

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 717 OF 2015**

MARY NJERI (suing as the legal representative of -

The estate of KARUGU GUANDAI).....1<sup>ST</sup>

PLAINTIFF

PARTRIC NJUGUNA WACHIRA.....2<sup>ND</sup>

PLAINTIFF

-VERSUS-

BOB ROBERT DRANI (suing as the legal representative of -

The Estate of PATRICK FUTO DRANI).....

DEFENDANT

**JUDGMENT**

**Background**

1. This suit is premised upon a sale agreement dated 25<sup>th</sup> September 1990 between the late Patrick Futo Drani (hereinafter referred to as 'the original vendor') and the late Karugu Guandai (hereinafter referred to as 'the original purchaser'). The agreement was for the sale of four (4) acres of land which was to be excised from the parcel of land known as L.R. No. 1160/156 at Langata in Nairobi. The purchase price was Kshs. 2,400,000/- out of which was Kshs. 240,000/- was paid to the Advocates for the parties (Khaminwa & Khaminwa Advocates) as stakeholders at the time of signing the agreement.

2. The sale agreement, the subject matter of this suit was subject to the Law Society Conditions of sale in so far as they were not inconsistent with the conditions contained in the agreement. The contractual completion date was the 31<sup>st</sup> December 1990. The balance of the purchase price of Kshs. 2,160,000/- was to be paid on or before the completion date or as soon as the sub-division formalities were completed and the title containing by measurement four (4) acres was procured by the vendor. It was explicitly stated in the sale agreement that time was of essence.
3. It is noteworthy that Patrick Futo Drani (the original vendor), entered into the sale agreement in his capacity as the personal representative of the estate of Charles Origa Futo Drani (deceased). The registered proprietor of the suit property was Charles Origa Futo Drani. From the copy of the title presented to the court by the Chief Land Registrar and Director Land Administration, grant of letters of administration in the estate of Charles Origa Drani issued to Patrick Futo Drani was registered against the Title, L.R. No. 1160/156 on 3<sup>rd</sup> May 1989 as entry No. 13 of the Land Register. The said grant had been issued by the High Court of Kenya at Nairobi in P & A Cause 334 of 1985 (In the Estate of Charles Origa Futo Drani) which resealed the grant of letters of administration intestate granted on 9<sup>th</sup> January 1985 by the High Court of Uganda at Kampala.
4. The agreement was not completed. Karugu Guandai filed this suit way back in 1993, originally at the High Court in Nairobi as case no. HCCC 5791 of 1993 seeking to enforce the agreement of 25<sup>th</sup> September 1990 against Patrick Futo Drani by way of specific

performance. This suit was only transferred to this court (ELC) in the year 2015, 22 years after it was filed in the High Court.

5. The original parties to the sale agreement have since passed on. The 1<sup>st</sup> Plaintiff herein, Mary Njeri Mburu took over the case upon the death of Karugu Guandai in the capacity of the legal representative of the estate of the Karugu Guandai - deceased.
6. A curious development had happened in the year 2008 in this suit, as disclosed at paragraph 7A of the amended plaint, when the original purchaser Karugu Guandai purportedly sold the four (4) acres, the subject matter of this case, to one Patrick Kariuki Njuguna Wachira for the sum of Kshs. 32,000,000/- in spite of the fact that the transaction between him and the late Patrick Futo Drani had not been completed and this suit was still pending in court. That is how comes that Patrick Njuguna Wachira was joined into this suit as the 2<sup>nd</sup> Plaintiff. Mary Njeri Mburu then became the 1<sup>st</sup> Plaintiff.
7. Interestingly, Patrick Njuguna Wachira, the 2<sup>nd</sup> Plaintiff exited the case as quietly as he had come in when he withdrew his case in its entirety with no orders as to costs on 6<sup>th</sup> December 2022.
8. The late Patrick Futo Drani on his part was replaced by Bob Robert Drani; the legal representative of his estate, in spite of the fact that he had been registered in the title to the suit property as an administrator of the estate of Charles Origa Futo; not as the owner of the suit property. He had indeed entered into the agreement for sale agreement not as an owner but as the administrator of the estate of Charles Origa Futo. In the amended

plaint, the Plaintiffs explicitly describe the Defendant as the administrator of the estate of Patrick Futo Drani.

