



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO 175 OF 2010**

**ELIZABETH KEMUNTO ANGWENYI.....PLAINTIFF**

**VERSUS**

**1. RODAH NYAKERARIO ONGONDI**

**2. JARED MONARI**

**3. WILLIAM ONCHONGA.....DEFENDANTS**

**JUDGMENT**

1. The plaintiff brought this suit against the defendants on 21<sup>st</sup> June, 2010 seeking the following reliefs:-
  - i. **A declaration that the plaintiff is the registered and/or lawful owner of LR No. Nyaribari Chache/B/B/Boburia/3520 (hereinafter referred to as “the suit property”).**
  - ii. **An order for the eviction of the defendants their agents and/or servants from the suit property.**
  - iii. **A permanent injunction to restrain the defendants by themselves and/ or through their agents from interfering with, cultivating, or wasting the suit property.**
  - iv. **Costs of the suit.**
  - v. **Such further and other relief as the court may deem fit and just to grant.**

In her plaint dated 21<sup>st</sup> June, 2010, the plaintiff averred that at all material times, she was and still is the registered proprietor of the suit property. The plaintiff averred that sometimes in the year 2010, the defendants without the plaintiff’s authority or any justifiable cause entered the suit property and started using the same. The plaintiff contended that as a result of the defendants’ acts aforesaid, the plaintiff has been deprived of possession, use and enjoyment of the suit property thereby exposing her to loss and suffering.

2. The defendants entered appearance on 26<sup>th</sup> March 2012 and filed a joint statement of defence and counterclaim on 23<sup>rd</sup> April 2012. In their defence, the defendants contended that if at all the plaintiff is registered as the proprietor of the suit property, such registration was obtained fraudulently. The defendant’s contended that the 1<sup>st</sup> defendant is the wife of John Ongondi Nyakundi, deceased (hereinafter referred to as “**the deceased**”) while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the sons of the 1<sup>st</sup> defendant with the deceased. The defendants contended that the suit property was at all material times owned by the deceased who settled them thereon in the year

1994. The defendants have denied the plaintiff's claim that they trespassed on the suit property in the year 2010. The defendants contended that the plaintiff caused the suit property to be transferred and registered in her name fraudulently so as to defeat the defendants' beneficial interest in the same. In their counterclaim against the plaintiff, the defendants averred that the plaintiff was a sister to the deceased who died on the 1<sup>st</sup> January 2012. The defendants contended that the deceased was at all material times the registered owner of the suit property and that the defendants were not aware and had not been informed that the deceased had transferred the suit property which was the deceased and the 1<sup>st</sup> defendant's matrimonial home to the plaintiff.

3. The defendants contended that the dispute over the ownership of the suit property started when the deceased died. The defendants claimed that the plaintiff and the 1<sup>st</sup> defendant's co-wife threatened the 1<sup>st</sup> defendant that she would be evicted from the suit property. The defendants wondered how the deceased could have transferred his matrimonial home with the 1<sup>st</sup> defendant to her sister without involving the 1<sup>st</sup> defendant and other family members in the transaction. The defendants contended that the alleged transfer of the suit property by the deceased to the plaintiff was a fraudulent scheme by the plaintiff and the 1<sup>st</sup> defendant's co-wife one, Beatrice Kwamboka Matundura to deny the defendants their lawful beneficial interest in the suit property. In their counter-claim, the defendants sought the following reliefs against the plaintiff:-

- a. **A declaration that the transfer of land parcel known as Nyaribari Chache/B/B/Boburia/3520 to the plaintiff was fraudulent.**
- b. **An order for the rectification of the register of land parcel known as Nyaribari Chache/B/B/Boburia/3520 to read John Ongondi or Rodah Nyakerario Ongondi.**
- c. **A permanent injunction to restrain the plaintiff whether by herself or her agents from interfering with the peaceful occupation of the suit property by the defendants and/ or alienating or transferring the said piece of land known as Nyaribari Chache/B/B/Boburia/3520.**
- d. **Costs of the counter claim and interest at court rate.**
- e. **Such other relief as the court may deem fit to grant.**

