



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 201 OF 2017**

**(FORMERLY NAIROBI ELC NO. 518 OF 2009)**

**CATHERINE NJERI ANGOTE (Suing as the  
administratrix of the Estate of Samuel Angote Ababu).....PLAINTFF**

**VERSUS**

**LUCY WANGARI NGUGI.....1<sup>ST</sup> DEFENDANT**

**JERRY WESTGATE LIMITED.....2<sup>ND</sup> DEFENDANT**

**TITLE BY COUNTER CLAIM**

**LUCY WANAGARI NGUGI**

**GABRIEL KIIRU IRAKI) Suing as the Administrators of the  
Estate of the Late William Ngugi Mwaura).....PLAINTIFFS**

**VERSUS**

**CATHERINE NJERI ANGOTE.....1<sup>ST</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By a Plaint dated 13<sup>th</sup> **October 2009**, the Plaintiff herein brought a suit against the Defendants and sought for the following orders;

- a) A permanent injunction restraining the Defendants, their agents, servants, employees officers and/ or directors from interfering with the suit premises in any manner whatsoever.*
- b) A permanent injunction restraining the Defendants from trespassing and invading the suit premises.*
- c) A mandatory injunction compelling the Defendants to remove the building materials on the suit premises*
- d) A mandatory injunction compelling the Defendants to cover the trenches the Defendants have dug on the suit premises.*
- e) A declaration and order that the Plaintiff is the owner of the suit premises.*
- f) General Damages*
- g) Costs of the suit*
- h) Any other or further orders this Honourable Court may deem fit and just to grant.*

In her statement of claim, the Plaintiff averred that **Samuel Angote Ababu** (deceased), was the registered owner of **L.R No. 4953/2017**. That on or about **12<sup>th</sup> June 1993**, the deceased entered into a sale agreement with one **William Ngugi Mwaura(deceased)** for the sale of **0.8094Ha** being a portion of the above parcel of land. The deceased pursuant to the sale agreement caused the parcel of land known as **L.R No. 4953/2017**, to be subdivided creating three portions and **L.R No. 4953/2413**, the suit land was one of them. However the sale did not materialize and the deceased continued with ownership of the suit property. That Samuel Angote died in the year 2007 and Letters of Administration to the Estate of the deceased were granted on **31<sup>st</sup> January 2008** and confirmed on **8<sup>th</sup> April 2008**, and rectification was done on **26<sup>th</sup> August 2009**. She averred that upon rectification of the confirmation of the grant, she discovered that the 1<sup>st</sup> Defendant fraudulently purported to be the owner of the suit property and was attempting to transfer the suit property to the 2<sup>nd</sup> Defendant.

She particularized fraud by the 1<sup>st</sup> Defendant as; Applying to the **Municipal Council of Thika** for Rates and Rents Clearance Certificate using forged documents, misrepresenting herself as the owner of the suit property to the Municipal Council of Thika and Thika Water Company to secure water in the suit premises;- illegally attempting to execute transfer in favour of the 2<sup>nd</sup> Defendant with no authority.

She further particularized fraud by the 2<sup>nd</sup> Defendant as; executing transfer between itself and the 1<sup>st</sup> Defendant, making payments of stamp duty for the transfer of the suit premises, entering into arrangements between itself and the 1<sup>st</sup> Defendant with the full knowledge that the suit premises did not belong to the 1<sup>st</sup> Defendant and she did not have title to transfer. She further averred that the deceased's title and ownership is threatened as the Defendants have trespassed and invaded the suit premises.

The suit is contested and the Defendants filed an Amended Defence and Amended Counter Claim dated **26<sup>th</sup> April 2011**. In their Amended Defence, the Defendants denied all the allegations made in the Plaint. They further averred that the agreed purchase price for the suit land was **Kshs. 1,400,000/=** out of which a deposit of **Kshs. 800,000/=** was to be paid by the purchaser upon execution and the balance was to be deposited with **Messrs C.K Mwhia & Company Advocates**, on undertaking to release upon registration of a transfer. It was their contention that the late vendor was required to present a Deed plan by **16<sup>th</sup> July 1993**, and execute a transfer immediately upon registration of the subdivision and the party in default was to pay liquidated sum of **20%** of the purchase price. However,

the late Vendor failed to present the Dead Plan in time and hence frustrating the timely registration of the suit property. They averred that thereafter numerous payments were made by the late purchaser either directly to the late vendor or according to his instructions. She particularized further payments as;

*i) 16<sup>th</sup> November 1993, Kshs. 20,000 vide Cheque No. 1369860*

*ii) 11<sup>th</sup> June 1994 Kshs. 20,000 in cash.*

*iii) 30<sup>th</sup> July 1994 Kshs.5,000 in cash*

*iv) 13<sup>th</sup> August 1994 Kshs. 5000 in cash*

*v) 19<sup>th</sup> November 1994 Kshs.50,000 in cash*

*vi) 7<sup>th</sup> December 1994,Kshs. 10,000 in cash*

*vii) 30<sup>th</sup> May 1997 Kshs. 100,000 in cash*

*viii) And on 13<sup>th</sup> November 1998 and 11<sup>th</sup> January 1999 payment of Kshs. 30,000 as per the late vendor's instructions.*

The Defendants further averred that some records of payments to the vendor were lost. It was the 1<sup>st</sup> Defendant's contention that if the sale of the suit premises was rescinded, monies paid to the vendor for the purchase of the suit premises were never refunded to the purchaser or to his Estate. Further that the orders as sought cannot be granted as the Plaintiff seeks to benefit both from the suit premises and the monies that were paid out.