9. The Defendant's response to the Plaintiffs' case was vide the statement of defence dated 27<sup>th</sup> January 2022. The Defendant denied the assertion that the 1<sup>st</sup> Plaintiff was the personal representative of the estate of Karugu Guandai, putting her to strict proof.
10. The Defendant too denied that the estate of Karugu Guandai had any known claim against the Defendant herein, Bob Robert Drani and or against the estate of Patrick Futo Drani or at all. On the whole, the Defendant averred that the suit by the Plaintiffs raised no reasonable cause of action against the Defendant, was incompetent, and an abuse of the court process and therefore bad in law. He prayed for its dismissal with costs.

**Evidence Adduced at the Hearing of the Case.**

11. The case proceeded to full hearing. The 1<sup>st</sup> Plaintiff testified in her case as PW4 and called 3 other witnesses.
12. PW1 was Dr. John Khaminwa, a senior member of the bar, who adopted his witness statement dated 12<sup>th</sup> September 2019 as his evidence in chief. He confirmed the sale agreement dated 25<sup>th</sup> September 1990 between Patrick Futo Drani as a personal representative of the estate of Charles Origa Futo Drani (deceased) as the vendor and Karugu Guandai, as the purchaser of four (4) acres out of L.R. No. 1160/156. Dr. Khaminwa acted for both parties in the transaction but for purposes of the agreement only.

13. PW2 was Mr. Samuel Gakuru, a member of the bar too and who was the Advocate for the late Karugu Guandai. He affirmed that the late Karugu Guandai had instructed him in 1991 to act for him in the purchase of the 4 acres, the subject matter of this suit after the execution of the agreement. He gave him a copy of the agreement prepared by Khaminwa and Khaminwa Advocates and eventually a copy of the title for L.R. 1/60/50 I.R. 11555 in the name of Charles Origa Drani measuring 5.35 acres. Patrick Futo Drani had registered a grant of letters of administration for the estate of Charles Origa Drani in 1989 against the title.
14. Mr. Gakuru, PW2 testified that he learnt from his client that the original title for L.R. 1/60/50 was held by one Mr. Sagoo as a security for a loan advanced to Charles Origa Drani (deceased). His client further informed him that his step mother who resided on the property, one Getrude Nansamba had sued him in the matter, P and A 1186 of 1989, claiming a portion of the suit property. Mr. Gakuru therefore, and under instructions of his client lodged a caveat against the title to protect his client's interests. The caveat was registered against the title of the suit property on 5<sup>th</sup> April 1991.
15. It was the testimony of PW2 that the late Karugu Guandai had paid a total of Kshs. 1,973,050/= towards the purchase of the suit property. The figure, according to Mr. Gakuru was acknowledged by Patrick Drani in his letter to Karugu Guandai dated 16<sup>th</sup> August 1994.
16. PW2 further testified that Patrick Drani gave Karugu Guandai the original Deed Plan for the four (4) acres portion that he was

to purchase and signed a transfer in favour of Karugu Guandai in his presence for the four acres portion. When it became apparent that the transaction was unlikely to be completed, Mr. Gakuru under instructions of his client filed this suit with a view to enforcing the agreement through an order of specific performance. He apparently obtained an order to retain the caveat against the title on 16<sup>th</sup> December 1993 and which order was registered against the title on 20<sup>th</sup> December 1993.

17. PW3 was Mr. George Kimathi Mugenyu, a surveyor who was contracted by Patrick Futo Drani in 1991 to undertake survey works on L.R. No. 1160/156. His instructions according to his testimony was to subdivide the said parcel into two portions in order to excise the four acres that was the subject of the agreement between Patrick Futo Drani and Karugu Guandai.
18. PW3, in his statement which he adopted as his evidence in chief affirmed that Patrick Futo Drani was the administrator of the estate of Charles Origa Drani, the original owner of the property. He undertook the exercise ending up with two portions for which he procured deed plans as follows;
  - L.R. 1160/530 – Deed Plan No. 159029.
  - L.R. 1160/531 – Deed Plan No. 159021
19. PW4, who is the Plaintiff in this case adopted her witness statement and further witness statement as her evidence in chief elaborating her claim against the Defendant as stated in her amended plaint. Regarding the Defendant's allegation that she lacked the locus standing to maintain this suit, PW 4 stated that the High Court in Machakos issued her a limited grant to

preserve the assets and the estate of the late Karugu Guandai. The grant which had been at one point revoked was reinstated by the court vide the order given on 16<sup>th</sup> March 2022. She was therefore competent to prosecute the suit on behalf of the estate of the late Karugu Guandai.

