



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 762 OF 2000

PENINA MURUGI NJENGA

JAMES KIARIE NJENGA (Both suing as the Legal Representatives

of the Estate of Henry Kiarie-Deceased).....PLAINTIFFS

VERSUS

SAMUEL MUIRURI GITO (The Administrator of the

Estate of EDITH WAITHIRA MUIRURI.....1ST DEFENDANT

THE NAIROBI CITY

COUNTY GOVERNMENT.....2ND DEFENDANT

JUDGMENT

BACKGROUND

1. This suit was instituted by the late Henry Njenga Kiarie on 17/5/2000 through a plaint dated 15/5/2000. The plaint was subsequently amended in 2006. A further amended plaint was filed on 21/2/2017. Upon the death of Henry Njenga Kiarie, the current plaintiffs, Penina Murugi Njenga and James Kiarie Njenga, were brought on board as the legal personal representatives of the late Henry Njenga Kiarie (the deceased).

2. The case of the deceased is that in 1978 he was allotted Plot Number B40 Umoja Sector III by the City Council of Nairobi (**the suit property**). He paid all the requisite monies and he was given possession of the Plot. In September 1999, the 1st defendant wrongfully entered the suit property and commenced construction on it. Aggrieved, he brought this suit against the defendants seeking the following verbatim orders:

1) Declaration that the plaintiffs are the lawful owners of the premises.

2) Vacant possession and delivery of the said premises and an injunction to restrain the defendants by themselves, servants and or agents or otherwise from carrying out any construction works, entering, transferring or interfering in any manner or howsoever with the plaintiff's ownership of the suit premises.

3) Damages and or mesne profits at Kshs 10,000 per month from 2nd February, 2000 until delivery of possession.

4) Any other relief the honourable court deems just and fit to grant

3. Edith Waithira Muiruri was named as the 1st defendant but died while this suit was still pending. Consequently, her husband, Samuel Muiruri Gito, was brought on board as her legal representative. The 1st defendant's response to the plaintiff's claim is contained in the further amended defence and counterclaim dated 30/5/2017. The case of the 1st defendant is that the late Edith Waithira Muiruri bought the suit property from one Henry Njenga Chege in 1997 at Kshs 300,000 and she paid the purchase price to the said Henry Njenga Chege. In pursuance of the said agreement, she entered the suit property and commenced construction. It is contended that at the time this suit was instituted, Edith Waithira Muiruri had incurred Kshs 1,079,950 as construction costs. Construction stopped at the wall plate level. It is further contended that the late Edith Waithira Muiruri is the legitimate owner of the suit property. By way of counter-claim, the 1st defendant seeks the following orders against the two defendants:

i. A declaration that the 1st defendant is the lawful registered assignee of the suit property, Umoja Innercore Plot No. B 40

Section 3.

ii. **In the alternative to 1 above, an order that the 2nd defendant pays to the 1st defendant Kshs. 1,379,950/- being the purchase price and costs incurred developing the suit property from 21st February 1997.**

iii. **Interest on (i), (ii) and (iv) at court rates from 21st February 1997 until payment in full.**

iv. **Costs of the suit.**

4. Further, the 1st defendant issued a notice of indemnity against the 2nd defendant. The 2nd defendant filed an amended defence dated 14/12/2007 in which it denied the plaintiff's claim in its entirety.

Plaintiff's Evidence

5. Hearing commenced on 12/3/2018. James Kiarie Njenga testified as PW1. He adopted his witness statement dated 10/10/2011. In summary, his testimony was that he was the son and legal representative of the late James Njenga Kiarie (the deceased). The deceased was allotted the suit property by the 2nd defendant vide a letter dated 31/8/1978 at a purchase price of Kshs 29,920 under the 2nd defendant's tenant purchase scheme. The 2nd defendant and the deceased subsequently executed a tenant purchase agreement. The deceased paid the required deposit and further fully paid the agreed instalments. The deceased was subsequently issued with a beacon certificate. On 3/7/1997, the 2nd defendant wrote to the deceased confirming that all the amounts due to the 2nd defendant under the tenant purchase agreement had been paid and all that remained was for the deceased to have his title processed.