The Defendants further alleged that when the Plaintiff allegedly obtained certificate of rectification of grant, an unregistered interest in the suit premises existed in favour of the Estate of the late purchaser and the 1<sup>st</sup> Defendant has always been in possession of the suit premises since the demise of her husband in **1997** and confirmation of grant in **2001**. The 1<sup>st</sup> Defendant further averred that her intention to transfer the suit premises to the 2<sup>nd</sup> Defendant to which she is the majority share holder has been frustrated by the Plaintiff's failure to transfer the title thereof.

In their Amended Counter claim the Defendants sought for the following orders;

*a) A permanent injunction restraining the 1<sup>st</sup> Defendant (By Amended Counter claim) its servants, agents, and /or assigns or otherwise howsoever from interfering howsoever with the Plaintiffs (By Amended Counterclaim) enjoyment, possession and /or occupation of all that parcel of Land known as Land Reference Number L.R No. 4953/2413 ad further restraining the 1<sup>st</sup> defendant (By Amended Counter claim) from misrepresenting herself to the general public as the owner of the suit property.*

*b) A permanent injunction restraining the 1<sup>st</sup> Defendant (By Amended Counter claim) its servants, agents and / or assigns or otherwise howsoever from selling, and/ or transferring all that parcel of land known as Land reference Number 4953/2413 to*

*third parties.*

*c) A declaration that the Certificate of title dated 23<sup>rd</sup> November 2009 over LR.No.4953/2413 held by the 1<sup>st</sup> Defendant (By Amended Counter Claim is fraudulent and therefore null and void ab initio)*

*d) A declaration that the 1<sup>st</sup> plaintiff (By Amended Counter Claim) is entitled to ownership and possession of all that parcel of land known as L.R.No.4953/213 on her own behalf and on behalf of the Estate of the late William Ngugi Mwaura.*

*e) Specific Performance of the sale agreement dated 12<sup>th</sup> June 1993 entered between the late Samuel Angote Ababu as vendor and the Late William Ngugi Mwaura as purchaser.*

*f) An order to compel the 1st Defendant (By Amended Counter claim) to sign all the necessary documents to facilitate the transfer of the beneficial interest in L.R No.4953/2413 to the 1<sup>st</sup> Plaintiff (By Amended Counter Claim) or IN THE ALTERNATIVE an order directed to the Land registrar to transfer the suit premises to the 1<sup>st</sup> plaintiff (By Amended Counter claim) on behalf of the Estate of the Late William Ngugi Mwaura.*

*g) An order that a proper Application for rectification of the rectified Confirmation of grant dated 26<sup>th</sup> August 2009 be made in the High Court Succession Cause No. 2433 of 2007 (In the matter of the estate of the late Samuel Angote Ababu.*

*h) Costs of this suit and of the Amended Counter Claim together with interest thereon for such period and at such rate as this Honourable Court may deem appropriate.*

*i) Such other or further reliefs as this Honourable Court may deem appropriate in the circumstances.*

In their Amended Counter Claim the Defendants reiterated the contents of the Amended Defence and averred that by the time of the demise of the late **William Ngugi Mwaura's** on **24<sup>th</sup> June 1997**, the suit property had not been transferred to him. Upon his demise, Letters of Administration were issued on **22<sup>nd</sup> November 2000**, and confirmed on **4<sup>th</sup> June 2001**. However the 1<sup>st</sup> Defendant (By Amended Counter claim) misrepresented facts and obtained a rectification of grant and confirmed grant in respect to the suit premises. She further averred that despite the existence of a Consent Order, preserving the suit premises, the 1<sup>st</sup> Defendant (By way of Counter claim), on **9<sup>th</sup> December 2009** registered the suit premises in her name and their attempts to register the consent order were not fruitful.

They particularized fraud by the 1<sup>st</sup> Defendant as; obtaining rectification of grant to include the suit property, by misrepresenting facts with knowledge that the suit property had been sold to the purchaser and in a bid to defeat the unregistered interest in the suit premises claimed by the Estate of the late purchaser, failing to disclose in **Succession Cause No. 2433 of 2007** that an unregistered interest in the suit property existed; failing to facilitate registration of the suit premises in their favour, unlawfully presenting title in the late Vendor's name to obtain title in her favour with full knowledge that there was a Court order issued preserving the suit property.

That the Defendants have always been under a legal duty to facilitate registration of the suit property. However the property, has not been transferred even though she has remained in uninterrupted possession and have been denied the full use and enjoyment of the suit premises.

After various interlocutory Applications, the matter was finally set down for hearing and the Plaintiff called one witness and the Defendants called three witnesses.

#### **PLAINTIFF'S CASE**

**PW1 Catherine Njeri Angote** testified that **Samuel Angote Ababu** was her late husband who died on **23<sup>rd</sup> January 2007**. Upon his death she acquired letters of Administration on **31<sup>st</sup> January 2008**, to which she indicated **LR. No. 76/458 Thindingua** as one of the only assets of the deceased and the grant was confirmed on **8<sup>th</sup> April 2008**. However she left out some properties being **L.R No.Escarpment/Kinale Block 1/1518 and L.R No. 4953/2413 Thika Municipality** as she did not have the ownership documents to the said properties.