20. PW4 produced the documents listed on her list of documents and the further list of documents as exhibits in support of her case.
21. Responding to questions in cross-examination, PW4 confirmed that she was aware of the proceedings in Nairobi High Court Succession Cause 1931 of 2009 (In the estate of Karugu Guandai) where she is not only an objector but also a cross-petitioner. Her cross-petition is dated 5<sup>th</sup> November 2009. The suit property was not listed as one of the properties of the deceased in the cause.
22. In spite of the proceedings in Nairobi High Court Succession Cause 1931 of 2009 (In the estate of Karugu Guandai), PW4 admitted that she lodged a petition for a limited grant in Machakos High Court Succession Cause 548 of 2011 after she had lodged her objection. That is how comes that she was issued with the limited grant by the Machakos High Court on 5<sup>th</sup> October 2011. She stated that she did not inform the Machakos High Court of the existence of the Nairobi High Court Succession Cause 1931 of 2009 (In the estate of Karugu Guandai) that was ongoing.

**Evidence adduced on behalf of the Defendant.**

23. On his part, the Defendant testified as a witness in his case and called one Winfred Karugu Guandai as a witness in support of his case.

24. Bob Robert Drani, DW1, adopted his witness statement dated 27<sup>th</sup> January 2022 as his evidence in chief. His testimony was that upon the death of Charles Origa Futo Drani, the proprietor of L.R. No. 1160/156, Patrick Futo Drani was granted letters of administration to the Estate of Charles Origa Futo Drani. Patrick Futo Drani however died on 8<sup>th</sup> April 1998 before the finalization of the attendant succession proceedings to distribute the estate of Charles Origa Futo Drani to his beneficiaries.
25. The witness further stated that upon confirmation of the grant, but before the distribution of the estate of Charles Origa Futo Drani, he learnt that a caveat had been registered by Karugu Guandai against the title of L.R. No. 1160/156 on 4<sup>th</sup> April 1991 citing a purchaser's interest. The caveat according to the witness had originated from this case (then referred to as Nairobi HCCC 5791 of 1993). Upon the death of the original parties, the suit abated. As a result of the abatement, all existing orders and or inhibitions lapsed and ceased to have any legal consequences.
26. DW1 reiterated that at the time of abatement of the suit, the Plaintiff then, Karugu Guandai had failed to complete the sale transaction and the agreement had lapsed even prior to his death as he had failed to prove payment of any purchase price as consideration for the purported purchase of the subject property.
27. In his witness statement, DW1 made reference to an affidavit by one Winfred Karugu whom he referred to as the known legal wife of Karugu Guandai whereby she deposed that the estate of Peter Karugu Guandai has no claim against the Defendant, Bob Robert Drani and or against the estate of Patrick Futo Drani or at all.

28. Responding to questions in cross-examination, DW1 stated that he was the administrator of the Estate of Patrick Futo Drani though he had no documents with him to prove that. He further stated that he held a power of attorney from the administrator of the estate of Patrick Futo Drani which likewise was not on record.
29. DW 1 was aware of the agreement of 25<sup>th</sup> September 1990 where the vendor was Patrick Futo Drani. He was to procure the title containing by measurements, 4 acres in accordance with the agreement. He could not however confirm whether subdivision was done as contemplated in the agreement. He too was not aware if Patrick Futo Drani had signed a transfer in favour of the late Karugu Guandai.
30. Responding to questions in re-examination by his Advocate, DW1 informed the court that the order allegedly barring any dealings in the suit property was not registered against the title.
31. DW2 was one Winfred Nyambura Karugu who adopted her witness statement of 27<sup>th</sup> January 2022 as her evidence in chief. She testified that she was issued with a limited grant of letters of administration ad colligenda bona in the estate of Karugu Guandai on 29<sup>th</sup> April 2010 in Nairobi High Court succession Cause 1931 of 2009. She asserted that she was the widow of the late Karugu Guandai. The limited grant entitled her to collect and preserve the estate and to defend and institute any suit on behalf of the estate. She did not share that authority with anyone. The Plaintiff in this case is an objector and cross-petitioner in Nairobi High Court Succession Cause No. 1931 of 2009.