6. PW1 added that subsequently, the deceased discovered that the 1st defendant had moved into the suit property, removed the deceased's fence, and excavated the ground. Upon investigation, the deceased discovered that the 1st defendant held a purported assignment signed by herself on account of a purported power of attorney donated to her by one Henry Njenga Chege who had purported to sell to her the suit property. He added that the 1st defendant's defence of *bonafide* purchaser for value could not stand because the 1st defendant was aware of the fraud, having been a witness in **Makadara CMCC Number 9536/1997; Republic R V John Ndungu Kamau**, in which the accused had been charged with the offence of obtaining money by false pretence in relation to the suit property. The accused in the said case was convicted. He urged the court to grant the prayers sought in the plaint.

7. PW1 produced eleven exhibits, among them: (i) Letter of Allotment dated 31/8/1975; (ii) Tenant Purchase Agreement between the deceased and the City Council of Nairobi; (iii) Letter dated 12/7/1990 from the City Council of Nairobi; (iv) Clearance Certificate from the City Council of Nairobi; (v) Beacon Certificate from the City Council of Nairobi dated 23/10/1996; (vi) Letter dated 5/7/1997 from Ms Musyoka Annan & Company Advocate; (vii) Letter dated 3/7/1997 from the City Council of Nairobi; (viii) Proceedings relating to Makadara CMCC No 9536/1997; and (ix) Receipt from the City Council of Nairobi. He urged the court to grant the prayers sought in the plaint.

1st Defendant's Evidence

8. The 1st defendant testified as DW1. In summary, his testimony was that he was the widower of the late Edith Waithira Muiruri who died in October 2014 in the United States of America. According to the records held by the 2nd defendant, Edith Waithira Muiruri is the proprietor of the suit property. She bought the suit property from Henry Njenga Chege in February 1997 at Kshs 300,000 through a sale agreement dated 21/2/1997. Through a memo dated 28/2/1997, the Accountant of the 2nd defendant informed the Chief Counsel of the 2nd defendant that Henry Njenga had paid the cost of the plot in full. Henry Njenga Chege executed a power of attorney donating his power to her. Using the donated power of attorney, his late wife executed an assignment of lease in her favour. His late wife entered the suit property on 21/2/1997. It was then that the deceased plaintiff filed Milimani CMCC No 1851 of 2000 which he subsequently withdrew and filed the present suit. Lastly, he testified that on 16/11/2004, the suit property was valued at Kshs 1,900,000. A subsequent valuation report dated 2/7/2011 assessed the value of the suit property at Kshs 2,550,000. The latest valuation report by M/s Tuliflocks Limited had assessed the value of the suit property at Kshs 7,00,000.

9. DW1 produced the following eleven documents: (i) Copy of Grant relating to the Estate of Edith Waithira Muiruri; (ii) Copy of Sale Agreement dated 21/2/1997; (iii) copy of Receipt dated 21/2/1997 for Kshs 5,00 issued by Kanyi Koge & Co Advocates; (iv) Undated letter from Henry Njenga Chege to the Director of Housing, City Council of Nairobi; (v) Further agreement dated 26/2/1997 between Edith Waithira Muiruri and Henry Njenga Chege; (vi) Receipt dated 28/2/1997 for Kshs 6,100; (vii) Copy of Memo dated 28/2/1997 bearing the name H Njenga; (viii) Copy of undated application for registration of power of attorney; (ix) copy of an Assignment dated 22/2/1999; (x) Copies of Receipts; and (xi) copy of valuation report by M/s Tuli flocks Limited.

