



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC. CIVIL CASE NO. 234 OF 2010

PAULINE NJOKI MOGWANJA.....1ST PLAINTIFF

SHEILA WARIARA KARAGO.....2ND PLAINTIFF

-VERSUS-

ROSKAN INVESTMENTS LIMITED.....1ST DEFENDANT

ROSEMARY WAMBUI KANYAGIA.....2ND DEFENDANT

PATRICK MUNGAI KANYAGIA.....3RD DEFENDANT

ANGELA NYOKABI KANYAGIA.....4TH DEFENDANT

JUDGEMENT

1. The Plaintiffs, the 2nd Defendant and James Mirie are children of the late Paul Thiong'o Samuel Mirie and the late Emily Nduta Thiong'o Mirie who died in 1974 and 1977 respectively. Their parents set up their home on L.R. No. 156/7 measuring 20 acres in Limuru ("the Suit Property") and were buried on that land. Their late mother drew her Will on 4/10/1976 and bequeathed the suit land to the Plaintiffs and the 2nd Defendant to hold as tenants in common in equal shares. Between 1977 and 2008 their brother James Mirie lived on the Suit Property and undertook farming activities to support his family. The 2nd Defendant is married to the 3rd Defendant and is the mother of the 4th Defendant. The 1st Defendant is a private limited liability company whose shareholders and directors are the 2nd, 3rd and 4th Defendants.

2. The Plaintiffs claim is that their late brother James Mirie devised a fraudulent arrangement in conjunction with the Defendants and sold the Suit Property to the Defendants in breach of the constructive trust. This was disguised as a plan for developing a housing estate on the Suit Property for the common benefit of the Plaintiffs, the 2nd Defendant and James Mirie. James Mirie invited the Plaintiffs to invest Kshs. 5 million each within 30 days in a plan under which 56 high class residential houses would be constructed on the suit land.

3. The Plaintiffs claim that as at 13/2/2010 when their brother James Mirie died after a short illness, the Suit Property was registered in his name until 30/3/2010 when the 1st Defendant was fraudulently registered as the proprietor of the Suit Property pursuant to a transfer dated 24/3/2010. The transfer was purportedly executed by the late James Mirie, and the 2nd and 3rd Defendant as directors of the 1st Defendant. The Plaintiffs contend that the heir of the late James Mirie was bound by the constructive trust and that only a person who had obtained letters of grant of administration of his estate could have transferred the Suit Property following his demise. The Plaintiffs therefore contend that the sale and transfer of the Suit Property to the 1st Defendant was null and void and seek a declaration to that effect.

4. Further, they seek a declaration that the 1st Defendant holds the Suit Property upon trust for the Plaintiffs and the 2nd Defendant; that upon breach of the trust that required the late James Mirie to give the Plaintiffs and the 2nd Defendant the first option to buy the Suit Property, the land reverted to them by virtue of their late mother's Will. In the Amended Plaint dated 21/7/2017, the Plaintiffs seek an order for the 1st Defendant to transfer the Suit Property to the Plaintiffs and the 2nd Defendant; a permanent injunction to restrain the Defendants or their agents from entering the Suit Property or selling it, or charging it, or alienating it, and a declaration that the purported purchasers of the Suit Property from James Mirie are the 2nd and 3rd Defendants.

5. In the Re-amended Defence and Counterclaim dated 14/8/2017, the Defendants denied the Plaintiffs' claim. They also denied that the late James Mirie Thiong'o held the title over the Suit Property upon trust. The Defendants denied purchasing the suit land from the late James Mirie Thiong'o. They relied on the Memorandum of Agreement dated 12/8/2009 which they claim was prepared after the late James Mirie approached the 2nd and 3rd Defendants with a request to develop the land since he did not have funds to develop it and they introduced Dr.

Kiaraho and Mr. Mirie Gachathi who were construction consultants to James Mirie for purposes of the proposed construction. They prepared the project proposals together with estimate costs of the proposed construction. James invited his three sisters to participate in the project by making initial investment of Kshs. 5 million each. Only the 2nd Defendant took up the offer.