32. It was the evidence of DW2 that the subject matter of this suit was not included in the list of the properties of the late Karugu Guandai (deceased) in the succession cause.
33. Responding to questions in cross-examination, DW2 confirmed that she had not filed any challenge to the limited grant issued to Mary Njeri Mburu which she had termed as a fraudulent document.

**Further evidence by the Chief Land Registrar and the Director Land Administration.**

34. on 29<sup>th</sup> June 2023, the court exercising its discretion under Section 22 (b) of the Civil Procedure Act, that empowers it to either on its own motion or on an application by any party to issue summons to persons whose attendance is required either to give evidence or to produce documents, called the Director in Charge of Land Administration and the Chief Land Registrar to appear as witnesses and appraise the court on the status of the title to the suit property. This was after noting that none of the parties had produced in evidence the current certified copy of the title or a search certificate showing the present status of the title which was absolutely necessary considering the nature of the prayers sought on the case.
35. The Deputy Director Land Administration, one Elias Kaburu testified on behalf of the Director of Land Administration. He adopted his witness statement dated 13<sup>th</sup> December 2024 as his evidence in chief. He further produced as exhibits extracts of the correspondence file listed as No. 24 - 60 in the 'Chief Land

Registrar and Director Land Administration List and Bundle of Documents' dated 13<sup>th</sup> December 2024.

- 36.** Responding to questions in cross-examination by M/S. Mwandumbo, Advocate for the Plaintiff, the Deputy Director confirmed that there was an unstamped copy of the transfer drawn by Gakuru and Company Advocates that was however unregistered. There too was a provisional approval of subdivision of the suit property, L.R. No. 1160/156 related to the unstamped transfer. The process had not been completed and no title/grant had been issued in favour of Karungu Guandai.
- 37.** Responding to questions by Mr. Wachira, Advocate for the Defendant, the Deputy Director confirmed that what he had put before the court was the correspondence file which contains all the correspondence in relation to the subject parcel of land. He pointed out that the letter by Njeri Mburu and Co. Advocates at paragraph 113 of the bundle attaching a copy of a sale agreement, a court order of 16<sup>th</sup> July 1993, a duly executed transfer and a Deed Plan No. 159021, had not been stamped as received.
- 38.** Mr. George Gitonga, a Land Registrar in the office of the Chief Land Registrar – Court Section, testified on behalf of the office of the Chief Land Registrar. He adopted his witness statement dated 13<sup>th</sup> December 2024 as his evidence in chief. He further produced the documents No. 1 - 23 in the 'Chief Land Registrar and Director Land Administration List and Bundle of Documents' as exhibits.

- 39.** The witness statement by the Land Registrar explained the ownership history of the suit property, L.R. No. 1160/156 measuring 5.35 acres as delineated on the Land Survey Plan No. 53750. The title of the land was first issued and registered as an estate in fee simple to William Derek Rhodes on 8<sup>th</sup> May 1965 vide a transfer.
- 40.** The land was transferred to Charles Origa Drani on 19<sup>th</sup> December 1969 vide a transfer from William Derek Rhodes for the value of Kshs. 90,000/-. This was registered as entry No. 4 of the land register.
- 41.** On 3<sup>rd</sup> May 1989, a grant of letters of administration of the estate of Charles Origa Futo Drani (deceased) was registered to Patrick Futo Drani as the administrator as per entry No. 13.
- 42.** On 25<sup>th</sup> May 2011, a grant of probate and administration in the Estate of Charles Futo Drani in Nairobi Cause 2827 of 1998 was registered as entry No. 21 in the register.
- 43.** On 6<sup>th</sup> October 2021 a grant of letters of administration of the Estate of Getrude Nansaba Drani (deceased) to Gloria Drani James and Olivia Dranny Bulyaba as administrators was registered as entry No. 21.
- 44.** On 6<sup>th</sup> October 2021, one portion of the suit property was transferred to Gloria Drani Jones and Olivia Dranny Bulyaba as administrators of the Estate of Getrude Nansamba Drani (deceased), while the other portion was transferred to Olivia Dranny Bulyaba.
- 45.** Responding to questions in cross-examination by M/S. Mwandumbo, Advocate for the Plaintiff, the Land Registrar stated