4. In her reply to the defendant's statement of defence and counter-claim, the plaintiff admitted that the deceased was her brother and that the 1<sup>st</sup> defendant was the deceased's 1<sup>st</sup> wife. The plaintiff denied however that the suit property was ever registered in the name of the deceased or that the deceased settled the 1<sup>st</sup> defendant on the suit property as her matrimonial home in the year 1994. The plaintiff denied further that she:-

- a. **Connived with the 1<sup>st</sup> defendant's co-wife Beatrice Kwamboka Matundura or any other person to deprive the 1<sup>st</sup> defendant of her matrimonial property.**
- b. **Caused the suit property to be transferred to her for a sum of kshs 3000/=.**
- c. **Involved herself in any suspect deal over the suit property.**
- d. **Failed to inquire about the rights that the defendants have over the suit property.**

5. When the suit came up for hearing, the plaintiff gave evidence and called no witness. The plaintiff testified that she is a retired nurse and midwife. She produced copies of certificates of her enrolment to the roll nurses and midwives which were marked as P. exhibit 1 and P. exhibit 2 respectively. She stated that the 1<sup>st</sup> defendant was her sister in law while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the sons of the 1<sup>st</sup> defendant and that the defendants have trespassed on the suit property. She produced in evidence, a copy of the title deed for the suit property dated 15<sup>th</sup> July 2007 which was marked as P. exhibit 3. She told the court that she purchased the suit property in the year 1974 from Marani Bananas Group in which her father one, Nyakundi Nyantika was a member. She told the court further that, when she bought the suit property, she had the same registered in the name of her deceased brother, John Matundura ("the deceased"). The decision to have the suit property registered in the name of the deceased was informed by the fact that at the time, she was working in Embu and as such she did not have the time to attend to the transaction

to successful completion. She stated that it was agreed between her and the deceased that the deceased would have the suit property registered in his name and would transfer the same to her later.

6. She told the court that at no time did the deceased dispute her ownership of the suit property during his lifetime. She developed the suit property by putting up some permanent structures thereon between 1979 and 1982. The deceased eventually transferred the suit property to her in the year 2007. She told the court that the 1<sup>st</sup> defendant is occupying one of the houses on the suit property while the rest are rented out to tenants. Before his death, the deceased, used to collect rent and to remit the same to her. After the demise of the deceased, she was denied access to the suit property by the defendants. She told the court that the 1<sup>st</sup> defendant is now keeping all the rents from the suit property which she has been collecting since the month of January, 2012. The plaintiff told the court that before the filing of this suit, she caused a demand letter to be sent to the defendants to vacate and hand over the suit property to her. The said demand letter that was dated 11<sup>th</sup> August 2009 was produced in evidence as P. exhibit 4. When the defendants failed to comply with the terms of the said demand letter, she caused a second letter of demand to be sent to them on 2<sup>nd</sup> December, 2009 to vacate the suit property. This letter was produced in evidence as P.Exhibit 5. In conclusion, the plaintiff urged the court grant her prayers in the plaint.
7. On cross-examination by the defendants' advocate, the plaintiff stated that the defendants entered the suit property in the year 2005. The defendant admitted that as at 16<sup>th</sup> March, 1981, the suit property was registered in the name of Mose Getanda and that on the same date the said property was transferred and registered in the names of the deceased and her father, Nyakundi Nyantika. She told the court that the suit property was transferred to the name of her deceased brother on 26<sup>th</sup> June, 1981 before the deceased transferred the same to her on 15<sup>th</sup> May, 2007. She stated that the suit property was neither sold to her nor given to her as a gift by the deceased. The plaintiff stated further that they simply proceeded to the Lands Office with the deceased where the deceased caused the suit property to be transferred to her. She stated that the deceased obtained the consent to transfer the suit property to her at Marani Land Control Board.
8. The plaintiff admitted that the defendants were in possession of the suit property when then same was transferred to her by the deceased. On re-examination, the plaintiff told the court that she did not know how her father came to be registered as co-proprietor of the suit property. She stated further that Kisii culture did not allow women to own land and this explains her arrangement with the deceased with regard to the suit property. On being examined by the court, the plaintiff stated that the deceased had a parcel of land registered in his name on which he wanted to settle the 1<sup>st</sup> defendant but this did not happen because the defendant declined to move to the said parcel of land on the ground that she would be bewitched. She told the court that the said parcel of land is still available although she did not know its reference number.
9. After the close of the plaintiff's case, the defendants called a witness to give evidence on their behalf before them. The witness was Benedicto Nyakundi Nyantika (DW1). DW1 is the father of the plaintiff and the deceased. DW1 told the court that, the 1<sup>st</sup> defendant was the 1<sup>st</sup> wife of the deceased while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were children of the deceased with the 1<sup>st</sup> defendant. He told the court that he was a member of Banana Group and that with the other members they purchased a parcel of land from one, Mose Getanda for the purpose of development. He is the one who purchased the said parcel of land on behalf of Banana Group of which he was the chairman. After purchasing the said parcel of land, the group lacked funds to develop the same and this caused the members to demand a refund of the contributions that they had made towards the purchase of the property. All the members of the group were refunded their contributions except him (DW1).
10. After paying off the other members of the Banana Group as aforesaid, he put up a permanent house on the said parcel of land. Thereafter, the house that was occupied by the 1<sup>st</sup> defendant