6. A Memorandum of Agreement was drawn under which the Defendants emphasised that the Suit Property would be transferred and not sold, to the 1st Defendant at a nominal value of Kshs. 10 million. The Defendants averred that further to that agreement, the directorship and shareholding of the 1st Defendant was expanded to include Dr. Daniel Kiaraho, Mr. Mirie Gachathi and the late James Mirie. The Defendants maintained that the late James Mirie was registered as the owner of the Suit Property absolutely and that there were no encumbrances registered against the title nor was the title subject to any trust or other equitable interest. The Defendants stated that the late James was buried on the Suit Property and that the site plans for the proposed project on the suit land isolated the gravesite and fenced them off.

7. Both the Plaintiffs and the Defendants extensively referred to Minute number 1 of the meeting held on 13/9/1997 which stated:

“It was agreed that island farm be left to Mr. James Mirie Thiong’o by all the 3 daughters and the Girls relinquish their interest in the said farm. It was agreed that the farm would not be sold and if Mirie ever wanted to sell it, he would give the 3 daughters 1st offer”.

8. The Defendants denied that any trust was created in favour of the Plaintiffs and the 2nd Defendant by the transfer of the Suit Property to the late James Mirie. They argued that the minutes only provided for an option to purchase but did not forbid the late James from selling the farm. They averred that the transfer did not forbid the late James Mirie from entering into a project development agreement for the construction of country houses on the Suit Property. They maintained that the transfer of the Suit Property to the 1st Defendant was carried out within the law and without any fraud or illegality. The Defendants maintained that the transfer was authentic and there was conveyance of title over the Suit Property to the 1st Defendant by the late James Mirie.

9. The Defendants counterclaimed against the Plaintiffs the sum of Kshs. 51,986,315/= together with interest being the costs and expenses incurred on the suit land since the commencement of the project. They aver that due to the Plaintiffs’ unjustifiable interference with the Defendants’ project, the Defendants were unable to complete the project within the anticipated timelines; and that the project was expected to generate substantive profit and revenue. The Defendants claim damages against the Plaintiffs from the date the court stopped the construction work up to the date of judgement. They particularised the costs and expenses incurred since the commencement of the project at Kshs. 51,986,315.00; and loss of earnings, profits and damages at Kshs. 475,895,520/= which they seek against the Plaintiffs together with the costs incurred in the project. They urged the court to dismiss the Plaintiffs’ claim.

10. The 1st Plaintiff’s evidence was that in 1997 the Public Trustee who was executing their late mother’s Will could have transferred the Suit Property to the Plaintiffs and the 2nd Defendant, but they allowed their late brother James Mirie who had a more urgent need for its use, to keep the farm to enable him support himself and his family. This was agreed to in writing through Minutes of the meeting held at Menengai Farm which was also attended by three elderly men, who were close friends of their late parents. She produced a copy of the minutes and stated that it was a condition that the farm was not to be sold and if their brother had any financial need that would make him wish to sell it, he would give the sisters the option to purchase the land.

11. Pursuant to that agreement the Suit Property was transferred to their brother James Mirie who practiced farming and lived on the land between 1977 and 2009. He moved out of the land in 2008 following many burglary incidents which compelled him to abandon the land for a safer place. She stated that James Mirie had inherited from their mother properties in Nyeri, Nanyuki, Karuri and Kiambaa in which he did not take much interest. Their late father had started putting up a house for James Mirie on the land in Kiambaa so that he could settle on it and make it his home. Unfortunately, their father died before completing the house and Mirie neither completed the house nor lived in it.

12. In 2009 James Mirie approached the Plaintiffs and the 2nd Defendant seeking suggestions on how to make good use of the farm. Through the arrangement of their sister, the 2nd Defendant they met a Mr. Kiaraho. She claims that the 2nd to 4th Defendants together with their late brother did not fully disclose the intentions they had for the property but only indicated that they wanted to build 54 houses on it. At the meeting, Mr. Kiaraho and the 2nd Defendant informed them that there would be two investors, a local one and an international one without disclosing their names. It was not made clear to them that a family company belonging to their sister, her husband and her daughter wanted to acquire the suit land. The 2nd Defendant informed the Plaintiffs that she had a developer who could assist build high class residential houses on the 20-acre farm for sale. Some correspondence was exchanged on this.

