



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 104 OF 2015

FRANCESCA REGAIOLLI.....PLAINTIFF

VERSUS

PETER NYIRO MGANGA

SUZANNE CHARTIER.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By a Plaint dated 30th June 2015 as amended on 27th April 2016, Francesca Regaiolli (the Plaintiff) prays for Judgment against the two Defendants for:-

A. 1)An order of a permanent injunction to issue restraining the Defendants by themselves, servants, agents and/or employees from interfering with the Plaintiff's quiet possession, use, occupation and proprietorship of the suit property known as House No. Q7 erected on Portion No. 587 in AG Complex situated in Malindi;

A2)A declaration that the Plaintiff is the legal owner of the House No. Q7 erected on Land Portion No. 587 Malindi;

B) Costs and incidentals of this suit and interest thereof at Court rates.

2. The Prayers arise from the Plaintiff's contention that at all times material, she was the absolute proprietor of the said House No. Q7 erected on Land Portion No. 587 in AG Complex Malindi having purchased the same from one Monique Grignon (now deceased) on 27th December 2014.

3. The Plaintiff states that Peter Nyiro Mganga (the 1st Defendant) was at the said time the Caretaker of the suit property and he was aware of the transfer of the same to herself. At the same time, Suzanne Chartier (the 2nd Defendant) as a Co-executor of the estate of the said Monique Grignon was and has been aware that the suit property was voluntarily transferred to the Plaintiff as aforesaid and that it was thus not part of the estate of the said Monique Grignon.

4. The Plaintiff avers that on or about 3rd December 2016, despite their knowledge as aforesaid, the Defendants obtained Grant of Probate in respect of the Estate of the late Monique Grignon wherein they listed the suit property as part of the estate. The Defendants have since refused to vacate the suit property and have denied the Plaintiff access thereto.

5. In response to the Plaintiff's claim Peter Nyiro Mganga (the 1st Defendant) denies that the Plaintiff is the beneficial owner of the suit property and/or that the same was transferred to her as stated by the late Monique Grignon. The 1st Defendant further denies that he was aware of the alleged transfer and/or that he denied the Plaintiff access to the suit property.

6. Without prejudice to his denials, the 1st Defendant avers that the Plaintiff procured the transfer of lease to her name by fraud in collusion with other people. The 1st Defendant further avers that he is a beneficiary of the Estate of the late Monique Grignon which estate includes the suit property.

7. The 1st Defendant further avers that in her Will dated 25th February 2015, the late Monique Grignon bequeathed the suit property to himself and accuses the Plaintiff of storming therein and forcefully taking possession of the same and removing documents and cash on 6th

July 2015.

8. By way of Counterclaim, the 1st Defendant prays that:-

- i) The (Plaintiff's) suit be dismissed with costs;*
- ii) A mandatory order be issued directing the Plaintiff to vacate and give possession of the suit property to the 1st Defendant;*
- iii) That the Plaintiff be ordered to return the private property, documents and cash;*
- iv) Rent arrears; and*
- v) A permanent injunction to issue against the Plaintiff restraining her from accessing the suit property.*

9. Ms Suzanne Chartier (the 2nd Defendant) is equally opposed to the Plaintiff's suit. In a Statement of Defence dated 23rd February 2017 and filed herein in person on 2nd October 2017, she denies that the Plaintiff is the proprietor of the suit property as alleged or at all.

10. The 2nd Defendant denies that the Plaintiff paid any consideration for the suit property and asserts that the transfer thereof to the Plaintiff's name was irregular and unlawful. The 2nd Defendant avers that on 30th November 2015, she obtained a Grant of Probate of the Estate of the late Monique Grignon as a result whereof she was named the Executor of the Estate. She denied that the Plaintiff purchased the house from the deceased and invites her to strict proof.

The Plaintiff's Case

11. At the trial herein the Plaintiff called two witnesses in support of her case.

12. PW1-Francesca Regaiolli is the Plaintiff herself. She told the Court that she bought the house in contention from Monica Grignon on 27th December 2014. They did a transfer of the Lease on the same day although it was not registered until 9th February 2015.