2nd Defendant's Evidence

10. The 2nd defendant called Geoffrey Cheruiyot as its only witness. He testified as DW2. His testimony was that he worked in the County Government of Nairobi as the County Surveyor. His work entailed carrying out survey works within the County. He was familiar with the facts of this case. He produced the 11 documents in the bundle filed by the 2nd defendant, namely: (i) Letter of Allocation dated 31st August 1978 from City Council of Nairobi; (ii) Tenant Purchase Agreement dated 18th March 1982 between the City Council of Nairobi and Henry Njenga; (iii) Letter dated 12th July 1990 from Nairobi City Commission; (iv) Clearance Certificate from Nairobi City Commission to Henry Njenga Kiarie; (v) Beacon Certificate to Henry Njenga Kiarie dated 23rd October 1996; (vi) Letter dated 2nd July from Musyoka – Annan & Co. Advocates to Henry Njenga Kiarie; (vii) Letter from Nairobi City Commission to Henry Njenga Kiarie (viii) Charge Sheet and Proceedings in Criminal case No 9536 of 1997; (ix) Receipt dated 13th May 1999 from City Council of Nairobi; (x) Receipt dated 4th June 1999 from City Council of Nairobi; and (xi) Receipt dated 3rd July 1997 from Musyoka-Annan & Co. Advocates.

11. DW2 further testified that according to the records held by the 2nd defendant, Henry Njenga Kiarie was allocated the suit property on

31/8/1978 under the 2nd defendant's tenant purchase scheme and he signed a lease agreement with the City Council of Nairobi on 18/3/1982 after paying the requisite deposit. He finished paying the principal sum in 1996 after which he was issued with a clearance certificate. He further testified that there was no allotment letter issued to Henry Njenga Chege. There was no lease agreement between the Council and Henry Njenga Chege. Thirdly, there was no evidence of any payment by Henry Njenga Chege to show that the Council sold the suit property to Henry Njenga Chege

12. DW2 added that the 2nd defendant had observed that the clearance certificate exhibited by the 1st defendant did not bear Mr Chege's full name and did not originate from the Housing Department of the Council. Further, the Memo at page 8 of the 1st defendant's bundle bore the stamp of the City Commission yet in 1997 there was no City Commission. DW2 added that the sale agreement which the 1st defendant relied on was not witnessed by the Council's advocate. He added that the assignment which the 1st defendant was relying on was fake because Henry Njenga Chege was not in the records of the 2nd defendant and did not have a tenant purchase agreement with the Council.

13. It was DW2's evidence that the Council did not make double allocations in relation to the suit property. He testified that the Council made only one allocation, and that single allocation was made to Henry Njenga Kiarie. He added that the Council did not deal with Henry Njenga Chege.

Plaintiffs' Submissions

14. The plaintiffs, through their counsel, Mr Mulekyo, submitted that the following four issues fell for determination in this suit: (i) Whether the late Henry Njenga Kiarie was the legal owner and rightful assignee of the suit premises known as plot Number B40 Umoja Sector III; (ii) Whether the late Edith Waithira Muiruri fraudulently transferred the suit property to herself; (iii) Whether the late Edith Waithira Muiruri was a *bona fide* purchaser for value without notice of the suit property; and (v) Whether the plaintiff's estate was entitled to damages and costs of the suit for the illegal alienation of the suit property by the defendants.

15. Counsel for the plaintiff submitted that the plaintiffs had demonstrated the root and history of the title documents held by the estate of the late Henry Njenga Kiarie. He added that the evidence presented by the plaintiffs had established that the deceased was issued with an allotment letter and fully complied with the conditions set out in the allotment letter. Counsel added that DW2, Goeffrey Cheruiyot, had confirmed that the deceased was the lawful owner of the suit property. He added that the 1st defendant had not produced any ownership document to support the claim that the suit property belonged to Henry Njenga Chege before she purported to acquire it.

16. Counsel for the plaintiff submitted that the late Edith Waithira Muiruri had committed the following acts of fraud: (i) misrepresenting that Henry Njenga Chege of ID No 186974/70 was one and the same person as Henry Njenga Kiarie of ID No. 13508335/66; (ii) misrepresenting that Henry Njenga Chege was the lawful owner of the suit property.

17. Counsel for the plaintiff further submitted that it had been established through evidence that soon after Edith Waithira paid the purported purchase price, she discovered that Mr John Ndungu Kamaru had falsely misrepresented himself as Henry Njenga Chege and as the owner of the suit property and had falsely and illegally obtained the purchase price of Ksh 300,000 from her. He added that despite being aware of the fraud and the resultant criminal conviction of the said fraudster in 1997, Edith Wairimu had drawn a fraudulent power of attorney in 1999 and had falsely misrepresented that she was the lawful attorney of the said fraudster. Based on the fraudulent power of attorney, the 1st defendant had purported to execute an assignment in her favour. Counsel added that an unregistered power of attorney did not confer legal capacity to act on behalf of the donor. He contended that the 1st defendant used unlawful means to procure the deed of assignment.

