

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC CAUSE NUMBER 47 OF 2023.

PETER KITSAO MWAROME & ANOTHER
PLAINTIFFS

VERSUS

MOTREX LIMITED
DEFENDANT

JUDGMENT

1. The present case is based on fraud. The plaintiffs' claim that the defendant unlawfully and fraudulently transferred the suit land known as **Malindi/Mambrui/ 266** to itself sometime in the year **2019** after the demise of the registered owner. The plaintiffs are suing in their capacity as the administrators of the registered owner known as *Mwenda Nzai Randu*, who was the 2nd plaintiff's wife.
2. The plaintiffs claim that the defendant forged the signatures of the deceased and registered transfer documents at the Kilifi Land Registry in favour of itself thus transferring the land to itself after the death of the deceased, and in the absence of confirmation of letters of administration and without the consent of the heirs and beneficiaries of the estate of the deceased.
3. The plaintiffs seek the following orders:
 - a. *A declaration that the late Mwenda Nzai Randu (deceased) is the lawful owner of the parcel of land known as Malindi /Mambrui Sabaki/ 266;*
 - b. *A mandatory injunction directing the Kilifi Land Registrar to cancel all entries in regard to plot number Malindi /Mambrui Sabaki /266 in favour of the defendant and/or consequential*

owners (sic) and refer the said parcel of land to the name of Mwenda Nzai Randu;

- c. A mandatory injunction directing the Kilifi Land Registrar to issue the plaintiffs with the title deed for plot number Malindi /Mambrui Sabaki / 266 in the name of the deceased;*
- d. Any relief this Court deems fit.*

The Defence

4. The defendant filed a defence dated 21st August 2023. It denied the plaintiffs claim. In particular it is denied that there was any fraud. It is stated that the defendant purchased the suit land from Mwenda Nzai Randu for the consideration of **Kshs 4,383,000/=** vide a written agreement dated 28th May 2019 and paid the entire consideration upon transfer of the property to its name.

Evidence

Plaintiffs' evidence

5. The plaintiffs' evidence was given through 2 witnesses.
6. **PW1, Marko Mwarome Lugwe**, testified that whilst the purchase price was 4,500,000/= million, he only received money from the defendant in two tranches, that is, Kenya Shillings 1,000,000/=, and Kshs 486,000/= from the defendant. In his written statement, he has stated that he is a chairman of the Mambrui Sabaki Land Committee. He met and made friends with the Chairman of Ngomeni Land Committee known as *Omar Mshamu*. Omar told him that he had a purchaser for the suit land. PW1 does not reside on the suit land. He gave Omar the original title deed to the suit land for him to show the potential purchasers. Sometime in 2019, Omar called him to the offices of Motrex Limited, the defendant herein, and informed him that he had a sale agreement with the latter in

respect to the suit land; that he was given **Kshs 486 787/-** on 14th May 2019 and **Kshs 1,000,000/=** sometime in 2021; that the defendant fraudulently drafted a sale agreement and a transfer of the property in the names of his late wife fully knowing that she was deceased; that when visiting the defendant's office, he was informed that the transfer had been completed even though he had not been fully paid. He stated that his wife passed away in 2018 and therefore she could not have executed any transfer.

7. Upon cross-examination by Mr. Olaba, PW1 stated that he used to have custody of the title deed even though the suit land was registered in the name of his wife; that his wife was alive at the time of issuance of the title deed; that she died on 21st October 2018. The title in her name was issued on 18th December 2018. PW1 had his own plot just adjacent to the suit plot; that his plot was plot number 197. PW1 is the one who consented to the search for a buyer. He also agreed to the sale of the land to the defendant. By the time of that agreement, his wife was already deceased. He had not taken out a grant of representation. He admitted that the photograph on the transfer among the defendant's documents belongs to his wife, but he did not know whether the thumbprint affixed to the transfer belong to her. The Identity Card number belonged to her and so did the KRA Pin Number. He admitted that he obtained a PIN Number for a deceased person without disclosing to the KRA that his wife was deceased. He has never reported to the Police that there is a fake

thumbprint purported to be his wife's on the alleged transfer. He admitted that he is the one who signed an agreement with Omar.

8. Upon re-examination by Mr Mwadilo, he admitted that the agreement was made in his advocate's office and that transfer followed, but maintained that all those events took place while his wife was deceased. He stated that he is 87 years old.
9. **PW2 Peter Kitsao Mwarome**, PW1's son, testified that PW1 is his father and the deceased is his mother. He stated that in early 2022 he came across an agreement for sale dated 28th May 2019, allegedly executed by his late mother and the defendant; that upon inquiring from the defendant, he was informed by the defendant that his late mother had received part of the purchase price from the defendant. He also discovered, upon conducting a search, that the suit land had been transferred to the defendant in 2019. He stated that the transfer of the suit property in favour of the defendant was fraudulent as his late mother had already met her demise at the time of the purported agreement and transfer.
10. Upon cross-examination by Mr Olaba, he admitted that he was an adult when his mother died; that it was his mother's photograph that was affixed on the transfer, and the identity card number on the transfer was also hers. However, he did not know whether the thumbprint belongs to his mother. He reiterated his father's evidence that the defendant had only paid Kenya Shillings **1,486,787/=**.