13. A meeting was held on 1/10/2009 in which sharp differences arose between the sisters and their brother regarding the proposed development of the Suit Property because the 2nd Defendant and their brother had already taken some decisions regarding the Suit Property without consulting the Plaintiffs. The 2nd Defendant told them at the meeting that her family had entered into an agreement with their brother James Mirie to buy the Suit Property and had paid him Kshs. 15 million, part of which he used to buy a maisonette in Akiba Estate in South B, Nairobi. Their brother James Mirie fell ill on 7/2/2010 and died on 13/2/2010. He was buried on 19/2/2010.

14. When the Plaintiffs did a search on the Suit Property on 30/3/2010, it showed that their late brother was the registered owner of the Suit Property. The Plaintiffs instructed their advocate to lodge a caveat against the Suit Property but were informed on 21/4/2010 that the caveat could not be registered since it had been overtaken by events. The Plaintiffs did a search on 7/5/2010 which showed that the Suit Property was transferred on 30/3/2010 to the 1st Defendant by their late brother. They did a search at the Companies registry which showed that the 2nd to 4th Defendants were the sole directors and shareholders of the 1st Defendant. The Plaintiffs learnt that the 2nd to 4th Defendants were the shareholders of the 1st Defendant after the demise of their brother.

15. The 1st Plaintiff maintains that at the time their brother died, the Suit Property was still registered in his name. The transfer to the 1st Defendant was executed on 24/3/2010 by which time their brother was dead. The 2nd and 3rd Defendants also signed the transfer. The

Plaintiffs put their late brother's widow on notice that they would enforce their rights over the Suit Property following their brother's demise. The Plaintiffs contend that the Suit Property is of great sentimental value to them as their parents were buried on the land. They lived on the land in their early years until 1977 when their mother died. When they visited the Suit Property in May 2010, they found two Maasai watchmen guarding it and saw that nothing had ever happened on the Suit Property.

16. It was the 1st Plaintiff's evidence that her late brother purported to sell the Suit Property to 1st Defendant for Kshs. 10 million out of which Kshs. 2 million was paid to him in cash and Kshs. 8 million in kind, without involving the Plaintiffs. The 1st Plaintiff believed that their brother in-law, the 3rd Defendant was the mastermind of the scheme to deprive the Plaintiffs of their inheritance. She stated that Dr. Kiaraho and Mirie Gachathi arranged to acquire interest in the Suit Property and signed the Memorandum of Agreement on 12/8/2009 without involving the Plaintiffs. The Plaintiffs were not involved in negotiating the terms of the memorandum of agreement and did not execute it. She urged that her late brother was to receive consideration for the Suit Property in form of cash of Kshs. 2 million, purchase of the house in Nairobi for Kshs. 8 million and 74% of the shares allotted in the 1st Defendant.

17. The 1st Plaintiff confirmed that Mirie Properties Limited, in which the three sisters were directors, was liquidated in 2003. The company owned one property on Ngong' Road near Baptist Church which measured approximately 2 acres. That property was sold and the proceeds shared by the three sisters. The 1st Plaintiff attended a family meeting held on 13/9/1997 to discuss the estates of their late father and mother. The sisters agreed that the Suit Property would be given to their brother James Mirie and that they would relinquish their interest in the farm. She understood relinquishing to mean not to interfere with the land and confirmed that they did not interfere with the land for 32 years. She maintained that the sisters were to be given an option to purchase the farm if their brother wanted to sell it. She confirmed being asked to contribute Kshs. 5 million towards the development of the farm and stated that they sought more details on that project. The Plaintiffs did not pay Kshs. 5 million each, the 2nd Defendant paid this sum. She conceded that the Minutes did not prohibit the late James Mirie from developing the suit property but that he was not to sell the land. She maintained that the Plaintiffs were not given the offer to buy the Suit Property. She also contended that their late brother went against the agreement reached earlier in which they gave him 100% of the farm yet in Roskan Ltd he only owned 74% of the shares.