that the application for registration of transfer by Njeri Mburu & Co. Advocates was unsuccessful. He could not explain the reasons why.

- 46.** Responding to questions by Mr. Wachira, Advocate for the Defendant, the Land Registrar stated that there were no remark, explaining why the application for registration by Njeri Mburu & Company Advocates was rejected.

**Submissions by the parties**

- 47.** The parties herein, pursuant to the directions by the court filed written submissions.
- 48.** The Plaintiff in her submissions identified four issues for determination as follows;
- (a) **Whether the parties have the requisite locus standi to prosecute this suit;**
  - (b) **Whether there is an enforceable contract between the parties;**
  - (c) **Whether the Plaintiff is entitled to an order of specific performance; and**
  - (d) **Who should bear the costs of the suit.**
- 49.** On the first issue, the Plaintiff submits that she is the personal representative of the estate of the late Karugu Guandai (deceased) as she holds a valid limited grant ad litem. She was therefore properly substituted as the Plaintiff in place of the late Karugu Guandai. The current Defendant too was properly substituted as the Defendant. Consequently, she submits that the two parties have the requisite locus standi.

50. On the 2<sup>nd</sup> issue, the Plaintiff submits that there is an enforceable contract between the parties as embodied in the agreement for sale dated 25<sup>th</sup> September 1990. The said contract, according to the Plaintiff has never been rescinded by any of the parties and no evidence to that effect has been adduced before the court.
51. The Plaintiff submits that though clause five of the agreement stipulated the contractual completion date as 31<sup>st</sup> December, 1990, special condition III gave a further completion date, “as soon as the subdivision formalities are complete and the title containing by measurement four (4) acres is procured by the vendor”. The Plaintiff submits that to date, no such title has been presented by the vendor.
52. As to whether the Plaintiff is entitled to the order of specific performance, the Plaintiff states the original purchaser had already paid a sum of Kshs. 1,073,050/- way beyond the deposit of 10% of purchase price stipulated in the agreement. Further the purchaser was and has been ready, willing and able to complete the transaction. It was the original vendor and his successors in title who had frustrated the process according to the Plaintiff.
53. The Plaintiff further submits that the Defendant has not demonstrated any difficulties or challenges he may have faced in procuring the title. She pleads for the court’s intervention to guarantee her justice through an order of specific performance. She made reference to the decision in ***Abdelhafid Tchoketch & another -versus- Mercy Nyambura Kanyara (2021) eKLR***, to support her claim for specific performance.

### **Submissions by the Defendant.**

54. On his part, the Defendant too identified four issues for determination as hereunder.

- i) Whether the Plaintiff has the requisite legal capacity (locus standi) to institute and prosecute this suit on behalf of the estate of Karugu Guandai (deceased);**
- ii) Whether the non- completion of the agreement for sale dated 25<sup>th</sup> September 1990 on the completion date of 31<sup>st</sup> December 1990, terminated the said agreement for sale;**
- iii) Whether the Plaintiff is entitled to the remedy of specific performance; and**
- iv) Who should bear the costs of the suit.**

55. On the issue of locus standi of the Plaintiff, the Defendant insists that the Plaintiff lacks the locus standi on the premises that the purported grant ad litem relied on by the Plaintiff was limited to the purpose of prosecuting Cause No. 1007 of 2009 and not this suit. Secondly, the Defendant contends that the Plaintiff did not have a valid grant ad litem at the time of filing the amended plaint dated 14<sup>th</sup> June 2019 and during the prosecution of the said amended plaint.