That later, she applied for rectification of grant when she received a letter from the Ministry of Lands confirming ownership of **L.R No. 4953/2413 Thika Municipality**, being a subdivision of **L.R No. 4953/2017**, which was duly registered in the name of **Samuel Angote(deceased)**. Further that her husband owned **L.R No. 4953/2017**, which he subdivided into three portions. The 1<sup>st</sup> Portion was sold to **Patrick Ngugi**, the 2<sup>nd</sup> portion sold to **Stephen Waithiru Baiya** and transferred to him and for the 3<sup>rd</sup> portion he entered into a sale agreement with one **William Ngugi Mwaura(deceased)** and she confirmed seeing the said sale Agreement. That the purchase price was **Kshs.1.4 million** and a deposit of **Kshs. 800,000/=** was made with the remaining balance being **Kshs. 600,000/=** The balance was to be deposited with **Mwihia & Mwihia Co. Advocates**, but unfortunately the said **William Mwaura Ngugi** passed on without ever paying the balance. The original grant was rectified and the title to the suit property was included in the grant. She confirmed that the title was to be preserved pending the hearing of the main suit. She produced the Certificate of title which is in her name as exhibit 2. Further that she acquired title to the suit land as the purchaser did not take possession

Further that her husband verbally rescinded the sale agreement when the balance of purchase price was not paid. She denied ever meeting the 1<sup>st</sup> Defendant and that she filed the suit because in **2009**, someone had laid claim to the suit property. That the 1<sup>st</sup> Defendant had attempted to transfer the suit land to the 2<sup>nd</sup> Defendant. That she wrote a letter to the **Thika Municipal Council** clerk inquiring on the land rates and she noted that the Defendant had paid transfer fees of **Kshs. 28,015/=**.

That when she visited the suit property, she found structures, dug trenches and deposit of building material. That she paid land rent and rates

owing to the suit property and the clearance certificates in favour of **Samuel Angote** was issued.

She denied fraudulently registering the suit property in her name or intending to defeat the 1<sup>st</sup> Defendant's title. That Deed Plan on the transfer document was a forgery as the original Deed Plan was in the title and that there are discrepancies in the Deed Plan. She denied that her husband collected the balance of the purchase price of the suit property in instalments and she disputed the Petty cash vouchers attached to the 1<sup>st</sup> Defendant's list of documents. She was ready to refund the **Kshs.800,000/=** paid as deposit together with interest. She stated that though they had tried to settle the matter amicably, the 1<sup>st</sup> Defendant was uncooperative. She urged the Court to declare her the registered owner of the suit property.

On cross examination, she stated that she received the proof of ownership from the Ministry of Lands in **2009** and that the letter from the Ministry confirmed that **Samuel Angote**(deceased) was the duly registered owner of **L.R No. 4953/2413**, which is a portion of **LR No. 4953/2017 and that 4953/2413** had not been given a title after subdivision of **4953/2017**, due to lack of payment of land rent of **Kshs. 22,000/=**. She denied that she was aware that the 1<sup>st</sup> Defendant had obtained Letters of Administration and that she failed to object to the said acquisition. That her husband subdivided the land in **1997**, though she did not recall the surveyor's name or the amount paid for subdivision. Further that the survey was conducted in **2001** and her husband undertook to carry out the subdivision and submit the Deed Plan to the purchaser. That the Sale Agreement had a default clause and was supposed to be completed on **16<sup>th</sup> July 1993**, but could not be completed for some reasons. That she did not know if her husband paid 20% in default and that the sale of the suit property did not materialize as the Vendor, **Samuel Angote** rescinded the sale Agreement. However the purchase price was not returned and the purchaser was not told about the Agreement being rescinded. Her husband however surrendered the Mother title before the subdivided titles came out. Further that although she did not know the value of the suit property, she was willing to refund the purchase price.

On re-examination she stated that the Grant of Letter of Administration was confirmed on **31<sup>st</sup> January 2008**, and rectified on **26<sup>th</sup> August 2009**. She further testified that the surrender document was prepared by **C.K Mwhia Advocate** who represented both parties and her husband informed him when he rescinded the Contract.

#### **DEFENDANT'S CASE**

**DW1 Lucy wangare Ngugi**, adopted her witness statement dated **27<sup>th</sup> May 2013**, and testified that her husband **William Ngugi Mwaura** died in **1997**. However her husband had entered into a sale agreement with the late **Samuel Angote** on **12<sup>th</sup> June 1993**, and the purchase price was **Kshs. 1.4 million**. The amount was partly paid vide a Cheque dated **18<sup>th</sup> June 1993** to the tune of **Kshs.800,000/=**. That the suit property was about **5 acres** situated in Thika Municipality and her late husband purchased the suit property as a whole together with **Patrick Ngugi Karanja** who got **2 acres** and **Harun Waitheru** got **1 acre** and her husband got **2acres**. While the other two obtained their title deeds, her husband had remained with a balance to which **Mr. Angote** used to collect from their shop through various instalments and he would sign petty cash vouchers. She further testified that the late **Mr. Angote** was supposed to present the Deed Plan, but when it was not presented, he asked their advocate to write to her husband indicating the delay. The Deed Plan was finally submitted to **C.K Mwhia Advocate** after the deadline together with a transfer and Certificate of subdivision by the Vendor. However her husband died in **1997**, before effecting the transfer and as the transfer. Though had been signed by the Vendor, she did not have capacity to sign the documents, since she had not taken out Letters of Administration. However, when she obtained the Letters of Administration, the documents were missing from the Lands officer. That she obtained letters of Administration in the year **2000** but she had given consent for transfer to the other purchasers as they were using the same Deed Plan and mother title which had been surrendered for subdivision