13. PW1 testified that she signed the transfer in the presence of her Advocate Lucy Wangari and the 1st Defendant herein. While the deceased signed the transfer, the 1st Defendant did not sign any document. PW1 told the Court that the Leaseholders thereafter transferred the property to her name. She paid Stamp Duty and her Advocate then had the property registered in her name.

14. PW1 told the Court Monique and herself were family friends. Monique trusted her and made a number of documents in her favour. One such document was a Power of Attorney dated 22nd October 2014. It was registered on 28th October 2014. Monique also gave her her last Will and testament dated 22nd October 2014. PW1 would later learn that Monique was bequeathing her the house and a Bank Account. Both the Power of Attorney and the Will were however revoked on 20th February 2015.

15. PW1 told the Court that the 1st Defendant was responsible for preparing furniture and other household items in Monique's house. PW1 did not know the 2nd Defendant then although she came to learn later that she lived within the same compound where the suit property is situated.

16. PW1 told the Court that Monique died in France in 2015. When PW1 learnt after sometime of the death, she went to the house and found Monique's housemaid Irene George Kenga and the 1st Defendant in the house. Irene was holding a power of attorney and Monique's personal effects were missing. PW1 reported the matter to the Police in June 2015. The Police went with her to the house and she took possession thereof.

17. PW1 told the Court that she had paid Kshs 5 Million to Monique in cash in three installments as consideration for the house.

18. During her cross-examination, PW1 told the Court that she first knew Irene and the 1st Defendant in 2013. Monique had bought the house for Kshs 5 Million on 27th February 2013 the same amount she bought it from her in 2014. PW1 told the Court she paid Monique in cash as Monique was evading payment of taxes in Italy and would not accept cheques. PW1 told the Court that she did not know what Monique did with the money. All she knew was that Monique was taking care of the 1st Defendant and his family.

19. PW1 further told the Court that at the time they signed the Agreement, Monique had been involved in some accident. While she could not move much, she remained mentally alert.

20. PW1 told the Court Monique did not give any receipts and denied that there was a balance of the purchase price owing from herself. She told the Court she was unaware Monique was receiving Euro 550/- as her pension from France. She denied making up the Power of Attorney and told the Court it was Monique's idea as she needed to get some money from Italy. In the end, PW1 never travelled as the Power of Attorney was revoked.

21. PW2-Lucy Wangari Mwangi is an Advocate of the High Court. She testified that she knew the Plaintiff in the year 2012 when they met and became friends. Later on, she was introduced to Monique at the Italian consulate where she used to work. PW2 visited Monique at her house where Monique told her she knew the Plaintiff. Monique told her at the time that she wanted to bequeath her property to the Plaintiff

and to donate a power of attorney to her.

22. PW2 told the Court that she recorded the instructions on video after which she proceeded to prepare and file the two documents on 22nd October 2014. However in December 2014, PW2 received a call from Monique in which Monique told her she could not transfer the property and that the Plaintiff would have to buy it.

23. PW2 further testified that on 27th December 2014, she went to Monique's house where she was welcomed by a househelp. PW2 found Monique, the Plaintiff and the 1st Defendant in the house. PW2 had gone to the house with already prepared transfer of lease documents. She spoke to the parties and recorded the proceedings again on video. PW2 told the Court that Monique was fine and that she executed the documents in triplicate.

24. PW2 told the parties they needed to get the consent of the Lessor prior to the transfer. She was then given the email for the Lessor and she emailed the transfer to them. The transfer was later signed by the Lessor in February 2015 after which PW2 proceeded to register the same. Thereafter the Plaintiff came into possession. PW2 denied that there was any fraud involved in the transaction and that Monique had confirmed to her that she had been paid in three installments before she executed the Lease.

25. PW2 told the Court that at the time, she never knew the 2nd Defendant and that she only got to see her in Court. She confirmed that she paid Stamp Duty for the transaction and that the Plaintiff is presently in possession of the property.