collapsed and he moved the 1<sup>st</sup> defendant to the said house that he had put up on the said parcel of land. Later, he asked Ariri Asango from whom they had purchased the said parcel of land to issue him with a title for the property. Ariri had by this time re-sold the property to a third party one, Mose Getanda. He managed to locate the said Mose Getanda who agreed to transfer the property to him as he was the first purchaser thereof. The property was then registered in his name. He told the court that the property was not registered in his name and the name of the deceased jointly. He stated that whereas the land that was registered in his name was Plot No 3546, the deceased owned Plot No 3545. He told the court that the land on which he settled the 1<sup>st</sup> defendant was Plot No. 3545. He denied any knowledge of Plot No. 2575 or the suit property. He told the court that the 1<sup>st</sup> defendant has been occupying Plot No. 3545 from 1968 to date.

11. DW1 told the court that he did not know how the plaintiff came to be registered as the owner of the suit property that was owned by him. He told the court that the plaintiff did not buy any land from Banana Group. He denied further that the plaintiff is the one who put up the house which is occupied by the 1<sup>st</sup> defendant. He stated that the only houses that the plaintiff put up were put up on the plaintiff's mother's parcel of land at a place called Mwembe. DW1 told the court that the 1<sup>st</sup> defendant is occupying a house that was put up by him (DW1). On being cross-examined by the plaintiff's advocate, DW1 stated that the 1<sup>st</sup> defendant was married in 1968 and that the parcel of land that he purchased from Banana Group was not subject to sub-division. On examination by the court, DW1 stated that a part from the parcel of land that he purchased from Banana Group, he also had other parcels of land at Mwembe and Marani. He reiterated that the plaintiff did not purchase any land from Banana Group. DW1 stated that Banana Group purchased only one parcel of land from Ariri Asango and that he had wanted to sub-divide the land but he fell ill and the proposed sub-division stalled.

12. The 1<sup>st</sup> defendant, Rhoda Nyakerario Ongondi (DW2) was the first to testify after DW1. In her evidence, she corroborated the evidence of DW1 that she is the widow of John Ongondi Nyakundi a.k.a Matundura, deceased ("deceased") and that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are her sons. She stated that she was settled on the suit property in the year 1994 by the deceased. She is staying on the suit property with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who have families. There are also tenants on the property. DW2 testified that the house that she is occupying on the suit property was put up by the deceased and herself with assistance from her father-in-law (DW1). She stated that she is occupying a self-contained house. There are also rooms that are occupied by tenants. She stated that 2<sup>nd</sup> and 3<sup>rd</sup> defendants have put up houses on the suit property which they are occupying.