That once she obtained the confirmed grant, she followed up on the issue of transfer, and the documents were taken to one **Esther Kamau**, who was in possession of the other documents. Though she followed up on the issue of transfer, the property was never registered in her name. Further, that when the sale agreement was signed in **1993**, the purchaser took possession of the property and started cultivating and put up a temporary house and car wash shed and she has been in occupation since then. When the Vendor **Mr. Angote** passed on in the year **2007**, he was aware of the developments on the suit property. That she had also obtained Letters of Administration and **Mr. Angote** and the Plaintiff did not object. She further testified that she has been paying land rent and rates since then. That she met the Plaintiff in **2015** to try and settle the matter amicably, they did not agree since she was not agreeable to the Plaintiff's terms. She urged the court to cancel the Plaintiff's title and that the same be registered in her name. She produced the bundle of documents as exhibit 1 and 2<sup>nd</sup> bundle of documents as exhibit 2.

On cross examination, she stated that the balance of purchase price was not to be paid to **C.K mwhia Advocates** but the late **Mr. Angote** collected the balance from their shop and that was by their mutual understanding and trust. That the balance of the purchase price was **Kshs. 600,0000/=** which was paid in full. However, she produced receipts for **Kshs.240,000/=** as the others had gotten lost. That though the agreement did not provide for piecemeal payments and that the sale agreement was not varied in writing, the piecemeal payments were done through mutual understanding. Further that she had a copy of the Deed Plan and the transfer, but it was never signed by her husband but it was signed by **Mr. Angote**. That the other subdivisions were registered and purchasers issued with Deed Plans but she was not aware why her husband was not issued with a Deed Plan. She acknowledged having attempted to transfer the land to **Jerry Westgate Company Limited** where she is a Director to which she paid stamp duty as the property belonged to her. Though she attempted to transfer the suit property, the transaction did not go through as she did not have a title deed. She further testified that she registered a restriction in **October 2009** when the suit was filed. She acknowledged that she had building materials on the suit property and there were other structures on the suit land. She however denied violating the Court Order for preservation of the suit property.

On re-examination she confirmed that the Sale Agreement was binding on the Vendor's beneficiaries and she was ordered to remain on the suit property.

**DW2 Esther Wangari Kamau** currently working at the Ministry of Agriculture but in **April 1998** was working in the Ministry of Lands as a secretary in the office of the Deputy Chief Registrar. She acknowledged knowing the 1<sup>st</sup> Defendant and seeing a Notice that confirmed she received a transfer document and a deed plan for the suit property. However she could not recall receiving the said document. She confirmed that **Lucy Wangari** used to go to the offices to follow up on her properties but denied receiving the said documents from her nor

signing the document. She further denied that the signature on the document was hers.

On re-examination, she testified that she could not recall if she wrote the document and was also not sure whether that was her handwriting or not. It was her testimony that she used to receive documents for the Deputy Registrar in her official capacity and the documents were first booked but she could not recall the procedure. It was her testimony that the letter ought to have been in an official letterhead and since that the documents are not in a letterhead their authenticity is in doubt.

**DW3 Charles Kipkurui Ngetich**, the Principal Land Registrar stated that he investigated the matter in relation to the suit property being a subdivision of **LR.No.4953/2017** and he retrieved three title deeds. That the original mother title had been surrendered and subdivided into three parcels being **L.R 4953/2411, 4953/2412,4953/2413**. He confirmed that all the titles are registered at the Land registry. He further testified that from the Land Registry's copy, he found a copy of the surrender of the Mother title being entry No, 2 of the Mother title. It was his testimony that the surrender was registered on **20<sup>th</sup> September 2001**. He further testified that after registration of the surrender, all the resultant subdivisions were to be registered and Certificate of leases were to be issued. However the only anomaly was that **I.R No. 120990** was not registered as it was registered as if it was a new grant. Further that the standard practice is that a subdivided land is not registered as a new grant. That a letter of offer was issued once a surrender was done. That the mother title had special conditions and the subsequent subdivisions are supposed to be issued with new titles forthwith. That in the instant case, two titles were issued after the surrender of the mother title and subdivision. However the 3<sup>rd</sup> title was registered much later as a new grant as there was a letter of allotment by the Ministry. He however failed to locate the letter of allotment as it was missing from the record.

It was his testimony that after subdivision, new certificates of titles are issued and not new allotment letters. He however testified that title **No. 4953/2413**, is a valid title though it was done **irregularly** and it is only the High Court that has power to cancel a new title. He confirmed that the new title was issued on **9<sup>th</sup> December 2009**, in favour of **Catherine Njeri Angote Ababu** as the Administrator of the **Estate of Samuel Angote** and that he had signed the surrender document.

On cross examination, he testified that the titles are dated **18<sup>th</sup> January** though it is no clear which year. Further that the title is in favour of **Samuel Angote** in pursuant to a surrender of the mother title. Further that the second title is **4953/2413**, which is the suit property was registered on **9<sup>th</sup> December 2009** and what was to be issued was certificate of title and not new grant. It was his testimony that the three titles are all registered as new grant and the anomaly is by the Land Administrator and not by the parties as the parties had nothing to do with the registration. That the procedural impropriety does not make the title invalid. Further that all the three titles are **void** though they have not been recalled and he did not remember ever recalling any titles for fresh issuance and that he had not flagged the titles to be recalled.