18. Joseph Kuria Kiaraho gave evidence for the Plaintiffs. The Plaintiffs' parents were his close friends. He testified that the Plaintiffs' late mother bequeathed the Suit Property to the Plaintiffs and the 2nd Defendant. He stated that their brother, the late James Mirie was a trouble maker in the family and confirmed that James inherited properties at Karuri and Kiambaa. The sisters got married and had families. For about 20 years after their mother died, the Plaintiffs were not on talking terms with their brother. Mr. Kiaraho together with two other friends of the Plaintiffs' late parents had discussions with the Plaintiffs, the 2nd Defendant and the late James Mirie. At the meeting held in 1997, an agreement was reached to allow James Mirie to use the farm on condition that he would not sell it. If he wished to sell it, he was to give the sisters the first offer on the understanding that they would not buy it the same way outsiders would have bought it since it was their property and they were just allowing him to use the land.

19. He confirmed that on 1/10/2009 the Plaintiffs requested him and the other two friends of their late parents to meet with the 2nd Defendant and the late James Mirie since a problem had arisen touching on the Suit Property. The late James Mirie and the 2nd Defendant had devised a plan to construct houses on the Suit Property without consulting the Plaintiffs. He stated that James Mirie informed them at that meeting that he wanted to build residential houses on the Suit Property through a joint venture with an investor and developer in which Mirie would provide the land for building the houses. He did not explain how that would happen without the property being charged to the lender. James claimed the Plaintiffs had lost interest in the land and that they failed to contribute Kshs. 5 million each towards the project within the deadline given so that they could become equal owners. He stated that James Mirie told them that he had sold the farm and used the proceeds of sale to acquire a house in Nairobi. James Mirie and the 2nd Defendant were on the same side during that meeting, the two declared that the Plaintiffs had forfeited any claim to the Suit Property.

20. The 3rd Defendant gave evidence. He confirmed that he is a shareholder of the 1st Defendant. He confirmed that he attended the meeting of 13/9/1997 when the sisters agreed to relinquish their interest in the Suit Property to their brother James Mirie. He stated that James Mirie approached him and requested him to be his partner in developing the housing estate on the Suit Property. An investment agreement was reached on 12/8/2009 which was drawn by P. M. Kamaara Advocate between James Mirie, the 2nd and 3rd Defendant and the building consultant.

21. He produced a copy of the Memorandum of Agreement dated 12/8/2009 which provided that the Suit Property would be transferred to Roskan Investments Ltd, the 1st Defendant, in which James Mirie would hold 74% shareholding while the 2nd, 3rd and 4th Defendants held 26%. He stated that the value of the land would be Kshs. 53 million out of which James Mirie would be paid Kshs. 10 million to enable him purchase a house in Nairobi so that he could move out of the suit land and give vacant possession to the 1st Defendant for its development. James Mirie was paid Kshs. 2 million vide a cheque dated 12/8/2009 while Kshs. 8 million was paid to the vendor for the purchase of L/R/ No. 209/10498/25 Akiba Estate, Mombasa Road, Nairobi. The 3rd Defendant confirmed that he was present in the office of Mr. Kamaara Advocate when the agreement was signed by the parties including Mr. James Mirie. By then Mr Mirie was already living in the house purchased for him in Nairobi with his family.

22. He stated that James Mirie executed the transfer of the Suit Property to the 1st Defendant and handed it over to Mr. Kamaara for safekeeping. He explained that the indenture in favour of the 1st Defendant was left undated and was to be dated at the time of presentation for registration. Mr. Kamaara advised the Defendants that stamping and registration of the transfer had to be in tandem with the purchase of the house for James at Akiba Estate.