13. DW2 denied that the plaintiff purchased the suit property. She stated that the suit property belonged to the deceased and DW1. She corroborated DW1's testimony on how DW1 acquired the suit property. She stated that DW1 had two wives and that the property that DW1 acquired from Ariri Asango and which, was transferred to him by Mose Getanda was sub-divided into two portions. One portion was transferred by DW1 to his son from his first wife while the other portion was transferred to the deceased who was a son of the second wife. She stated that DW1 transferred the suit property to the deceased on 26<sup>th</sup> June, 1981 and that she did not know how the plaintiff got the title to the suit property. DW2 told the court that she is not in good terms with her co-wife because when the deceased died, she attempted with the assistance of the plaintiff to exclude her from his funeral arrangements. She was forced to file a suit namely, Kisii Chief Magistrate's Court Civil Case No. 250 of 2012 against the said co-wife before she was allowed to participate in the deceased's burial preparations and ceremony. She produced in evidence, copies of the pleadings that she filed in the said civil case. The same were marked as D. exhibit 1 and D. exhibit 2. DW2 also produced in evidence a copy of the register for the suit property that was marked as D. exhibit 3.

14. DW2 told the court that this suit is an attempt by the plaintiff and her co-wife to frustrate her. She testified that the plaintiff has never occupied the suit property. DW2 denied the plaintiff's claim that she (the plaintiff) is the one who put up the houses on the suit property. She stated that the

deceased did not inform her of the alleged transfer of the suit property to the plaintiff. DW2 admitted that she has another home at Marani. She stated however that the Marani land is a portion of what was hitherto a larger parcel of land that was divided between her and her co-wife. She stated that the deceased did not give her the title deed for her portion of the said large parcel of land. DW2 urged the court to grant the reliefs set out in the defendants' counter-claim.

15. On cross-examination, DW2 stated that the plaintiff had sent them a letter dated 11<sup>th</sup> August, 2009 demanding that her deceased husband vacates the suit property. DW2 told the court that upon receipt of the said demand letter; the deceased informed her that the suit property belonged to the plaintiff. DW2 admitted that the suit property was transferred to the plaintiff when the deceased was alive and that she did not know what transpired between the plaintiff and the deceased. DW2 also admitted that she was not privy to the purchase of the suit property as she had not been married to the deceased as she was married in 1971. She stated however that she had been married when the suit property was transferred to the deceased and DW1 by Mose Getanda although she was not involved in the transaction.
16. DW2 told the court that she did not know the land reference for the original parcel of land that DW1 had purchased from Ariri Asango and Mose Gitanda. She stated further that she did not know the source of the funds that DW1 used to purchase the said parcel of land. DW2 stated further that she had no document to show that DW1 had divided the land that he purchased between the deceased and his step brother. DW2 stated that the deceased had abandoned her after marrying the second wife in 1990 and that she left her matrimonial home and stayed at her parent's home for 4 years. It is after she came back from her sojourn at her parent's home that she occupied the suit property. DW2 admitted that she has a home at Marani and that she visits her Marani home from time to time from the suit property. She stated that she came to know that the suit property had been transferred to the plaintiff when the plaintiff sent to them a letter to vacate the property.
17. Next to testify was the 3<sup>rd</sup> defendant, Jared Monari Matundura (DW3) who is a son to the deceased. He told the court that he has lived on the suit property for over 20 years. He has a house on the suit property that he put up in the year 2004 with the permission and direction of the deceased. He denied that he entered the suit property in the year 2010 as claimed by the plaintiff. DW3 corroborated the evidence of DW1 and DW2 that the plaintiff never bought the suit property and had it registered in the name of the deceased as she has claimed. He stated that he only came to know that the suit property is registered in the name of the plaintiff when plaintiff filed the present suit. DW3 stated that when the deceased married a second wife, he moved them from where they used to live and brought them to the suit property. They left their previous home to the deceased's second wife. On cross examination, he stated that he was born in 1977 and that as at that time the suit property was already developed. He stated further that he was not privy to the purchase of the suit property. He however maintained that the suit property belonged to the deceased. DW3 admitted that they have ancestral land at Marani which is registered in the name of the deceased.
18. The last to testify was the 3<sup>rd</sup> defendant, William Matundura Onchonga (DW4). DW4 is also a son to the deceased with DW2. In his testimony, he corroborated the evidence of DW2 and DW3 concerning the ownership of the suit property. DW4 told the court that he is unable to move out of the suit property because of his meagre income. On cross-examination, he told the court that he was born in 1975 and that he is the third born. He told the court that DW3 is his follower. He told the court that although two of his brothers have put up homes at Marani, he has not done so. He admitted that the 1<sup>st</sup> defendant was given land at Marani and that the 1<sup>st</sup> defendant and his two brothers have houses at Marani. On examination by the court, DW4 stated that they are 3 brothers who have put up houses on the suit property and that their houses are built with iron sheets on the wall and the roof. He stated further that there is land at Marani on which he can put up a house but he has no means to do so.
19. After the close of the defendant's case, the advocates for the parties agreed to make closing