56. Finally, the Defendant averred that at the point of applying for the grant ad litem, the Plaintiff concealed the fact that the purchaser's only wife, Winfred Karugu, had already instituted succession proceedings at the Nairobi High Court and that she had already been issued with a grant of representation in the

estate of Karugu Guandai. He relied on the decision in the case of **Re Estate of Henry Kithia Mwitari (deceased) (2021) eKLR**, where the court emphasized that a limited grant ad litem is issued for a specific, limited and finite purpose.

- 57.** The Defendant further relying on the decisions in **Mary Rose Namu -vs- Ngoroi ( 2016) eKLR** and **James Mwaniki Munyi and another -vs- Lucy Wanjiku Nyaga (2016) eKLR**, submitted that a grant ad litem issued for the purpose of prosecuting one suit cannot be used to prosecute a different suit.
- 58.** The Defendant pointed out that in any event, the grant ad litem held by the Plaintiff, on her own admission had been revoked on 28<sup>th</sup> June 2017 and was only reinstated on 18<sup>th</sup> March 2022. It is the Defendant's position therefore that the Plaintiff had no valid grant of representation between 28<sup>th</sup> June 2017 and 18<sup>th</sup> March 2022, yet she filed the amended plaint dated 14<sup>th</sup> June 2019 and continued to prosecute this suit including giving oral testimony in support of her case.
- 59.** On the second issue whether non-completion of the agreement for sale dated 25<sup>th</sup> September 1990 on the completion date terminated the agreement, the Defendant submitted that there was an explicit clause in the agreement indicating that time was of the essence. The agreement therefore ought to have been completed by 31<sup>st</sup> December 1990. All contractual obligations ought to have been performed on or before the completion date, otherwise the contract stands terminated. He cited a number of decided cases to support the argument.

**60.** On the remedy of specific performance, it is the Defendant's position that the Plaintiff is not entitled to an order of specific performance considering that the contract sought to be enforced had long been terminated on 31<sup>st</sup> December 1990. He cited numerous authorities on the applicable principles for the grant of the relief concluding that the Plaintiff is not entitled to the relief. He prayed that the Plaintiff's suit be dismissed with costs.

**Issues for determination.**

**61.** Having carefully considered the pleadings by the parties herein, the evidence adduced as well as the submissions filed, the issues for determination in the court's considered opinion, are;

***A. Whether the Plaintiff has established a cause of action against the estate of Patrick Futo Drani (deceased);***

***B. Whether the agreement of 25<sup>th</sup> September 1990 between the late Patrick Futo Drani in his capacity as the administrator/personal representative of the estate of Charles Origa Drani and the Late Karugu Guandai is an enforceable contract;***

***C. Whether the Plaintiff has the locus standi to prosecute the suit on behalf of the estate of Karugu Guandai (deceased);***

***D. Whether the Plaintiff is entitled to the remedies sought in the amended plaint; and***

***E. What orders should issue in respect to the costs of the suit.***

**Analysis and Determination.**

**A. Whether the Plaintiff has established a cause of action against the estate of Patrick Futo Drani (deceased).**

62. At the risk of repeating myself, I need to restate that the Plaintiff's case is grounded on the sale agreement dated 25<sup>th</sup> September 1990 that was between the late Karugu Guandai as purchaser and Patrick Futo Drani in his capacity as the administrator of the estate of Charles Origa Futo Drani (deceased) as the vendor. The land that was the subject of the agreement was owned by the late Charles Origa Futo Drani and subsequently by his estate upon his death. Patrick Futo Drani was acting on behalf of the estate; not as the owner of the land. Patrick Futo Drani was never an owner of the subject property. Therefore, any claim arising out of the agreement dated 25<sup>th</sup> September 1990 must therefore be against the Estate of the late Charles Origa Futo Drani. It cannot be against Patrick Futo Drani or his estate.

63. The Plaintiff's case unfortunately as pleaded in the amended plaint is against the estate of Patrick Futo Drani. At paragraph 2 thereof, the Plaintiff pleads that the Defendant is the administrator of the estate of Patrick Futo Drani. The claim has been directed at the wrong person who is not the owner of the suit property, L.R. No. 1160/156.
64. This fatal mistake is enough to dismiss the Plaintiff's case, however, and as good practice demands, I will proceed to determine the other identified issues.