23. He confirmed that a meeting was held on 1/10/2009 which James Mirie, his three sisters, Mr. Joseph Kiaraho, Mr. Evanson Munira and Mr. Francis Ng'ang'a attended. The 2nd Defendant made it clear at the meeting that the proposed project was going on and that she had paid Kshs. 15 million which was equivalent to 26% shares in the project. He denied that the Plaintiffs were beneficiaries under trust maintaining that the late James Mirie did not hold the Suit Property in trust for them. The 3rd Defendant stated that the Plaintiffs had never mentioned anything about acting in breach of the alleged trust before the death of James Mirie. He maintained that no offer was made to the Plaintiffs to

purchase the Suit Property because there was no sale. He understood that there was no sale and that James Mirie only transferred the Suit Property to 1st Defendant in which he owned 74%. He confirmed that the 26% shares in the 1st Defendant are owned by him, his wife and daughter. He also confirmed that his mother in law's Will gave the Suit Property to her three daughters. He conceded that there was no offer to buy the land made to the Plaintiffs and that the Plaintiffs were not part of the memorandum of agreement. It was his evidence that the late James Mirie invited him to participate in the development of the land when his sisters declined to participate. He was adamant that there was no sale between the 1st Defendant and James Mirie. He stated that they had commenced development on the suit land.

24. The 3rd Defendant gave the breakdown of the special damages of Kshs. 51,986,315.00. This is made up of amounts paid to the late James Mirie, Mr. Kamaara Advocate and Archgrid Systems. The sums claimed to have been paid to James Mirie include Kshs. 2 Million paid on 12/8/2009, legal fees on account of his house, the Mater Hospital bills and the funeral expenses, which presumably are for James Mirie's burial. The legal fees paid to Mr. Kamaara include the stamp duty paid for Tigoni on transfer of the suit land to the 1st Defendant, the legal fees for the conveyance and legal fees for defending this suit. There is a combined claim for consultancy fees for Archgrid Systems for Kshs. 44,160,000.00. The other claim relates to payment of two guards from January 2009 to July 2014.

25. Dr. Daniel Kairu Kiaraho gave evidence for the defence. He was introduced to James Mirie in June 2009 by the 2nd and 3rd Defendants after James Mirie expressed his wish to develop the Suit Property by constructing a modern gated housing estate on it. He informed James Mirie that he could assist him to raise the funds required to carry out the construction having done previous projects in Nairobi. James Mirie informed him that his sisters whom he had approached to buy shares in the project failed to respond and to deposit 15 million which was equivalent to 26% shares in the project. He later learnt that the 2nd and 3rd Defendants offered to pay the sum of Kshs. 15 million and consequently acquired 26% share in the project. He confirmed that the Memorandum of Agreement was drawn up out of which James Mirie would hold 74% of the shares in the 1st Defendant while the remaining 26% would be held by the 2nd and 3rd Defendants as investors in it.

26. He stated that James Mirie executed the transfer of the Suit Property to the 1st Defendant on 12/8/2009. Thereafter he worked with various professionals including architects, quantity surveyors, lawyers and other consultants to plan for the project and carry out due diligence in preparation for the commencement of actual construction on the Suit Property. He produced a copy of the topographical survey of the farm, a site plan of the entire project and the design and drawings of the buildings that were to be developed on the Suit Property together with the development plans which were submitted to Limuru Municipal Council for approval vide a letter dated 14/9/2010. He maintained that the graveyard where James Mirie and his parents were buried was clearly demarcated on the site plan and isolated with an access road.

27. He stated that the 1st Defendant incurred substantial costs amounting to Kshs. 44,160,000/= being the consultancy fees of which 75% amounting to Kshs. 33,120,000/= was due and payable. It was his evidence that it was in bad faith for the Plaintiffs to continue to make false and unfounded allegations without a justifiable cause. Upon completion of the project it would have been costed based on the values set out in the memorandum of agreement drawn in 2009. Since the proposed development did not commence immediately, it was obvious that the projection on costs and values had changed.