submissions in writing. The plaintiff's advocates and the defendants' advocates filed their written submissions on 8<sup>th</sup> May, 2014 and 21<sup>st</sup> October, 2014 respectively. I have considered the pleadings filed herein and the evidence tendered by the parties and their witnesses. I have also considered the parties respective closing submissions and the authorities cited in support thereof. The parties did not agree on the issues for determination by the court. The plaintiff framed six issues while the defendants' advocates came up with a total of eight issues for determination. From the parties pleadings and the evidence tendered at the trial the following in my view are the issues that have arisen for determination in this suit;

- i. **Whether the plaintiff is lawfully registered as the proprietor of the suit property?**
- ii. **Whether the defendants are trespassers on the suit property?**
- iii. **Whether the plaintiff is entitled to the reliefs sought in the plaint?**
- iv. **Whether the defendants are entitled to the reliefs sought in the counter-claim?**
- v. **Which party should bear the costs of the suit?**

#### **20. Issue number I;**

There is no dispute that the plaintiff is registered as the proprietor of the suit property. She was registered as such on 15<sup>th</sup> May, 2007. What are disputed are the circumstances under which the plaintiff became registered as the proprietor of the suit property and the legality of her registration. The plaintiff has contended that she purchased the suit property in the year 1974 and had the same registered in the name of her deceased brother, John Ongondi Nyakundi ("deceased") on the understanding that the deceased would transfer the suit property to her at a later date. The defendants on the other hand have contended that the suit property was at all material times owned by the deceased and was and is still occupied by the 1<sup>st</sup> defendant and her children including the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as her matrimonial home. The defendants have contended that the suit property was transferred to the plaintiff in circumstances that reeks of fraud. The defendants have denied that the plaintiff was the owner of the suit property and that the deceased was holding the same in trust for her pending transfer. The defendants have contended that the suit property belonged to DW1 who caused the same to be transferred to the deceased who held the same as of right as the proprietor thereof. The defendants contended that it is inconceivable that the deceased would transfer the suit property that was in occupation by his wife and children without notifying them.

21. In her evidence, the plaintiff maintained that she purchased the suit property through the deceased who all along held the same in trust for her and that the deceased voluntarily transferred the suit property to her on 15<sup>th</sup> May, 2007. The plaintiff produced in evidence a copy of the title deed for the suit property issued on 15<sup>th</sup> May, 2007 in her favour. Section 26 of the Land Registration Act, 2012 provides that the certificate of title issued upon registration or to a purchaser of land upon transfer by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner thereof and that the title of such proprietor shall not be challenged except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate was acquired illegally, unprocedurally or through a corrupt scheme.

22. As I have stated above, the plaintiff's case is that she purchased the suit property through the deceased who acted as her agent or trustee. The plaintiff testified that she purchased the suit property through the deceased because at the time, she was working in Embu away from Kisii where the sale transaction was taking place and that the arrangement between her and the deceased was that the deceased would transfer the suit property to her at an appropriate time. The plaintiff testified that in fulfilment of the agreement that she had with the deceased and in discharge of the said trust, the deceased transferred the suit property to her on 15<sup>th</sup> May, 2007 subsequent to which she was issued with a title deed. The plaintiff having explained the circumstances under which she acquired the suit property and had the same registered in her name, the burden shifted to the defendants to prove any of the grounds upon which the plaintiff's title to the suit property can be challenged.