The Defence Case

26. The Defence called three witnesses in support of their case.

27. DW1-Peter Nyiro Mganga is the 1st Defendant. He told the Court he is a Jua Kali Artisan and that the late Monique was his client and a close friend. DW1 told the Court that he had known Monique for seven years by the time she passed away and that she was a proprietor of the suit property.

28. DW1 told the Court that the Plaintiff and Monique were friends. Monique bought the house in 2013. Sometimes in 2014, DW1 came to learn that the Plaintiff had a Power of Attorney from Monique. The Plaintiff also had a Will. Both were however revoked.

29. DW1 testified that the relationship between the Plaintiff and Monique ended when the Will in which she was to be a beneficiary was revoked on 20th February 2015. By a letter dated 2nd March 2015, the Plaintiff was asked to return all documents she had taken from Monique. Thereafter DW1 only saw the Plaintiff after Monique's death.

30. DW1 told the Court that during Monique's last days, Irene George was incharge of house-keeping duties while he was in-charge of her medication and well-being. DW1 told the Court he was not there when the house was allegedly sold. He therefore never saw any money exchange hands or the alleged transfer of title.

31. DW1 told the Court that Monique left for France when she became unwell and never told him she had sold the house. He further testified that he had since seen Monique's Last Will dated 25th February 2015 and that the suit property had been bequeathed to himself in the Will.

32. DW1 further testified that he would assist Monique with her accounts which were at DTB. DW1 had access to both accounts-one in Kenya Shillings and the other a Euro-Account. He however never saw any deposit of Kshs 5 Million reflected in any of the accounts. DW1 told the Court that at some point in time, they lost the Lease Agreement. He did not understand how the Plaintiff came to be the registered owner of the property. He told the Court the Plaintiff has since evicted him from the same.

33. On cross-examination, DW1 testified that he was first introduced to Monique by a friend at a hotel in 2014. Monique wanted to renovate her house and she took DW1 to the house to see it. DW1 told the Court they then became close and he moved in with Monique after she had an accident in which she broke her leg and arm. DW1 told the Court Monique got the accident while on Safari and that even though she had a househelp, she could not live alone.

34. DW1 told the Court the Plaintiff was just an ordinary friend of Monique's. Their friendship however ended when Monique realised that she had lost the Lease Agreement. On 27th December 2014, DW1 recalls that he saw PW2 come to their house. He however never saw PW2 record any video.

35. DW1 later learnt from a friend called Hellen that Monique had passed away in France.

36. DW1 insisted the transfer of the property was procured illegally. He told the Court Monique had told him the Lease Agreement was missing. He was however unaware if Monique ever did anything to recover the same or if a report was made with the Police. He told the Court Monique did not put a Caution on the title. He declined to state if in 2014 Monique was in a proper state of mind to transfer the property.

37. DW1 further told the Court he was able to access Monique's accounts since she had a power of attorney. When he filed **Succession Cause No. 92 of 2015**, the Plaintiff filed an objection which was upheld by the Court.

38. DW2-Irene George Kenga was Monique's housekeeper. She told the Court she started working for Monique in 2013. She would work

from 9 a.m. to 1 p.m. every day. DW2 told the Court there were some artisans who used to work on the house and that she first saw the Plaintiff at one time possibly in 2014 when Monique had come from Italy and the Plaintiff came for a visit.

39. DW2 told the Court that before Monique got an accident, the Plaintiff used to go to the house and would do a few things in the house. At some point after the accident, they started quarrelling. That was after Monique asked for her spectacles and started reading some documents. DW2 told the Court that Monique told her the documents she was reading had been done by the Plaintiff as her Last Will and that the Plaintiff was trying to force her to sign. She had declined to sign.

40. DW2 further told the Court she had seen Lucy Wangari Advocate (PW2) at the house with the Plaintiff. She told the Court Monique was not happy to see them. DW2 told the Court she continued staying in the house even after Monique's death.