28. James Mirie's widow gave evidence. She confirmed that she obtained a grant with her daughter over her husband's estate. The 1st Defendant was among the assets of her late husband. They lived on Island Farm (the Suit Property) and moved out in December 2009. She did not know the conditions under which her husband held the Suit Property. She confirmed that her husband was given Kshs. 2 million and that Kshs. 8 million was used to buy the house that they lived in. She confirmed that her husband, James Mirie, died on 13/2/2010.

29. The Defendants called Kenneth Muiro Mwangi, a registered certified public accountant to give evidence on the financial analysis and projection of the housing project that was to be developed on the Suit Property. It was his evidence that the projected net profit of the venture was Kshs. 475,895,500/=. He gave the breakdown of this sum based on the expected sales upon completion of the project comprising 48 country houses. He had never been to the land which he confirmed was undeveloped. His estimates were projections based on the financial analysis of the housing project that was to be developed on the land. His projection was based on the assumption that the 1st Defendant would get financial resources and obtain approvals. The projection took into account the assumption that the property market would remain stable.

30. Parties agreed to dispense with the need to call Mr. Patterson Kamaara advocate as a defence witness. They agreed to adopt his witness statement as his evidence in the matter. He stated that in July 2009, his client, the late James Mirie, asked him to write to his three sisters and invite them to join him in the proposed gated housing development project on the Suit Property by contributing Kshs. 5 million each within 30 days which would entitle the sisters to 26% shareholding in the project. The Plaintiffs failed to make the contribution and James Mirie approached the 3rd Defendant, who was also Mr. Kamaara's client, and requested him to partner with him in the project. Following the request, the 2nd and 3rd Defendant contributed Kshs. 15 million towards the investment and an agreement was drawn with Daniel Kiaraho and Mirie Gachathi as consultants for the project. Mr. Kamaara drew the investment agreement. The late James Mirie signed the indenture conveying the Suit Property to the 1st Defendant and handed over the title to him.

31. According to him, the indenture conveying the suit property declared the consideration of the Suit Property as being Kshs. 10 million which was not the market value of the land. The investment agreement had declared the value at Kshs. 50 million. Upon signing the indenture, James Mirie was paid Kshs. 10 million in accordance with the terms of the memorandum of agreement, not as the market price for the Suit Property, but to enable him purchase a house in Nairobi so that he could deliver vacant possession of the suit land to the 1st Defendant for the intended development. He reiterated that James Mirie never intended to sell the Suit Property to the 1st Defendant and that the sum of Kshs. 10 million indicated on the indenture dated 24/3/2010 was only a nominal figure to facilitate the transfer to the 1st Defendant and was not its market price.

32. Mr. Kamaara acted for James Mirie in the purchase of the house in Akiba Estate. He drew the transfer in respect of the Suit Property in favour of the 1st Defendant and left it undated. He denied that there was anything illegal or fraudulent in the manner in which the stamping and registration of the indenture dated 24/3/2010 was done.

33. The issues for determination are:

- a) Did the late James Mirie hold the Suit Property in trust for his sisters?
- b) Was the Suit Property sold to the 1st Defendant, in other words, did the Memorandum of Agreement dated 12/8/2009 amount to a sale of the Suit Property?
- c) Was the transfer of the Suit Property to the 1st Defendant fraudulent?
- d) Are the Plaintiffs entitled to the orders they seek in their Amended Plaint dated 21/7/2017?
- e) Should the court grant the orders sought by the Defendants against the Plaintiffs in the Amended Counterclaim dated 14/8/2017?
- f) Who should bear the costs of this suit?

34. It is not in dispute that the Suit Property was bequeathed to the Plaintiffs and the 2nd Defendant by their late mother, Emily Nduta Mirie in her Will dated 4/10/1976. It is also common ground that there was a family meeting on 13/9/1997 at which the sisters agreed to relinquish their interest in the suit land to their brother James Mirie. It was agreed at that meeting that the farm would not be sold and if James Mirie ever wished to sell it, he would give his sisters the first offer. The sisters allowed James Mirie to derive his livelihood from the Suit Property through farming and reside there with his family. The Defendants maintain that if the intention was for James Mirie to hold the Suit Property in trust for his sisters, then that should have been done by the Public Trustee at the time James Mirie was registered as the absolute owner of the Suit Property.