When the hearing of the matter was concluded, the Court directed the parties to file written submissions and in compliance with the said Order, the Plaintiff through the **Law Firm of Mbugua Mureithi & Company Advocates** filed her submissions on **11<sup>th</sup> December 2018**.

The Defendants on the other hand through the **Law Firm of Nyachoti & Company Advocates** filed their submissions on the **18<sup>th</sup> of December 2018** and relied on various provisions of the law and decided cases.

The Court has now carefully read and considered the pleadings herein, the evidence on record, the exhibits produced thereto and the rival written submissions and renders itself as follows;

There is no doubt that on **12<sup>th</sup> June 1993**, the late **Samuel Angote Ababu** as the registered owner of **LR.No.4953/2017**, entered into a Sale Agreement with the late **William Ngugi Mwaura** for purchase of **0.8094 Hectares** from the above stated parcel of land. The purchase price was agreed at **Kshs.1,400,000/=** and it is evident that the purchaser paid **Kshs.800,000/=** as part payment of the purchase price vide **Cheque No.1366985**. The balance was **kshs.600,000/=** which was payable upon transfer.

It is evident from the sale agreement that the completion was supposed to be on **16<sup>th</sup> July 1993**. However the same was not achieved. Further it is not in doubt that the purchaser **William Ngugi Mwaura** died in **1997**, before the suit property was transferred to him. The 1<sup>st</sup> Defendant is administrator of his estate. She took out Letters of Administration in the year **2000** and the Grant was confirmed in the year **2001**.

Further it is evident that the Vendor **Samual Angote Ababu** died in the year **2007** and the Plaintiff took out Letters of Administration in 2008. The Grant was confirmed in the year **January 2008** and later rectified in the year **2009** to include the suit property.

It is also evident that the original parcel of land was subdivided into three portions being **LR.No.4953/2411, 4953/2412 and 4953/2413**. The first two parcels were duly transferred to other purchasers and there is no dispute. However, **LR.No.4953/2413**, herein after referred to as the suit property was the one supposed to have been transferred to the purchaser, the late **William Ngugi Mwaura**. However the same was not transferred. The Plaintiff has alleged that the said **William Ngugi Mwaura** did not pay the balance of the purchase price and thus her husband rescinded the sale agreement. However the 1<sup>st</sup> Defendant has contended that her late husband paid the full purchase price and even took possession of the suit property during the lifetime of the late **Samuel Angote Ababu**. However the late **Samuel Angote** failed to transfer the suit property to the 1<sup>st</sup> Defendant after the demise of her husband. She alleged that she has been in possession of the suit property all along.

The Plaintiff acquired registration of the suit property after the Grant was rectified and thereafter filed the present suit. The above are the undisputed facts. The court finds the issue for determination are as follows:-

- 1. Whether there was a valid contract that is then enforceable**
- 2. Whether the payment of the purchase price was completed**

3. *Whether there was fraud by either party*

4. *Whether the Court can order for specific performance*

5. *Whether the Parties are entitled to the orders as sought.*

**1. Whether there was a valid Sale Agreement**

It is not in doubt that on the **12<sup>th</sup> of June 1993**, parties being the Plaintiff's husband and the 1<sup>st</sup> Defendant's husband (both deceased) entered into a Sale agreement. The parties have produced a Sale agreement in Court. The said agreement is in writing and is signed by the parties. It thus met the requirements of **Section 3(3) of Contract Act** which states as follows:-

**3 (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—**

**(a) the contract upon which the suit is founded—**

**(i) is in writing;**

**(ii) is signed by all the parties thereto; and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:**

**Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.**

Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement by the parties. See the case of **Nelson Kivuvani... Vs... Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, where the Court held that:-

**“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.**

All the above ingredients are met in the instant sale agreement entered between the Plaintiff's husband and the 1<sup>st</sup> Defendant's husband and therefore the sale agreement between the two was valid. This Court therefore holds and finds that there is a valid Sale agreement entered between the late **Samuel Angote Ababu** and the late **William Ngugi Mwaura**.

**2. Whether the payment of the purchase price was completed**

The Court has already held and found that there is a valid sale agreement capable of being enforced. It is also not in doubt that the purchase price for the suit property was set for **Kshs.1.4 million** as per the sale agreement. It is also not in doubt that the purchaser paid a deposit of **Kshs.800, 000/=** and it was a term of the agreement that parties would complete the agreement by the **16<sup>th</sup> of July 1993**. This would therefore mean that the purchaser would complete payment of the purchase price while the Vendor would avail all the necessary completion documents. Further it was agreed that the purchaser would deposit the balance of the purchase price with **C.K Mwihiya Advocates** who were the Advocates for the parties. The Plaintiff has averred that the purchaser did not complete the payment of the purchase price while on the other hand the 1<sup>st</sup> Defendant testified that her husband completed payment on various dates after the Vendor agreed to accept payments in instalments to which he could collect the same from their shops on various dates.

