract may be threefold. If at the time of making the contract there is intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab inito and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy.”***

The contract between the parties herein, if at all, contravenes the provisions of section 45 of the Law of succession Act (CAP 160 Laws of Kenya) and as such it is illegal and unenforceable. The court therefore makes no orders in respect thereof.

On the issue of costs, the Judgment of the court favours the Plaintiff with exactitude as he would have wanted it. But due to his questionable conduct, as explained above, his victory here is not on merit but by sheer coincidence. The general rule that costs follow the event is therefore not applicable here. This is therefore not a case in which the court should exercise its discretion as to costs in his favour. Accordingly, I make no orders as to costs.

Each party shall bear its own costs.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 11TH DAY OF NOVEMBER, 2021.**

**MUGO KAMAU**

**JUDGE**