35. The Defendants dispute that the late James Mirie held the Suit Property in trust for his sisters. They contend that James Mirie relinquished his interest in a prime property known as Mirie Properties Limited and never laid any claim to it. The defence only made reference to the plot which was owned by Mirie Properties which the sisters sold and shared the sale proceeds. The suit property was not the only asset left to James Mirie, there were other properties in Nyeri, Nanyuki, Karuri and Kiambaa. It is presumed that these other properties were left to James Mirie. It is not clear why James Mirie did not move into the house on the Kiambaa land which his parents put up for him on that land.

36. The Defendants relied on **Charles K. Kandie v Mary Kimoi Sang [2017] eKLR** in which the court made reference to the case of **Twalib Hatayan & Another v Said Saggat Ahmed Al-Heidy & 5 Others [2015] eKLR** where the court stated that a constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrongdoing. It arises where the intention of the parties cannot be ascertained, and that where the circumstances of the case demand that equity treats the legal owner as a trustee, the law will impose a trust. The court observed that in the absence of an express trust, there are trusts created by operation of law.

37. Black's Law Dictionary, 10th edition describes constructive trust as an equitable remedy by which the court recognises that a claimant has a better right to certain property than the person who has legal title to it.

38. The minutes of the family meeting held on 13/9/1997 to discuss the estates of their late father and mother were not written in an elaborate legalistic manner as other legal documents drafted by advocates. The way the minutes were captured reflected the intention of the parties at the meeting which the siblings attended with the three gentlemen who were old friends of their late parents. The intention of the parties was for James Mirie to use the Suit Property and not part with its possession, this is why it was agreed that the land would not be sold and if he wished to sell it, then his sisters were to be given the first offer. James Mirie did not pay any consideration when the sisters agreed to let him use the land. Evidence was led to show that their late parents had intended for him to settle on the land in Kiambaa where they had started putting up a house for him.

39. The intention of the parties in having James Mirie registered as proprietor of the Suit Property cannot be ascertained. The court is satisfied that the circumstances of the case demand that equity treats James Mirie who was the legal owner of the Suit Property as a trustee of the Suit Property for his sisters even though no trust was registered against the title he held over the Suit Property. This is borne from the fact that he was not to sell the land which had initially been bequeathed to the sisters by their late mother in her Will but his sisters allowed him to use the farm. The intention of the siblings was to keep the Suit Property within the family. The sisters relinquished their interest over the Suit Property on condition that the farm would not be sold and were to be given the first option to buy it if their brother wished to sell the land.

40. The Defendants have argued that the Suit Property was not sold to the 1st Defendant and that the minutes did not prohibit the late James Mirie from developing it. The Defendants urged that James Mirie invited his sisters to each contribute Kshs. 5 Million for the development of houses for sale on the Suit Property but the Plaintiffs failed to raise the funds, and that the 2nd and 3rd Defendants raised Kshs. 15 Million which entitled the 2nd to 4th Defendants to 26% stake in the proposed development of the Suit Property. This begs the question, if the late James Mirie held the Suit Property as the absolute proprietor and not in trust after his sisters relinquished their claim to it as the Defendants have strenuously argued in the submissions, why was it necessary for him to invite his sisters to each contribute Kshs. 5 Million towards the proposed development of houses on the Suit Property? This goes to confirm that the Plaintiffs retained an interest over the Suit Property which their brother held in trust for them. The Plaintiffs were required to raise the funds within 30 days, it is not clear why this was so considering that Kshs. 5 Million is not a paltry sum of money that is easily within reach in such a short period of time. It is highly unlikely that the proposal to have a housing estate developed on the Suit Property was conceptualised and reached overnight. The Plaintiffs ought to have been informed of the negotiations and involved in the proposal to develop the Suit Property by their late brother and the Defendants.