41. During cross-examination, DW2 told the Court she came to hear that the Plaintiff had conspired with others to prepare false documents to transfer the house. She testified that before Monique travelled to Italy in January 2015, she had given her a Power of Attorney. She told the Court she never saw any money exchange hands between the Plaintiff and Monique.

42. DW3-Suzanne Chartier is the 2nd Defendant herein and a lawyer by profession. She told the Court that she met Monique in 2012 while on a visit to Kenya.

43. DW3 testified that Monique told her she had bought the suit property for Euros 100,000/- in February 2013. DW3 bought a house next to the suit property on 5th December 2013 and then rented it out. She would next see Monique in December 2014 when she next visited the Country. DW3 told the Court that by then Monique was very sick.

44. DW3 testified that during this visit, she took up residence in the house she had bought next to the suit property. She recalled in the process seeing the Plaintiff twice in Monique's house but Monique was not very happy with the Plaintiff in one of those two occasions. DW3 told the Court the Plaintiff had been asked by Monique to travel to Italy to deal with some of Monique's financial transactions but the Plaintiff decided to take her time.

45. DW3 told the Court that Monique then revoked the Power of Attorney and the Will she had prepared in favour of the Plaintiff. At some point Monique had told DW3 that she had foolishly signed some documents. DW3 did not however know whether what Monique was referring to was the Will.

46. On cross-examination DW3 testified that she is the Executor of Monique's Will. She told the Court that when they prepared the Will, she had got the properties from a document that Monique had given to her earlier. She further told the Court there was no deposit of Kshs 5,000,000/- at any time reflected in Monique's Bank Statements.

47. DW3 testified that the 1st Defendant had become Monique's lover in 2013 and that in her Will, she had left the house for him having revoked the previous one in favour of the Plaintiff. DW3 told the Court that Monique only realised she had signed documents transferring the house to the Plaintiff in February 2014. DW3 told the Court Monique did not think she sold the house.

48. DW3 on being shown the transfer documents conceded that based on the same, Monique was shown to have transferred the house to the Plaintiff upon receipt of Kshs 5,000,000/- and that upon receipt of the Lessor's consent, the transfer was registered in February 2015. DW3 told the Court Monique talked about signing some documents "stupidly" but she never reported any fraud to the Police.

49. DW3 told the Court she prepared Monique's Will on 25th February 2015 and that she understood by then the transfer had been done. Monique had asked her to write the Will to correct the mistakes that had been done.

Analysis and Determination

50. I have perused and considered the pleadings filed herein by the parties, the oral testimonies of the witnesses who testified before me and the evidence adduced at the trial. I have also perused the written submissions and authorities placed before me by the Learned Advocates for the parties and have considered the facts and the law.

51. The dispute herein relates to the ownership of an Apartment known as House No. Q7 erected within the commercial and residential premises situated at Land Portion No. 587 and more commonly known as AG Complex, Malindi. By a Sub-Lease Agreement dated 27th February 2013, the said premises were leased to one Monique Angeline Augustine Grignon (Monique) to hold for the remainder of the 99 years term running from 1st January 2008 by Messrs Vibieffe Ltd, the registered Lessor thereof.

52. From the material placed before me, Monique was a French national with some interests in France, Switzerland, Italy and Kenya. All the parties in this dispute met and interacted with Monique between the short stint of time she purchased the suit property on 27th February 2013 and the 20th day of March 2015 when she is said to have passed away in Toulon, France.

53. The Plaintiff-Francesca Regaiolli is an Italian tourist and a resident of Malindi. She told the Court that she first met Monique in the year 2013 on a flight from Italy upon which they became good friends. It was her case that Monique sold and transferred to her the suit property on 27th December 2014. It was further her case that although Monique executed all the documents the same day, they had to email the documents to the Lessor of the suit property for their consent to transfer and that the same was not received until 9th February 2015 when the transfer was registered.