11. **DW1 Mzee Omar Mshamu** testified and adopted his witness statement dated 17th March 2024 as his evidence-in-chief. According to DW1, he was sold the land by PW1. He admitted that there is a balance owing to the deceased. That after the defendant had paid part of the consideration twice, he discovered that the vendor had died and asked that the plaintiff do obtain a grant of letters of administration.
12. According to DW1, it is the 2nd plaintiff (PW1) who approached him and asked him to look for a buyer of his wife's plot sometime in the year 2019; that the main reason why his wife was seeking to sell the property was because they needed money for her medical treatment as at that time because she was ill. DW1 agreed to look for a buyer. He obtained a buyer in May 2019. The buyer authorized him to view the property and report back to it. Negotiations for the purchase price were done between DW1 and PW1 and the sum of Kenya Shillings 4,870,000/= was agreed on as consideration. The application for the Land Control Board consent was made and given to PW1 to have his wife execute it. PW1 later returned the LCB application form to DW1 for lodgment at the Land Control Board offices. DW1 lodged the application for consent with the LCB and the LCB consent letter dated 13th June 2019 was issued. An agreement for sale was prepared on 28th May 2019 between the deceased and the vendor. The purchase price remained as agreed between DW1 and PW1. Both plaintiffs led DW1 to their house, accompanied by an advocate, to have the agreement executed by the vendor. The

parties entered the house. PW1 took the agreement and entered into an inner room in which he said his wife was bedridden. After short while he emerged from the room and handed over the agreement and showed them where his wife had thumbprinted on it, and the defendant's advocate stamped on it as a witness. The sum of Kenya Shillings **486 787/=** was paid to the vendor and she acknowledged receipt by thumbprinting on the petty cash voucher. A sum of Kenya Shillings **1000,000/=** was also paid to the vendor and she acknowledged receipt by thumb printing the petty cash voucher too. The sum of Kenya Shillings **500,000/=** was paid by **DW1** on behalf of the defendant and received by someone by the name *Onesmus Kombe*, and he also acknowledged to receipt by way of thumbprint. The plaintiffs availed copies of the passport and **6** pictures of the vendor. Transfer documents were prepared which were taken to the vendor to sign. PW1 took the transfer into his wife's bedroom and return with it duly executed, and the advocate for the buyer stamped and certified all the copies. Subsequently that transfer was presented for registration. The old title deed was surrendered and a new one was issued in the name of the defendant. However, the defendant declined to pay the remaining balance because the second plaintiff (PW1) encroached on the suit property, and that particular dispute is still pending before a tribunal adjudication.

13. On cross-examination, DW1 stated that he is not a director of the defendant and neither does he own shares in the defendant. He

however admitted that the defendant, for whom he had been acting, has not paid anything since the deceased died midway through the transaction. He also so stated that there is an issue of double allocation of the suit land and that the said land had been subdivided. However, he had not brought evidence of the double allocation or of those subdivisions to court. He denied that the defendant had refused to pay. He also denied that defendant had refused to make any payment, and attributed non-payment to the fact that in 2022 the defendant discovered that the vendor died.

14. When re-examined by Mr Olaba, he denied fraud and stated that he was ready to pay the balance.

15. The plaintiffs filed written submissions dated 16th July 2025 and the defendant filed submissions with dated 8th December 2025. I have considered the said submissions in the preparation of this judgment.

16. The plaintiffs' submission is that it is trite that a deceased person cannot contract or transfer property posthumously. It is submitted that the second plaintiff's wife died on 21st October 2018, and the agreement and the transfer are all dated or registered on various dates in 2019; that if the transaction documents purport to bear the thumbprint of the deceased and yet they are dated after the date of the deceased's demise, that is evidence of forgery and fraud; that the defendant had failed to discharge the burden of proof under **Sections 109** and **112** of the Evidence Act to prove that the deceased was alive and that she did indeed personally

execute the said documents; that the defendant's actions amount to intermeddling with the estate of the deceased in contravention of **Section 45** of the Law Of Succession Act and are a nullity.

17. On its part the defendant's submissions took a different trajectory. The defendant pointed out that the title deed purported to be the deceased's which is among the plaintiff's documents is purported to have been issued on 18th December 2018, while the demise of the vendor according to the succession documents is said to have occurred on 21st October 2018. The defendant admitted even in submissions that there was a balance of the purchase price not paid which it was willing to pay.