**B. Whether the agreement of 25<sup>th</sup> September 1990 between the late Patrick Futo Drani in his capacity as the personal representative of the Estate of Charles Origa Drani and the late Karugu Guandai is an enforceable contract.**

65. The vendor in the agreement made on 25<sup>th</sup> September 1990 was Patrick Futo Drani who as clearly stated in the agreement was a personal representative of the estate of Charles Origa Futo Drani (deceased). The grant of letters of administration conferring Patrick Futo Drani with the title of the personal representative of the estate of Charles Origa Futo Drani (deceased) had been issued by the High Court of Kenya at Nairobi in P & A Cause 334 of 1985 (in the matter of the Estate of Charles Origa Futo Drani) which resealed the grant of letters of administration intestate granted on 9<sup>th</sup> January 1985 by the High Court of Uganda at Kampala. This grant as evidenced by the copy of the title for parcel of land L.R. Parcel No. 1160/156 presented by the Chief

Land Registrar and the Director of Land Administration was registered against the title on 3<sup>rd</sup> May 1989.

66. It is not in doubt that at the time of the agreement, the grant of letters of administration in favour of Patrick Futo Drani had not been confirmed. The question then that begs an answer is whether without a confirmed grant of letters of administration, Patrick Futo Drani had the capacity to sell the subject property belonging to the estate of Charles Origa Futo Drani.

67. The decision by F. Gikonyo J, in the case of **Re -Estate of M'Ajogi M' Kiugu (deceased) (2017) eKLR**, conclusively answers the question. The Learned Judge rightly and emphatically stated that,

***“Courts have said time and again and I will not be tired of stating it again - that, under Section 82, (b) (ii) of the Law of Succession Act sale of immovable property of the estate before confirmation of grant is prohibited. Again, under Section 55 of the Law of Succession Act, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to***

***a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property above.” (Emphasis added).***

68. The above position has been affirmed in numerous decisions by the Superior Courts of this country. In the case of **Kamau - versus- Kiarie & another (legal representatives of the estate of Naomi Wambui Kiarie (2024) KEELC 222 (KLR)**, Gacheru J stated that the law forbids **any person**, may it be a beneficiary or not from dealing with the estate of a deceased person before being allowed by the court through succession proceedings. Dealing with such an estate without authority constitutes the offence of intermeddling. She cited with approval the decision in the case of **Samuel Ariga Bosire -vs- Abagusii Otenyo Self Help Group (2021) eKLR**, where the court held that;

***“...an administrator is not allowed to dispose of any part of the deceased’s property even if he is a beneficiary ...if he does so, he will be guilty of intermeddling with the deceased 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. 1,000/- or to a term of imprisonment not exceeding 1 year or both penalties”.***

69. In the case of **Morris Mwiti Mburugu -vs- Dennis Kimanthi Muburugu (2016) eKLR**, the court was categorical that, where

any person interferes with the free property of the deceased person contrary to the provisions of Sections 45 and 82 of the Act, he/she is intermeddling and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of the innocent beneficiaries who may have been affected by the act, but were not involved in the same.

70. From the foregoing, Patrick Futo Drani, the personal representative of the estate of Charles Origa Futo Drani (deceased), did not have the legal capacity to enter into a contract to sell the property of the estate of Charles Origa Futo Drani as he purported to. The agreement made on 25<sup>th</sup> September 1990 was there for all intents and purposes null and void and cannot enjoy the protection of the law.
71. In the case of **David Sironga Ole Tulai vs Francis Arap Muge & 2 others (2014) eKLR**, the Court was explicit that no court of law will enforce an illegal contract or one which is contrary to public policy.
72. The decision in the David Sironga case was an affirmation of the well-established principle as elaborated Lindley, LJ in the case of **Scott vs Brown, Doering, McNab & Co (3), (1892) 2 QB 724 at page 728** as follows:

***“Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense, and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No court ought to enforce (an) illegal contract or allow itself to be made the instrument of enforcing obligations***

***alleged to arise out of a contract or transaction which is illegal, if illegality is duly brought to the notice of the court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him.”***