18. Counsel further submitted that the 1st defendant was not an innocent purchaser because she was not issued with any ownership document. Secondly, the sale agreement indicated that she paid Kshs 300,000 as purchase price while the deed of assignment indicated that she paid Kshs 40,000. Thirdly, she fraudulently procured a purported power of attorney and deed of assignment while fully aware that the purported donor of the power of attorney had been convicted and jailed over the purported transaction.

19. On the plaintiff's plea for Kshs 10,000 per month as *mesne profits*/damages, counsel for the plaintiff submitted that, having fulfilled the terms of the tenant purchase agreement, the deceased plaintiff was entitled to exclusive possession and use of the suit property. Through the illegal activities of the 1st defendant, the deceased plaintiff had been denied use of the land. He urged the court to grant the plea.

1st Defendant's Submissions

20. In response, counsel for the 1st defendant submitted that the 1st defendant conducted due diligence before purchasing the suit property. He added that the 1st defendant knew that the suit property belonged to a man by the name "Henry Njenga" and it is to him that payment was made. He contended that because the land register bore the name Henry Njenga the 1st defendant was a *bona fide* purchaser for value without any notice of any defect in the title. Reliance was placed on the case of **Fletcher v Pack 10 U. S 87 (1810)**, among others. Counsel added that an assignment was issued by the 2nd defendant and from the date of the assignment, the deceased 1st defendant started paying rates. Counsel contended that, without any signed witness statement by the 1st defendant and DW1, the contention that they were privy to the criminal proceedings against John Kamaru were mere allegations. He added that the allegation relating to the power of attorney were unfounded.

21. On the allegation that the 1st defendant had engaged in fraud, counsel for the 1st defendant argued that the allegation had not been proved and was therefore unfounded. Lastly, counsel for the 1st defendant submitted that from the time the 1st defendant entered the suit property, he had erected developments now valued at Kshs 5,000,000. He contended that in the event that the court found that the suit property belonged to Henry Njenga Kiarie, the court should condemn the 2nd defendant to pay the 1st defendant Kshs 5,000,000 being the current value of the suit property.

2nd Defendant's Submissions

22. On her part, counsel for the 2nd defendant itemized the following issues as falling for determination in this suit:

- 1) *Who between the deceased (Henry Njenga Kiarie) the plaintiff and Edith Waithira Muiruri (deceased) 1st Defendant, is the legal owner of the suit premises known as plot No B40 Umoja Innercore Sector III. Whether the 1st defendant fraudulently misrepresented to the 2nd defendant that Henry Njenga Chege was the lawful owner of the suit premises and further that Henry Njenga Chege was the same as Henry Njenga Kiarie;*
- 2) *Whether the 2nd defendant wrongfully, fraudulently and unlawfully executed an Assignment purporting it to have been executed by the deceased Henry Njenga Kiarie transferring his interest in the suit premises to the 1st defendant, or whether the same was the 1st defendant's fraud;*
- 3) *Whether it is the plaintiff or the 1st defendant who was deprived of the occupation, user and development of the suit premises. And whether the plaintiffs or 1st defendant have suffered any loss and damage. And who is to blame;*
- 4) *Whether the plaintiff or 1st defendant have proved any valid claim against the 2nd defendant;*
- 5) *Whether the 1st defendant is liable to indemnify the 1st defendant and if so to what extent or whether the 1st defendant is fully and solely liable for any loss and damages herein;*
- 6) *Whether the above acts were subject of Criminal Case No 9536 of 1997 at Makadara Law Courts, where the Accused was convicted on his own plea of guilty. And whether the plaintiff or the 1st defendant suffered any loss or damage;*
- 7) *Whether demand was issued to the defendants;*
- 8) *Whether the plaintiffs are entitled to the prayers sought;*
- 9) *Whether the 1st defendant is entitled to the prayers sought;*
- 10) *Who bear the costs of the suit.*