ANALYSIS AND DETERMINATION

18. In the present case both the claimants and the defendant agree that they were on the wrong in handling the transaction as they did. The plaintiffs admit so expressly while the defendant appears to be attempting to shirk from the responsibility for the mishap. I doubt that even on a preliminary basis I would even suspect the defendant's actions as classifiable under the heading of "*fraud*" intended to be perpetrated against the plaintiffs. The plaintiffs have admitted that they sold the land and received some of the consideration and they are in court simply because the defendant never paid the full consideration. Besides, fraud must be specifically pleaded and proved according to the decision in *Gladys Wanjiru Ngacha v Treresa Chepsaat & 4 others [2013] eKLR*. In the

present case, the plaintiff's evidence has not established fraud but the actions of both parties with regard to land belonging to a deceased person are nevertheless illegal when viewed in the light of the provisions of **Section 45** of the Law of Succession Act. They can not stand scrutiny of this court and must be nullified. The issue is what course the court should take bearing in mind that both parties have evinced a willingness to proceed to the conclusion of the transaction. The plaintiffs willingly participated in the sale of the suit land despite knowledge that it was registered in the deceased's name and can not cry foul now and cite **Section 45** of the Law of Succession Act without sharing the blame. At the end of the day, all they wanted was that the balance of the purchase price be paid by the defendant. They even knew the consideration amount. When the same was not paid, and they did not have any cause of action owing to their illegal actions, they crucified innocent fraud for a scapegoat and managed to slip through the fences of the justice system undetected until after the hearing of this matter when the court realized their true and nefarious role in the scheme. The defendant on the other hand agreed to enter into an agreement with the plaintiffs despite the fact that the alleged vendor was deceased. The defendant, just as the plaintiffs urge, never established by evidence that the deceased was alive as at the time both the agreement and the transfer were prepared and purported to have been executed by her. The defendants never even brought expert evidence to establish that the thumbprint on the documents

they held was the deceased's, and neither did the plaintiffs bring evidence to prove that it was not hers. The evidence of both parties was extremely unsatisfactory.

19. What this court has on its hands is a situation in which the title document that has resulted from the parties agreed transaction is illegal under **Section 45** of the Law of Succession Act; however it also has a situation in which it is agreed by all parties that the suit land exists, and that the plaintiffs now have a grant of letters of administration to the deceased's estate, and in which the defendant not only admits that he owes a balance of the purchase price but also agrees that it is liable to pay the same. There are some unsavoury falsehoods this court has detected from both sides, and both parties are guilty under the law for dealing with the suit property illegally, but it is clear that they know one another and appear not to have any major differences between them save the non-payment of a portion of the consideration which the defendant is ready to settle. The court is thus called upon issue orders that will benefit both parties.

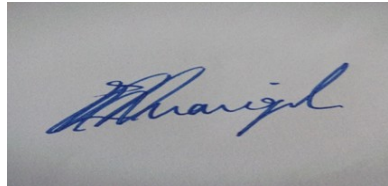
20. An illegal title is an illegal title and nothing can cure it. The title in the defendant's name must be cancelled. However, supplemental orders must be crafted herein in order to balance the rights of the parties.

21. In the final analysis I dismiss the plaintiff's case but taking note of the admissions on the part of the defendant I issue the following final orders:

- a. *The title deed in the name of the defendant is hereby cancelled;*
- b. *The Land Registrar Kilifi shall ensure that the entries recorded in the defendant's name in the land register under the illegal transaction to the suit land are cancelled and that the title reverts back to the name of the deceased Mwenda Nzai Randu;*
- c. *The defendant shall pay and the plaintiffs shall receive acknowledged balance of the purchase price being Kshs 3,383,213/= within 90 days from the date of this judgment;*
- d. *The plaintiffs shall within 7 days of the settlement of the sum of Kshs 3,383,213/= in their favour by the defendant execute and deliver while so executed transfers of the suit land in favour of the defendant and all other necessary completion documents for fresh registration in its favour at the land registry;*
- e. *In default of the terms set out in (c) and (d) herein above on the part of the plaintiffs the plaintiffs shall refund to the defendant the sum of Kshs 1,486,787/= paid to them within 60 days from the date of delivery to them of a formal demand in writing by the defendant;*
- f. *The plaintiffs shall receive and be accountable for the funds received as administrators of the estate of the deceased.*
- g. *Each party shall bear its own costs of the present suit.*

Dated, signed and delivered at Malindi on this 20th Day of April, 2026.

**MWANGI
JUDGE, ELC,**



**NJOROGE,
MALINDI.**