54. According to the Plaintiff, the sale and transfer was done in the presence of her Advocate Lucy Wangari Mwangi (PW2) and the 1st Defendant herein at Monique's house. Apparently, despite the sale and transfer, Monique continued occupying the house. A couple of months later, the Plaintiff heard of Monique's death and when she went to the suit property, she found Monique's househelp Irene George (DW2) and the 1st Defendant therein.
55. According to the Plaintiff, the househelp was holding what she said was a power of attorney and the Plaintiff noticed that Monique's personal effects were missing from the house. That was in June 2015 and the Plaintiff reported the matter to the Police who accompanied her back to the house and put her in possession thereof.
56. The Plaintiff's account was however disputed by the Defendants. Peter Nyiro Mganga (the 1st Defendant) told the Court that he was a Jua Kali artisan and that he was introduced to Monique by a friend at a hotel in Malindi in 2014. According to the 1st Defendant, Monique required to renovate her house (the suit property) and they proceeded to the suit property shortly after the introduction at the hotel.
57. As it turned out, that was the first of the many encounters the 1st Defendant would have with Monique and the two eventually fell in love. Following an accident in which Monique broke both her leg and arm while on safari, the 1st Defendant moved in with Monique at the suit property. In the process, the 1st Defendant told the Court that while Monique's househelp (DW2) was in charge of house-keeping duties, he was the one in charge of Monique's medication and well-being.
58. During that period, the 1st Defendant came to learn that the Plaintiff who was Monique's friend had tried to cause Monique to execute some documents. The 1st Defendant told the Court that when Monique realised what was happening, he was very unhappy with the Plaintiff and their friendship ceased as he never saw the Plaintiff until some four (4) months after Monique's death.
59. The 1st Defendant told the Court that Monique thereafter left for France where she died shortly thereafter. The 1st Defendant told the Court Monique never told him she had sold the house. He had since come across Monique's last Will and testament dated 25th February 2015 wherein he came to learn the suit property had been bequeathed to himself by Monique.
60. That account was supported by that of Ms Suzanne Chartier another traveller from Spain and a Lawyer by profession who was enjoined herein as the 2nd Defendant. Testifying before this Court, the 2nd Defendant told the Court that she had met Monique at a hotel in Malindi in the year 2012. At that time, Monique who had just arrived from Italy was looking forward to buying a house in Malindi.
61. The 2nd Defendant told the Court that Monique was successful in her venture as she did purchase the suit property in February 2013. She told the Court that Monique informed her she had bought the suit property at Euro 100,000/- after which Monique went back to Italy and brought in her furniture. The 2nd Defendant later became Monique's neighbour after she also bought an apartment within the AG Complex, Malindi on 5th December 2013. She rented out the house for the first year.
62. According to the 2nd Defendant, she thereafter travelled back to Spain and was away until December 2014 when she moved into her house. When she next saw Monique, she was very sick. The 2nd Defendant told the Court that during this period, she saw the Plaintiff twice in Monique's house. On one of those occasions however, Monique was not happy as she had detailed the Plaintiff to go to Italy to deal with some of her financial transactions but the Plaintiff was taking her sweet time and had post-poned the travel.
63. The 2nd Defendant testified that Monique then went on to revoke a power of attorney together with a Will she had made in favour of the Plaintiff. The 2nd Defendant further told the Court that it was at that time that Monique confided in her that she had at one point "stupidly" signed some documents in favour of the Plaintiff. It was the 2nd Defendant's testimony that Monique thereafter appointed her the Executor of her Will in which she bequeathed the suit property to the 1st Defendant as her friend and partner.
64. From the evidence of Lucy Wangari Advocate (PW2), it would appear that Monique initially prepared a power of attorney and a will bequeathing the suit property to the Plaintiff on 22nd October 2014. According to the Advocate who was introduced to Monique by the Plaintiff, she prepared and lodged those documents at the Registry of Documents Mombasa on 28th October 2014. There was apparent general consensus by the parties herein that those documents were indeed prepared before being revoked on Monique's instructions on 24th February 2015.
65. According to PW2 however, before the revocation, Monique summoned her to her house again on 27th December 2014 after she told PW2 that she was unwilling to bequeath the suit property and that the Plaintiff would have to buy the same. Following these new instructions, PW2 went to Monique's house with already prepared transfer of lease documents.
66. It was PW2's testimony that she arrived at the house and was welcomed by Monique's househelp (DW2). At the house, PW2 found the Plaintiff, Monique and her 1st Defendant partner. She told the Court that she spoke to the parties and like she had done before, recorded those proceedings on video. According to the Learned Advocate, Monique was fine and she went ahead to sign the documents in triplicate having known what they were about.
67. I have agonized about the evidence of PW2 in these proceedings. While the video recording said to have been made by herself when she is said to have received instructions was not produced herein, I had no reason to doubt that Counsel appeared in the suit premises on the said date.
68. I say so because while the 1st Defendant and the househelp (DW2) denied seeing the video recording, none of the witnesses herein denied her presence in the house. According to DW2, she could remember seeing the Advocate and the Plaintiff in the house although