23. The defendants' contention as I have stated above is that the plaintiff's title to the suit property was acquired fraudulently. In the Court of Appeal Case of **Viram t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Company Ltd [2004] 2KLR 269**, it was held that fraud is a serious quasi criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt. In their statement of defence and counter-claim, the defendants did set out the particulars of the plaintiff's fraud as consisting of among others; connivance with the 1<sup>st</sup> defendant's co-wife to deprive the defendants of the suit property, enjoying the support of the 1<sup>st</sup> defendant's co-wife aforesaid in the intended eviction of the defendants from the suit property and having the suit property transferred to her at a consideration of Ksh. 3000/= only. The defendants gave evidence and called one witness, DW1. I am not satisfied from the evidence tendered by the defendants that they have succeeded in proving that the plaintiff acquired the suit property fraudulently or unlawfully.
24. I am in agreement with the submission by the plaintiff's advocates that the evidence of DW1 should be handled by this court with caution. DW1 looked confused and exhibited signs of memory lapse. According to his witness statement, he was 92 years old when he tendered his evidence in court. The demeanour that he exhibited in court is not out of character with a person of his age. DW1 testified that he purchased a parcel of land from Ariri Asango on behalf of an entity called Banana Group. The members of the said group later on demanded a refund of the funds that they had contributed towards the purchase of the said parcel of land. He refunded the monies that the said members had contributed and retained the ownership of the said parcel of land that was subsequently transferred to him by Mose Getanda. Although DW1 claimed that it is this parcel of land that he purchased from Ariri Asango that he allowed the deceased and the 1<sup>st</sup> defendant to settle on, DW1 could not remember the parcel number. DW1 also insisted that the said parcel of land was not registered in his name jointly with the deceased. DW1 claimed further that the said parcel of land was not a sub-division which is contrary to the evidence on record. DW1's evidence turned out also to be in conflict with the evidence of the 1<sup>st</sup> defendant, (DW2).
25. Whereas DW1 claimed that he allowed the deceased and DW2 to occupy the parcel of land that he purchased from Ariri Asango in the year 1968, DW2 stated that she was married in the year 1971 and that she was settled on the suit property by the deceased in the year 1994. It is not clear from the evidence of DW1 if the parcel of land that he purchased from Ariri Asango that he referred to in his evidence is the same as the suit property. DW1 talked of the deceased and him owning different parcels of land. He claimed that he owned Plot No. 3546 while the deceased owned Plot No. 3545. He stated that he settled the 1<sup>st</sup> defendant on Plot No. 3545. He told the court that he had no knowledge of the suit property or Plot No. 3520 from which the suit property is said to have originated. At the conclusion of the evidence of DW1, the court was left wondering how the deceased and DW1 came to be registered as the proprietors of the suit property and under what circumstances the suit property came to be registered in the name of the deceased. Although DW1 denied that the plaintiff had purchased any land from Banana Group, he did not deny the plaintiff's claim that she purchased land from the said group through the deceased. Although DW1 talked of the deceased having owned Plot No. 3546, he did not say whether that plot was purchased from Banana Group or otherwise.
26. I am of the view that the evidence of DW1 has no probative value to the defendants' case. I think that it brought more darkness to the case than light. The evidence of DW2, DW3 and DW4 was the same on the issue of the ownership of the suit property. Their position was that the deceased acquired the suit property from DW1. The defendants contended that the parcel of land that DW1 acquired from Ariri Asango was sub-divided by DW1 after which DW1 transferred one portion, namely, the suit property to the deceased while the other portion was transferred to the deceased's step brother. These claims are inconsistent with the evidence of DW1 and other evidence on record. DW1 did not say in his evidence that he had transferred any land to the deceased. In fact, he was surprised that the deceased was at one time jointly registered with him as owners of the suit property. According to DW1 the land which is occupied by the defendants belongs to him. DW1 had also denied in his evidence that the parcel of land that he purchased from Ariri Asango

was sub-divided.