**C. Whether the Plaintiff is entitled to the remedies sought in the amended plaint.**

73. The Plaintiff seeks to enforce the agreement of 25<sup>th</sup> September 1990 by way of an order of specific performance. Her main prayer is for an order of specific performance of the agreement dated 25<sup>th</sup> September 1990 compelling the Defendant to subdivide land parcel known as L.R. No. 1160/156 and transfer the portion measuring four acres to the Plaintiff.
74. The jurisdiction on specific performance is well settled. In the case of **Reliable Electrical Engineers Limited -vs- Mantrac Kenya Limited (2006) eKLR**, Maraga J (as he then was) stated that;

***“Specific performance like any other equitable remedy is discretionary and the court will only grant it on well laid principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistakes or***

***illegality, which makes the contract invalid or unenforceable. Even when the contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy.”***

75. From the foregoing there are five main reasons why the remedy of specific performance cannot issue;

- a) The case as held earlier on was against the Estate of Patrick Futo Drani who are not the owners of the suit property. An order of specific performance, even if it were to issue cannot be enforced against the Estate of Patrick Futo Drani.
- b) The court has already found that the agreement upon which the Plaintiffs' case is premised on was null and void. It is outrightly unenforceable.
- c) Even if I was to find otherwise, the agreement was terminated by non-performance on or before the completion date. Of significance is that the agreement was subject to the Law Society conditions of sale, 1989 Edition, and explicitly provided that time was of the essence.
- d) The Plaintiff has not performed his part of the agreement.
- e) The land, the subject matter of the suit is non-existent having already been distributed to the beneficiaries of the late Charles Futo Drani.

**76.** The Plaintiff had also sought for an order of permanent injunction. In the case of **Kenya Power & Lighting Co. Limited vs Sheri Molana Habib [2018] eKLR**, the court discussed the conditions under which an order of permanent injunction may be granted as follows:-

***“...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”***

**77.** Going by the findings of the court, the Plaintiff’s case is unmerited. The order cannot issue.

**78.** As to whether the Plaintiff had the locus standi; the court’s finding is that at the time of filing the amended plaint, the grant ad litem that the Plaintiff relies on had been revoked. She had no legal standing then to file the amended plaint upon which her claim is based.

**79.** There is an even bigger issue regarding the Limited grant ad litem obtained by the Plaintiff. In her testimony, the Plaintiff admitted that she sought the grant of the letters ad litem in Machakos High Court in spite of the proceedings in Nairobi High Court Succession Cause 1931 of 2009 (In the estate of Karugu Guandai),

which she was aware of since she had lodged her objection therein.

- 80.** I agree with the holding of the court in the case of *Re Estate of Mwaura Mbira (deceased)*(2018) eKLR, where the court expressed the view that where there is a substantive succession cause which has followed all the processes and a Grant of Letters of Administration has been issued, a limited or special grant cannot be issued to another person over the same estate. The Act has provisions on how the administrators can be held and/or made to account.
- 81.** Consequently, the proceedings to obtain the limited grant in Machakos High Court were defective in substance as the Plaintiff was aware of the existence of the substantive succession cause in Nairobi where she was an Objector. She obtained the grant secretly and fraudulently and failed to disclose that there existed a substantive cause and a grant of Letters of Administration had already been issued.
- 82.** In ***Alfred Njau -versus- City Council of Nairobi (1983) KLR 625***, the court defined locus standi as follows;  
***“Locus standi literally means a place of standing and refers to the right to appear or to be heard in court. To say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding”.***
- 83.** The impact of that finding can be equated to a court acting without jurisdiction. It all amounts to null and void proceedings.

**84.** Consequently, the Plaintiffs' suit fails in its entirety. It is dismissed with costs to the Defendant.

**Dated Signed and Delivered at Kajiado Virtually this 16<sup>th</sup> Day of October 2025.**

**M.D. MWANGI**  
**JUDGE**

**In the virtual presence of:**

Ms. Mwandumbo for the Plaintiff

Mr. Nthei h/b for Mrs. Lumumba for the Defendant

Court Assistant: Mpoye

**M.D. MWANGI**  
**JUDGE**