It is trite that whoever alleges must prove. The Plaintiff has alleged that the late **William Ngugi Mwaura** did not pay the balance of the purchase price. However, the 1<sup>st</sup> Defendant has alleged that the purchaser paid the full balance of the purchase price through various instalments. Though Plaintiffs alleged that the balance of **Kshs.600,000/=** was never paid. She did not produce any evidence of demand of payment of the said amount. She also alleged that due to non-payment of the balance of the purchase price, the Vendor rescinded the sale agreement. It is evident that by **16<sup>th</sup> July 1993**, the Vendor had not completed subdivision of the original property. It is clear from the sale agreement that the balance of the purchase price was to be paid upon subdivision and transfer of the suit property. Time was also **‘not of essence’** in the said sale agreement. The 1<sup>st</sup> Defendant on her part has averred that the purchaser did pay the balance of the purchase price. She produced various receipts which showed monies were paid to **Samuel Angote** over the plot in Thika. She said that due to passage of time, some of the receipts have gotten lost. However the Plaintiff alleged that the said receipts were never signed by her late husband. The Plaintiff is the one who has alleged and she ought to have proved by calling evidence to disapprove that the receipts produced by the 1<sup>st</sup> defendant were never signed by the Vendor (late **Samuel Angote**). **Section 107** of the **Evidence Act** is very clear and it provides:-

**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

The 1<sup>st</sup> defendant produced a payment schedule which showed various amounts paid via petty cash vouchers to the late **Samuel Angote**.

The said schedule of payments as provided by the 1<sup>st</sup> Defendant is as follows:-

- i. On 16<sup>th</sup> November 1993, kshs.20,000/= vide cheque no.1369860.
- ii. On 11<sup>th</sup> June 1994, kshs.20,000= in cash
- iii. On 30<sup>th</sup> July 1994 kshs.5000/= in cash
- iv. On 13<sup>th</sup> august 1996, kshs.5000/= in cash
- v. On 19<sup>th</sup> November 1994, kshs.50,000/= in cash
- vi. On 7<sup>th</sup> December 1994, kshs.10,000/= in cash
- vii. On 30<sup>th</sup> May 1997, kshs.100,000/= in cash
- viii. On 13<sup>th</sup> November 1998 and 11<sup>th</sup> January 1999 payment of kshs 30,000/= as per the late vendors instructions.

Though the above payment schedule comes to a total of about 240,000/=, the 1<sup>st</sup> defendant explained that some of the receipts were lost and that since the payments were done out of mutual understanding, the late purchaser was not keen to keep all the petty cash vouchers as signed by the late **Sameul Angote**. This court would have no reasons to doubt that the balance of the purchase price was paid. The court finds so because there is no evidence of any demand made by the late **Samuel Angote** for payment of the balance of the purchase price. Further there is no evidence that the sale agreement was ever rescinded because of non-payment of the purchase price. It is also evident that in the year 1998, the late **Samuel Angote** signed for the surrender of the mother title to the Ministry of Lands to facilitate the subdivisions of the original parcel of land. If he had not received the balance of the purchase price, then there would have been evidence of demand of the same from the purchasers. Though the purchaser **William Ngugi Mwaura** died in 1997, it is evident that the 1<sup>st</sup> Defendant took out Letters of Administrating in the year 2000 and Grant was confirmed in 2001 during the lifetime of the late **Samuel Angote**. If the said balance had not been paid, then he would have objected to the said confirmation of Grant in favour of the 1<sup>st</sup> Defendant.

After a careful analysis of the available evidence, the court believe the 1<sup>st</sup> Defendant evidence that the late **William Ngugi Mwaura** paid the balance of the purchase price through various instalments which amount of money was collected by the late **Samuel Angote Ababu** and he signed various petty cash vouchers and given the length of time from 1993 to 2009 when the suit was filed, then some of these petty cash vouchers had been misplaced as alleged by the 1<sup>st</sup> Defendant.

### iii. Whether there was fraud by either of the party herein?

It is evident that the plaintiff alleged that the 1<sup>st</sup> Defendant had fraudulently attempted to transfer the suit property to the 2<sup>nd</sup> Defendant while knowing very well she did not have a good title. However on her part, the 1<sup>st</sup> Defendant has averred that the Plaintiff fraudulently obtained registration of the suit property in her name while knowing very well that the 1<sup>st</sup> Defendant had unregistered interest over the suit property. Further that the said registration was obtained during the existence of a court order directing that the suit property should be preserved.

Fraud has been defined by the **Blacks Law Dictionary** as follows:-

*“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”*

Further on Page 731 is also defined as:-

*“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”*

It is also evident that allegations of fraud are serious and the said allegations must be specifically pleaded.

In her statement of claim in paragraph 11, the Plaintiff particularized fraudulent activities that were allegedly committed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff alleged that the 1<sup>st</sup> Defendant applied for clearance certificates from Municipal Council using forged documents. The 1<sup>st</sup> Defendant averred that she applied for the said clearance certificates and also sought for installation of water because after payment of the full purchase price, the purchaser and later herself took possession of the suit property and she has been utilizing the same since then.

The Plaintiff herein alleged existence of fraud and she ought to have called evidence to prove the said allegations of fraud. As the court observed earlier, the late **Sameul Angote** died in 2007 and there was no evidence that he had ever asked the 1<sup>st</sup> Defendant to stop utilizing the suit property. Further the Plaintiff confirmed that land rent and rates had been paid for all the previous years before 2009. The 1<sup>st</sup> Defendant confirmed that she paid the said rates because her late husband had purchased the suit property and had paid all the purchase price. The only thing that had remained was formal transfer of the said property to her. There was no evidence adduced by the Plaintiff that her late husband had complained about payment of land rent and rates by another person over the suit property. The Court finds that the 1<sup>st</sup> Defendant paid the land rent and rates because her late husband purchased the suit property and she did not engage in any fraudulent

activities at all. The 1<sup>st</sup> Defendant explained why she was trying to transfer the suit property to the 2<sup>nd</sup> Defendant wherein she is a majority shareholder. The court finds that there is no evidence of fraud on the part of the 1<sup>st</sup> Defendant.