23. Counsel submitted that the evidence led by the plaintiff and the 2nd defendant proved that Henry Njenga Kiarie of P O Box 11206 Nairobi was the legitimate proprietor of the suit property. She added that the suit property was allocated to Henry Njenga Kiarie. He subsequently signed a lease agreement on 18/3/1982 and paid all the dues. He was thereafter issued with a clearance certificate. Lastly, he was issued with a beacon certificate. She added that Henry Njenga Chege with whom the 1st defendant entered into a sale agreement did not own the suit property. Counsel submitted that a fraudster cannot pass a good title to a buyer.

24. On whether the 2nd defendant was privy to the deed of assignment held by the 1st defendant, counsel for the 2nd defendant submitted that the 2nd defendant did not execute the deed of assignment. She argued that page 13 of the said deed of assignment made reference to a non-existent and undated agreement and referred to "project" as opposed to "housing scheme". Counsel contended that the 2nd defendant was not privy to the fraudulent documents held by the 1st defendant. She added that the 2nd defendant was not privy to the seizure of the suit property by the 1st defendant and should not be held liable on account of the dispossession. Counsel argued that the 2nd defendant had all along provided all necessary evidence to demonstrate that the deceased plaintiff was the owner of the suit property.

25. On the 1st defendant's claim against the 2nd defendant, counsel for the 2nd defendant submitted that there was no double allocation in relation to the suit property and it had been demonstrated that the 1st defendant dealt with a fraudster misrepresenting himself as Henry Njenga Chege. She added that the 1st defendant had knowingly involved herself in fraud. She contended that it would be wrong to penalize the 2nd defendant on account of documents to which the 2nd defendant was not privy. She cited the purported memo dated 28/2/1997 which the 1st defendant has relied on and observed that it bore the rubber stamp of Nairobi City Commission. Counsel submitted that the Commission was replaced in 1993 after conclusion of the December 1992 elections and therefore a memo dated 28/2/1997 and bearing the Commission's rubber stamp was a fraudulent document. Counsel urged the court to absolve the 2nd defendant of any liability.

Analysis & Determination

26. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issues falling for determination in this suit. The plaintiff and the 2nd defendant filed a statement of twelve issues. The 1st defendant did not endorse the said statement. In his written submissions, the plaintiff condensed the twelve issues into four key issues. The four issues are: (i) Whether the late Henry Njenga Kiarie is the legal owner and rightful assignee of the suit premises known as plot Number B40 Umoja Sector III; (ii) Whether the late Edith Waithira Muiruri fraudulently transferred the suit property to herself; (iii) Whether the late Edith Waithira Muiruri was a *bona fide* purchaser for value without notice of the suit property; and (iv) Whether the plaintiff's estate is entitled to damages and costs of the suit for the illegal alienation of the suit property by the defendants.

27. The 1st defendant did not frame a concise statement of issues in his written submissions. Counsel for the 1st defendant, however, submitted under the following heads: (i) *Bona fide* Purchaser; (ii) Alleged Fraud; and Valuation. Counsel for the 2nd defendant itemized at pages 11 to 12 of its written submissions ten issues itemized in paragraph 22 above.

28. Having considered the parties' pleadings, evidence and submissions, and having taken into account the separate issues framed by the parties and the key areas covered by the parties in their respective submissions, the following four key issues fall for determination in this

suit:

i. Who between Henry Njenga Kiarie (deceased and represented by the plaintiffs herein) and Edith Waithira Muiruri (deceased and represented by the 1st defendant) is the legitimate owner of the suit property, Plot Number B-40 Umoja Sector III also known as Plot Number B40 Umoja Inner Core Sector 3?

ii. Is there a basis for holding the 2nd defendant liable in damages to both or either of the other parties to this suit?

iii. What reliefs should be granted in the circumstances of this case?

iv. Who should bear costs of this suit?