Monique was not happy to see them. On his part, the 1st Defendant admitted that PW2 was in the suit property on 27th December 2014. He did not however see her record any video or Monique signing documents or receiving money. On her part, the 2nd Defendant recalled that Monique told her she had, in her words, “stupidly” signed some documents. It was thus the 2nd Defendant’s case that the Plaintiff and her Advocate had coerced Monique who was unwell and unstable to execute the transfer of the Lease.

69. Quite evidently and whatever the prevailing situation, it was apparent to me that PW2 indeed appeared at Monique’s house with the duly prepared transfer documents and that Monique executed the same. On the Lawyer’s advise that they needed the Lessor’s consent to the transfer, she was given the email of Vibieffe Ltd (the Lessor) to whom she emailed the instructions. PW2 told the Court that it was not until the 9th February 2015 that she was able to register the transfer.

70. The said Transfer of Lease produced herein reads as follows in the relevant part:-

“WHEREAS:-

C. The Vendor by virtue of a Lease dated 27th February 2013 registered at the Land Titles Registry at Mombasa in Volume LT. 40 Folio 347/1 File 11133(the ‘Lease’) is registered as Proprietor as Lessee of the residue of the term of Nine Hundred and Ninety Nine(999) years from the Fifth day of August Nine Hundred and Thirty subject to the burden of any covenants entered into by the Vendor with the Lessees of other apartments in the AG Complex so far as such covenants are intended to bind the premises or the Vendor of ALL THAT premises known as House No. Q7 and more particularly described in the Schedule hereto (hereinafter referred to as the “Premises”).

D. The Vendor has agreed to sell and the Purchaser has agreed to purchase the Vendor’s leasehold interest in the premises for the price of Kshs 5,000,000/- and on other terms appearing.

E. The Lessor has agreed to join in these presents for the purpose of giving its consent thereto in the manner hereinafter appearing.

NOW THIS TRANSFER OF LEASE WITNESSETH as follows:-

1. In pursuance of the said agreement and CONSIDERATION of the sum of Kshs 5,000,000/- paid to the Vendor by the Purchaser on or before the execution of these presents (receipt of which the Vendor hereby acknowledges) the Vendor as registered proprietor as aforesaid and with the consent of the Lessor HEREBY TRANSFERS unto the Purchaser ALL her rights to Title and interest in and to the Premises comprised in the Lease.

....”

71. On the basis of that conveyance the Plaintiff submitted that the late Monique Grignon had freely and voluntarily conveyed her interest to transfer the suit property to the Plaintiff at a valuable consideration. It was however the Defendants’ contention that the Plaintiff took advantage of Monique’s ill-health and that they had obtained the said transfer by way of misrepresentation, fraud and coercion.

72. From the oral testimony of all the witnesses who testified before me, it was apparent that sometime between 2013 when she bought the suit property and December 2014, the late Monique had suffered an accident while on Safari. From the testimony of the Defendants and Monique’s househelp (DW2) it was clear to me that Monique had broken her leg and arm during the accident and that she was unable thereafter to do much on her own.