27. The defendants did not also explain why the suit property was initially registered in the joint names of DW1 and the deceased before it was transferred to the deceased. If the suit property belonged to DW1 before it was transferred, why was the property transferred by Mose Getanda into the joint names of the deceased and DW1? I am of the opinion that the manner in which the suit property changed hands is consistent with the plaintiff's claim that she purchased the suit property through the deceased. There is no dispute that the deceased did not purchase the suit property on his own account. The deceased must have been registered a co-proprietor of the suit property with DW1 to protect some interest that he had in the property. If that interest was not his then whose was it? The only person who has claimed a right over the suit property through the deceased is the plaintiff herein. The defendants and their witness DW1 did not place any credible evidence before the court linking the 1<sup>st</sup> defendant's co-wife to the transfer of the suit property to the plaintiff. The fact that the 1<sup>st</sup> defendant and her co-wife are not in talking terms and that they had a dispute that ended in court over the burial of the deceased is no proof of the fact that the said co-wife is the driving force behind these proceedings.

28. There is no dispute that the suit property was transferred to the plaintiff during the life time of the deceased. The 1<sup>st</sup> defendant admitted in evidence that the plaintiff had demanded that they vacate the suit property during the life time of the deceased. The 1<sup>st</sup> defendant told the court further that the deceased had told her that the suit property is owned by the plaintiff. If the deceased did not contest the plaintiff's title to the suit property, I see no basis on which the defendants herein can do so. For the foregoing reasons, it is my finding that the plaintiff is lawfully registered as the proprietor of the suit property.

#### **29. Issue number II;**

I have held herein above that the plaintiff is the lawful proprietor of the suit property. Under sections 24 and 25 of the Land Registration Act, 2012, the registration of the plaintiff as the proprietor of the suit property confers upon the plaintiff exclusive rights to occupy and use the suit property. There is no dispute that the suit property is now occupied by the defendants without the permission of the plaintiff. There is also no dispute that the plaintiff has served the defendants with a notice to vacate the suit property which notice the defendants have defied. The plaintiff having proved that she is the owner of the suit property, the onus is upon the defendants to justify their continued occupation of the suit property without the plaintiff's permission. The defendants have contended that they are entitled to remain in occupation of the suit property by virtue of their relationship with the deceased. As I have already found hereinabove, the deceased had no legal interest on the suit property which he merely held in trust for the plaintiff. The deceased transferred the suit property to the plaintiff before he died. The deceased therefore had no interest in the suit property before and after his death that he could pass on to the defendants. It follows from the foregoing that the defendants have no interest recognised in law in the suit property. Their continued occupation of the suit property is therefore without any lawful excuse or basis. It is my finding therefore that the defendants are trespassers on the suit property.

#### **30. Issue number III;**

The plaintiff has established that the defendants are trespassers on the suit property and that they have no justification for their continued occupation of the suit property. The plaintiff is in the circumstances entitled to the reliefs sought against the defendants in the plaint which are aimed at putting the plaintiff into possession of the suit property.

#### **31. Issue number IV;**

The defendants' counter-claim against the plaintiff was based on the defendants' contention that the plaintiff acquired the suit property fraudulently. I have already held above that the defendants have failed to prove fraud against the plaintiff. The defendants' counter-claim against the plaintiff has therefore not been proved. In the circumstances the defendants are not entitled to the reliefs sought against the plaintiff

in their counter-claim.

**32. Conclusion;**

Due to the foregoing, I am satisfied that the plaintiff has proved her claim against the defendants on a balance of probability. On the other hand, the defendants counter-claim has not been proved. In the circumstances, I hereby enter judgment for the plaintiff against the defendants as prayed in paragraph (i) of the plaint dated 21<sup>st</sup> June, 2010. The defendants shall vacate and hand over possession of the suit property to the plaintiff on or before 31<sup>st</sup> July, 2015. The defendants shall however cease collecting rent from the tenants on the suit property forthwith. Due to the relationship that exists between the parties and having regard to the circumstances under which the defendants entered into the suit property, each party shall bear its own cost of the suit and counter-claim.

**Delivered, dated and signed at Kisii this 6<sup>th</sup> day of February, 2015.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Bigogo h/b for Mrs. Asati for the Plaintiff

Mr. Ojala h/b for Ogari for the Defendants

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**