29. I will make pronouncements on the four issues in a sequential order as itemized above. The first issue relates to the rival claims of legitimate ownership of the suit property by the two estates represented by the plaintiff and the 1st defendant respectively. The plaintiff produced a letter of allotment dated 31/8/1978 showing that the suit property was allotted to Henry Njenga of P O Box 11296 Nairobi. They further produced a tenant purchase agreement dated 18/3/1982 between the City Council of Nairobi and Henry Njenga of P O Box 11296 Nairobi. Also produced was a memo dated 31/10/90 from the Council's Accountant in Charge of Umoja Office to the Surveyor in charge of Sector III confirming that Henry Njenga Kiarie had fulfilled all the requirements under the tenant purchase agreement. Other documents produced to support the plaintiffs' claim were: the beacon certificate dated 23/10/1996 indicating that the suit property was surveyed as allocated to Henry Njenga Kiarie; letter dated 3/7/1997 from the City Council to Henry Njenga Kiarie confirming that the loan against the suit property had been paid in full and various receipts relating to payments made by Henry Njenga Kiarie to the City Council of Nairobi in relation to the suit property.

30. Lastly, the plaintiffs produced a charge sheet dated 28/7/1997 and proceedings relating to Makadara Senior Principal Magistrate Court Criminal Case Number 9536 of 1997 in which one John Ndungu Kamaru was charged with the offence of obtaining by false pretences contrary to Section 313 of the Penal Code. The complainant in the said case was Samuel Muiruri Gitu (DW1) and the particulars of the charge were that; on diverse dates between 20th and 21st February 1997 at Umoja One, with intent to defraud, jointly with others not before the court, the said John Ndungu Kamaru obtained Kshs 300,000 from Samuel Muiruri Gitu (DW1) by falsely pretending that Plot Number B 40 belonged to them. The charge sheet listed the following as witnesses: (i) Samuel Muiruri Gitu; (ii) Edith Waithira Muiruri; (iii) Henry Njenga Kiarie; (iv) C I David Korir; and (v) P.C. Juma Amimo. From the proceedings, it is clear that the accused person was convicted and sentenced to serve 2½ years imprisonment by Hon M Muya (as he then was) on 8/8/1997.

31. The 2nd defendant led evidence and produced documents demonstrating that the suit property was allocated to Henry Njenga Kiarie in 1978 under the 2nd defendant's tenant purchase scheme. The deceased plaintiff was given possession of the suit property and paid the purchase price under the tenant purchase agreement. The deceased plaintiff was subsequently issued with written confirmation that he had completed paying the requisite purchase price. He was also issued with a beacon certificate.

32. The 1st defendant did not lead any evidence to demonstrate that Henry Njenga Chege who purported to sale the suit property to Edith Wairimu was an allottee of the suit property or that he had a tenant purchase agreement with the 2nd defendant. There was no evidence to demonstrate that Henry Njenga Chege paid any purchase price to the 2nd defendant in relation to the suit property. Secondly, there was evidence that in July 1997, DW1 together with his wife Edith Wairimu, complained to the police that one John Ndungu Kamaru alias John Njenga Chege had obtained Kshs 300,000 from them by falsely pretending that the suit property belonged to him. DW1 and Edith Wairimu were listed as 1st and 2nd prosecution witnesses respectively. The deceased plaintiff too was listed as a prosecution witness. The accused was convicted and jailed for 2½ years. It is therefore clear from the record relating to the criminal case that Edith Wairimu and DW1 were conned and they have been aware of this fact since 1997. They too knew the identity of the fraudster who conned them. I therefore find it dishonest for Edith Wairimu and the 1st defendant to not only contest the deceased plaintiff's title, but also bring a counterclaim purporting that they are the legitimate owners of the suit property.

33. It was contended by counsel for the 1st defendant that Edith Wairimu was a bona fide purchaser for value and therefore her title should be upheld. I do not agree. Firstly, the suit property was and still is unregistered. There is therefore no registered title which Edith Wairimu purchased. Secondly, the 1st defendant has not displayed any letter of allotment or tenant purchase agreement or lease which the purported seller sold to her. There is no ownership document which was given or conveyed to her. The Deed of Assignment dated 1999 was done two years after the fraudster had been convicted and jailed. Edith Wairimu procured it while aware that she had been conned and the conman had been jailed. She cannot therefore invoke the doctrine of innocent purchaser to defeat the rights of a legitimate owner.