73. As it were, there was however no evidence placed before this Court to suggest even remotely that as at the time she is said to have executed the aforesaid transfer, the late Monique was not mentally stable as to be capable of entering into the contract. As the Learned Judges of the Court of Appeal observed in *Grace Wanjiru Munyinyi & Another –vs- Gedion Waweru Githunguri & 5 Others (2011) eKLR:-*

“The starting point is the presumption that must always exist, until it is proved otherwise, that every person is of sound mind. It is a logical presumption otherwise no one would be held responsible for their actions. It is also the position in law, and we find persuasive authority for it in the Wiltshire Case (Supra) that the burden of proof lies on the person who asserts the incapacity. In the Wiltshire Case, those who were asserting mental incapacity as cited in paragraph (6) above, called a medical practitioner who had been attending to the defendant for forty years, and testified that he examined the Defendant three months after the sale agreement and “found symptoms of senile degeneration in that he was delusional, confused and incoherent” incapable of managing his own affairs by reason of mental infirmity.” A neighbour of the Defendant was also called to testify that she saw him “doing stupid things” while the defendant’s married daughter also testified that “he stayed away from home one full day,” talked and walked about and loosed other people’s animals”, and “tore up dollar bills.” All that evidence was rejected by the Court as insufficient to avoid the transaction. The Supreme Court stated:-

“A person may be or become of unsound mind because he has lost the ability to reason by disease, grief or other accident. Where a person in such condition can be shown not to have understood because of his mental condition what he was doing and further that the other party was aware of this incapacity, then any contract, other than a contract for necessities, made by such a person is not binding on him.”

74. Indeed as *Kuloba J observed in John Patrick Machira –vs- Patrick Kahiaru Muturi (2002) eKLR:-*

“It is a very serious thing to say of, and concerning a person, that such person is a person of unsound mind or suffers mental disorder. The law presumes that every person is mentally sound, unless and until he is proved mentally disordered. And, even where one person is shown to be of unsound mind one must always bear in mind that the degrees of mental disorder are widely variable, and incompetence to do any legal act or inability to protect one’s own interests, must not be inferred from a mere name assigned to the malady from which a person may be suffering. The validity of ordinary contracts entered into by persons of unsound mind depends mainly on the circumstances which accompany the act. If there is anything unreasonable in the conduct of the person of unsound mind and the party with whom he contracts has no knowledge or suspicion of his mental disorder, the contract will be binding on the person of unsound mind and his representatives.”

75. In the matter before me, it was not lost on this Court that while the Defendants urged this Court to make an inference that Monique was not in a mental state that could allow her to execute a transfer of the lease on 27th December 2014, she was able to revoke a power of attorney and her will previously made in favour of the Plaintiff barely some sixty days later and as she prepared to leave the country for France on 25th February 2015. If Monique was able to make a binding will a month before her death, I did not see why she would not have been in a position to execute the transfer as aforesaid.

76. At any rate, it was clear to me from the evidence presented by the Defendants that Monique was conscious of her actions. That can be the only reason that the Defendants would have noticed that she was unhappy with the Plaintiff as they alleged. According to the 1st Defendant Monique was unhappy because she could not find the Lease Agreement she had executed while according to the 2nd Defendant, Monique was unhappy because the Plaintiff had made her to, in her words, “stupidly” sign some documents.

77. Thus, if the Defendants were to be believed, Monique was fully in charge of her faculties. That is the reason given why she revoked the initial power of attorney and changed her will and last testament. There was however no evidence that Monique ever made a complaint to the Police in regard to the transfer, tried to reverse it and or that she placed any Caveat or restriction on the suit property before she left the Country in late February 2015. I was therefore not persuaded by the argument that she had no mental capacity or that she was coerced into executing the transfer.