On her part, the 1<sup>st</sup> Defendant had particularized fraud and misrepresentation by the Plaintiff herein. It is evident that this suit was filed after the demise of the late **Samuel Angote Ababu**. There is no evidence that during the lifetime of **Samuel Angote**, any dispute arose between him and the 1<sup>st</sup> Defendant. The court has found that the purchaser paid the full purchase price. With the payment of the full purchase price, the purchaser acquired unregistered interest over the suit property. It is clear that the 1<sup>st</sup> Defendant **Lucy Wangari** obtained a confirmed grant in **2001**, during the lifetime of **Samuel Angote Ababu** and there was no objection raised by the said **Samuel Angote Ababu**. Further it is evident that after the demise of **Samuel Angote**, the Plaintiff took letters of administration and grant of the said estate was confirmed in **2008**. However in **2009**, the Plaintiff sought to rectify the grant and included the suit property. The Plaintiff did so without informing the 1<sup>st</sup> defendant. Her action was aimed at defeating the 1<sup>st</sup> Defendant unregistered interest. Further she obtained the certificate of title over the suit property on **9<sup>th</sup> December 2009**, even after the court had issued an order of preservation of the suit property. Therefore the certificate of title issued to the Plaintiff was obtained through misrepresentation and her action of obtaining rectification of grant and including the suit property which she knew very well had been purchased by the late **William Ngugi Mwaura** amounted to fraud. **Section 2** of the **Registration of Titles Act Cap 281 Laws of Kenya** defines fraud as follows:-

***“fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration;***

It is therefore evident from the above provision of law that the actions of the plaintiff herein which culminated in her obtaining the certificate of title on **9<sup>th</sup> December 2009** even after the court had issued preservation Order amounted to fraud and misrepresentation. The Plaintiff’s action is fraudulent because she knew very well that the court had issued an **Order for preservation** of the suit property but she went ahead and obtained a Certificate of title as if there was no bar to the said registration. She also misrepresented facts to court when she presented a letter from the Ministry of Lands which only gave the history of subdivision of **LR.4953/2017** and confirmed that one of the resultant subdivision of the above land being **LR.No.4953/2413**, had not been registered. The said letter was not explicit that **LR.No.4953/2413** belonged to the late **Samuel Angote Ababu**. The Plaintiff used the said letter to have the Grant rectified and later obtained registration of the suit property in her name. The registration of the suit property in her name while this suit was on-going and with existence of **Preservation Order**, went against the doctrine of **Lis pendens**. See the case of **Rose Wakanyi Karanja & 3 Others v Geoffrey Chege Kirundi & Another [2016] eKLR**, where the Court of Appeal held that:-

***The doctrine of lis pendens rests upon the foundation that it would plainly be impossible that any action or suit could be brought to a successful conclusion if alienations pendent lite were permitted to prevail.***

In **Bellamy v Sabince IDEG & J 566** it was held:

***“The doctrine of lis pendens intends to prevent not only the defendant from transferring the suit property when litigation is pending but it is equally binding on those who derive their title through the defendant, whether they had or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party ...”***

Further in the case of **Koinange Investment & Development Ltd...Vs....Nairobi City Council & 3 Others (2009)eKLR**, it was held that:-

***“The sale by auction that followed thereafter was in contravention of the court order. Accordingly, it follows that and so I hold that the sale of the suit property by auction on the 17<sup>th</sup> October 2006 was unlawful, null and void and of no effect whatsoever”.***

**iv. Whether the Court can grant an Order of specific performance.**

Granting of an order of specific performance is discretionary. However the court must be satisfied that there is a valid and enforceable contract that is in existence. See the case of **Reliable Electrical Engineers Ltd....Vs....Mantrac Kenya Limited (2006) eKLR**, where the Court stated:-

***“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 mistake or illegality, which makes the contract invalid or unenforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”***

The Court has already found that there exist a valid sale agreement and that the purchaser did pay the full purchase price. The 1<sup>st</sup> Defendant explained that the transfer could not be effected because her husband died in the year **1997** and by **1998** when the transfer was signed and Surrender of the mother title presented to the Ministry of Lands, she could not sign the same as she had not obtained Letters of Administration. Further that when she obtained the same, the necessary documents were missing at the Ministry of Lands. Therefore it is evident that the late purchaser or 1<sup>st</sup> Defendant had performed all her obligations under the sale agreement. See the case of **Sisto Wambugu vs Kamau Njuguna (1983)eKLR**, where it was held:-

***“In my judgment the Respondent cannot come to the court and obtain an Order of the transfer of the land, as he sought in his***

**Counterclaim, which is in effect an Order of Specific Performance of the agreement, unless he had performed his part of the bargain or can show that he was at all times ready and willing to do so”.**

Though the plaintiff alleged that the vendor had rescinded the sale agreement, the court found that there was no such evidence of rescission and this court finds and holds that the contract herein was never rescinded. See the case of **Sisto Wambugu vs Kamau Njuguna (supra)**:-