34. For the above reasons, I am satisfied that the suit property belongs to the late Henry Njenga Kiarie and the fact of Henry Njenga Kiarie's ownership was within the full knowledge of both DW1 and his wife, Edith Wairimu Muiruri. It is therefore my finding that Henry Njenga Kiarie (deceased), represented by the plaintiffs herein, is the legitimate owner of the suit property.

35. The second issue is whether there is a basis for holding the 2nd defendant liable in damages to the other two parties to this suit. There was no evidence that the 2nd defendant allocated the suit property to more than one allottee. Secondly, there was evidence that DW1 and Edith Wairimu were initially victims of fraud perpetuated by a fraudster known to them. There was no evidence linking the fraudster to the 2nd defendant. There was similarly no evidence linking the 2nd defendant to the dispossession of the suit property from the plaintiff. In the circumstances, I find no proper basis for holding the 2nd defendant liable to the other two parties to this suit. My finding therefore is that the 2nd defendant is not liable in damages to the other two parties.

36. The last issue relates to the reliefs available in the circumstances of this case. The plaintiffs sought a declaratory order and an order for vacant possession. Having found that the late Henry Njenga Kiarie is the legitimate owner of the suit property, it follows that the two orders would be appropriate.

37. The third prayer relates to damages or *mesne* profits. Apart from the fact that the deceased plaintiff was disposed and both himself his estate have remained out of the suit property from 1997 to-date, there was no evidence tendered to enable the court assess and award a particular amount in damages or *mesne* profits as prayed in the plaint. All the plaintiff did was to ask the court to assess damages at Ksh 10,000 per month. Consequently, the court will only award nominal damages. Taking into account the manner and period of disposition, I would award the plaintiff Kshs 1,000,000 as nominal damages against the 1st defendant.

38. In light of the fact that the deceased defendant perpetuated the initial fraud through procurement of a fraudulent deed of assignment in 1999 while aware that the deceased plaintiff was the legitimate owner of the suit property, and has dragged the deceased plaintiff and the 2nd defendant through this lengthy litigation, the 1st defendant will bear the costs of this suit.

39. For the reasons given in the preceding paragraphs, the 1st defendant's counter-claim fails.

Summary of Findings

40. In summary, it is my finding that: (i) Henry Njenga Kiarie (now deceased and represented by the plaintiffs) is the legitimate proprietor of Plot Number B.40 Umoja Section III, also described as Plot Number B-40 Umoja Innercore Sector 3; (ii) there is no proper evidential basis for holding the 2nd defendant liable in damages to the other two parties to this suit; (iii) the plaintiffs are entitled to prayers (i) and (ii) of the prayers sought in the plaint; (iv) the plaintiffs are entitled only to nominal damages of Kshs 1,000,000 against the 1st defendant because they did not lead evidence to enable the court award *mesne* profits; (v) the 1st defendant's counter-claim fails wholly; and (v) the 1st defendant shall bear costs of this suit;

Disposal Orders

41. In light of the above findings, I make the following disposal orders in tandem with the prayers sought in the Further Amended Plaint and in the Further Amended Defence and Counter-claim.

a) It is declared that the late Henry Njenga Kiarie, represented by the plaintiffs herein, is the lawful owner of the suit property, Plot Number B40 Umoja Sector III, also described as Plot Number B40 Umoja Innercore Sector 3.

b) The estate of the late Henry Njenga Kiarie is hereby granted possession of the said property and the 1st defendant is hereby restrained against interfering with the said estate's possession and ownership of the suit property.

c) The estate of the late Henry Njenga Kiarie represented by the plaintiffs herein is awarded nominal damages of Kshs 1,000,000 against the 1st defendant

d) The counter-claim by the 1st defendant is dismissed.

e) The 1st defendant shall bear costs of this suit.

f) Order (b) above is stayed for sixty (60) days to enable the 1st defendant peaceably vacate the suit property and remove their structures from the suit property

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF DECEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Opiyo holding brief for Mr Mulekyo Advocate for the plaintiff

Mr Opiyo holding for M/s Esonga advocate for the 1st defendant

Court Clerk - June Nafula