78. In regard to the allegation that the transfer was tainted by fraud, this Court could not fail to note that there was neither any such claim in the Defendants’ pleadings nor any attempt to prove the same. Dealing with a similar situation in **Bruce Joseph –vs- Coquero Ltd (2014) eKLR**, the Learned Judges of Appeal (Okwengu, Makhandia & Sichale JJA) held as follows:-

“In our view the appellant’s assertion that the respondents’ acquisition of the suit premises smacked of fraud and illegalities cannot stand scrutiny. In the case of Koinange & 13 Others –vs- Koinange (1968) KLR 23 it was held that allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the balance of probabilities. Counsel for the appellant seems to be laying their obligation to strictly prove the fraud allegedly committed by the respondent on the Court by calling upon it to investigate the issue whether pleaded or not. Parties ought to know that they have an obligation to present a prima facie case of fraud or illegality before the Court can investigate the issue. Mere mention of fraud or illegality in passing will not do. In the case of Westmont Power (Kenya) Ltd –vs- Westmont Power (Kenya) Ltd (2003) eKLR the Court in addressing the issue of pleading fraud as a defence stated that:-

“Setting up one’s case or defence is to compose, propound, posit, or begin to develop and show the structure of the case of defence. One is required to place in view the line of case or defence and show the structure of the case or defence intended to be pursued.....”

.....

Experience in our Courts has shown that many a defendant hope to get away with it by merely pleading fraud or illegality or a bare denial. It has however to be understood clearly, that a general or bare denial is not sufficient. The mere assertion of fraud or illegality can no more entitle a defendant to have leave to defend than can a mere assertion that he gave value entitle a Plaintiff to Judgment. There must be particularity in the defendant’s allegations. A general allegation of fraud or illegality and misrepresentation as was the case here was not sufficient to infer liability on the part of those who are said to have committed it.”

79. The Defendant’s joint and several contention was that the 1st Defendant is entitled to the suit property the same having been bequeathed to him as a gift by Monique vide the will and testament dated 25th February 2015. Testifying before this Court, the 2nd Defendant as the Executor of the said will told this Court that she got the properties listed under the will from a list that Monique had given her earlier. It was therefore not entirely clear to me if indeed that will was indeed attested by Monique. That however is not a matter for this Court.

80. What was of concern to this Court was the fact that the will is dated 25th February 2015. Having found that Monique had transferred the suit property on 27th December 2014 (or even on the date the Transfer was registered on 9th February 2015); it was clear to me that the suit property was not available or capable of such bequest under the doctrine of ademption as provided under Section 23 of the Law of Succession Act.

81. Explaining that doctrine in **Ellen Nyatetu & Another –vs- Danson Weru & 7 Others (2017) eKLR**, Ngaah J delivered himself succinctly as follows:-

“The whole idea is that a testator cannot bequeath what he does not own. It follows that while a will may appear valid in every respect merely because it conforms to all the formalities of a valid will as by the law prescribed, the bequest may end up being an ineffectual gift if it turns out that a testator purported to give out what in fact does not belong to him. It may not be appropriate,

as Githinji, J.A., held, to invalidate such a will on the ground that the testator does not own the property he purports to bequeath but in my very humble and respectable view, such a will serves no other useful purpose once it is established that the very substratum on which it ought to be founded is lacking; if, for this reason it cannot confer what a will, properly so called, is intended to confer then the fate of such a will is as good as void. I reckon that grant of probate to such a will would be an exercise of futility.”

82. Arising from the foregoing, it was clear to me that the suit property having been sold and transferred to the Plaintiff was no longer capable of being passed to the 1st Defendant by way of a bequest as was purported herein.

83. In the premises, I am satisfied that the Plaintiff has proved her case on a balance of probabilities and that she is entitled to the Orders sought. I was on the other hand not persuaded that there was any merit in the 1st Defendant's Counterclaim.

84. Judgment is accordingly hereby entered for the Plaintiff as prayed in the Plaint. The 1st Defendant's Counterclaim is hereby dismissed.

85. The Plaintiff shall have the costs of both her suit and the 1st Defendant's Counterclaim.

86. Orders accordingly.

Dated, signed and delivered at Malindi this 17th day of June, 2020.

J.O. OLOLA

JUDGE