**“I have been unable to get the case of Roberts v Wyatt (1810) 2 Taunt 268 cited at 9 Halsbury’s Laws of England (4<sup>th</sup> Edn) P 366, para 531 F2 but the relevant statement says that Contracts for the sale of land commonly give the Vendor the right to rescind the sale if the purchaser does not pay on the appointed day. The law is that this right can only be exercised where time is of the essence, or if it is not, after the party who is not at fault has given reasonable notice to the defaulting party making time of the essence”.**

Further in the case of **Margaret Wangechi Wachira vs. Mary Wanjiru Gitau & 2 others (2015) eKLR**,

**“As rescission has the effect of terminating the entire contract and restoring the parties to the contract to their pre-contractual positions, it has to be done in accordance with the law, and agreement of the parties where it has been provided for”.**

Having found that the late purchaser had performed his obligations under the sale agreement and having found that the sale agreement was not rescinded and that the 1<sup>st</sup> Defendant is in possession, then the court finds that it is fair and just to issue an order of specific performance. Further by presenting the documents to the Ministry of Lands in **1998** and having the original land being subdivided into three portions, the intention of the late vendor was to have the suit property transferred to the late purchaser and/or his assigns as per the sale agreement and the 1<sup>st</sup> defendant is such assign. Consequently the court orders that the sale agreement dated **12<sup>th</sup> June 1993** between the late **Sameul Angote Ababu** and the late **William Ngugi Mwaaura** should be specifically performed.

**v. Whethe the parties are entitled to the orders sought?**

The plaintiff has sought from various orders among them an order of permanent injunction restraining the defendants from trespassing on the suit property. A mandatory injunction to compel the 1st Defendant to remove building materials on the suit property and a declaration that the plaintiff is the owner of the suit property.

However the court has found that the 1<sup>st</sup> Defendant’s late husband had fully paid for the purchase of the suit property. Further the court has found that the plaintiff obtained the certificate of title through **fraud** or **misrepresentation**. She also acquired it during the pendency of a lawful court order of preservation of the suit property. She acquired the certificate of title in an attempt to steal a march against the 1<sup>st</sup> - 2<sup>nd</sup> defendants and defeat the 1<sup>st</sup> defendant unregistered interest.

Though the plaintiff has a certificate of title issued on **9<sup>th</sup> December 2009**, the same can be challenged as provided by **Section 23(1) of Registration of Titles Act** (now repealed) which states;

**(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.**

Further the Land Registrar testified that the plaintiffs title was obtained irregularly since she was issued with a new Grant instead of a certificate of title. **Section 26(1)(b)** of the **Land Registration Act** provides that a certificate of title that is issued unprocedurally or illegally can be challenged.

**Section 26(1)(a)&(b)** of the **Land Registration Act 2012**, states:-

**“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-**

**a. On the ground of fraud or misrepresentation to which the person is proved to be a party: or**

**b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

It is therefore not enough to dangle a certificate of title because the root of such title must be traceable and the said title must be acquire legally. See the case of **Munyuu Maina vs. Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, where the Court of Appeal held that:-

**“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”**

It is evident that the plaintiff acquired her certificate of title through misrepresentation and the same was irregularly issued. Therefore the court finds that she is not entitled to the prayers sought in her plaint.

However the court finds that the 1<sup>st</sup> Defendant is entitled to her prayers of specific performance and further she is also entitled to ownership and possession of the suit property being the legal representative of the estate of late husband. Consequently, the court finds that the 1<sup>st</sup> Defendant is entitled to the prayers sought in her Counter claim.

Since the certificate of tile is in the name of the plaintiff herein **Catherine Njeri Angote** and it was acquired through fraud, misrepresentation and irregularly, then the court finds that as provided by **Section 80(1)** of the **Land Registration Act**, then the Land Register should be rectified accordingly by canceling the certificate of title issued to the Plaintiff herein and the same should be registered in favor of the 1<sup>st</sup> Defendant herein.

**iv. who should bear costs of the suit?**

As provided by Section 27 of the Civil Procedure Act, costs are normally awarded at the discretion of the court. However, costs normally follow the event and is always awarded to the successful litigant. The Defendants are the successful litigants herein. Consequently the court awards the Defendants in the main, and who are the Plaintiffs in the Counter-claim costs of the main suit and the Counter claim herein.

The upshot of the foregoing is that the Plaintiff's claims in the main suit are found not merited and are dismissed entirely with costs to the defendants. However the Plaintiffs claims in the Counter-claim are found to be merited and are allowed entirely in terms of prayers no.(a), (b), (c), (d), (e), (f), (g) and (h) of the said Amended Counter claim.

It is so ordered.

**Dated, Signed and Delivered at Thika this 15<sup>th</sup> day of November 2019**

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Omollo holding brief for Olewe for the Plaintiff

Mr. Kinuthia holding brief for Mr. Nyachoti for 1<sup>st</sup> Defendant

No appearance for 2<sup>nd</sup> defendant

By counter claim

Mr. Kinuthia holding brief for Mr. Nyafhoti for ) 1<sup>st</sup> Plaintiff)

) 2<sup>nd</sup> Plaintiff

Mr. Omollo holding brief for Olewe for the 1<sup>st</sup> Defendant

No appearance for 2<sup>nd</sup> Defendant

Jackline - Court Assistant.

**L. GACHERU**

**JUDGE**

**15/11/2019**