41. Black's Law Dictionary, 10th Edition describes a sale as the transfer of property or title for a price or the agreement by which such a transfer takes place. It gives the four elements as: parties competent to contract, mutual assent, a thing capable of being transferred and a

price in money paid or promised. The dictionary quotes William W. Story, A Treatise on the law of sales for personal property at 1 (1853) where he defines it as

‘a sale is a transfer of the absolute title to property for a certain agreed price. It is a contract between two parties one of whom acquires thereby a property in the thing sold, and the other parts with it for a valuable consideration. If the property in any commodity be voluntarily transferred without a valuable consideration it is a gift; if one article be exchanged for another, it is a barter; but a sale takes place only, when there is a transfer of the title to property, for a price.’

42. It is not disputed that the Suit Property was transferred to the 1st Defendant on 30/3/2010 which was after James Mirie died. The memorandum of agreement provided that the property would be transferred to the 1st Defendant in which James Mirie held 74% of the shares. The conveyance indicated the consideration as Kshs. 10 Million which the Defendants submit was a nominal amount to facilitate the transfer of the Suit Property. The late James Mirie was paid Kshs. 10 Million by the Defendants to enable him purchase a house in Nairobi so that he could move out of the Suit Property.

43. The court finds that the four ingredients for a sale set out above were met. There was a sale of the Suit Property to the 1st Defendant which was contrary to the agreement between the siblings reflected in the minutes of the meeting held on 13/9/1997. The Plaintiffs were not given the first offer when the Suit Property was sold.

44. A company such as the 1st Defendant is a legal person separate from its shareholders, capable of owning and disposing of property. The late James Mirie parted with the Suit Property and the 1st Defendant acquired title to it. The administrators of the estate of the late James Mirie can only deal with his shares in the 1st Defendant and not the Suit Property, as part of the assets of his estate to be distributed among the beneficiaries of his estate.

45. If the late James Mirie had not sold the Suit Property to the 1st Defendant, then it would have formed part of the assets of his estate. As matters stand, the Suit Property belongs to the 1st Defendant and the beneficiaries of the estate of the late James Mirie can only claim his 74% stake in the 1st Defendant but not the land.

46. James Mirie died on 13/2/2010 and the transfer of the Suit Property was registered on 30/3/2010. The Law of Succession Act applied to his estate upon his death. Section 45 of this Act prohibits any person from taking possession or disposing of, or otherwise intermeddling with the free property of a deceased person except where it is authorised by law or by a grant of administration under the Act. The Act defines ‘free property’ as property which the deceased person was legally competent freely to dispose of during his lifetime in respect of which his interest has not been terminated by his death. Section 79 of this Act vests the property of a deceased person in the legal representative. The grant of letters of administration to a legal representative takes effect on the date of grant under Section 80 (2) of the Act. The court is of the view that the 2nd and 3rd Defendants intermeddled with the Suit Property by transferring it to the 1st Defendant after the death of the registered proprietor before grant of representation to his estate was made.

47. Section 61 of the Land Registration Act enjoins a personal representative to apply in the prescribed manner to be registered by transmission as proprietor in the place of the deceased person. The registration of such a person takes effect from the date of the death of the proprietor pursuant to Section 62 (2) of the Land Registration Act. The Suit Property ought to have been registered by transmission in the name of the personal representative of the late James Mirie, who pursuant to Section 62 would have held it subject to any liabilities, rights or interests that are unregistered but enforceable and subject to which the deceased proprietor held the land. The late James Mirie held the suit land in trust for his sisters subject to his sisters’ right to purchase it if he wished to sell it.

48. The Land Registration Act came into force in May 2012. In **Trouistik Union International & Another v Mbeyu & Another [1993] KLR 230** the court held that death by itself automatically divests the deceased of his chose in action because in law the dead have no rights and that since rights must be vested in an owner, then the property ought to vest in the courts between the date of death and the grant of letters in any entity. Based on this holding, the Suit Property was illegally transferred to the 1st Defendant after the death of James Mirie.

49. The Defendants gave evidence that the late James Mirie executed the transfer of the Suit Property before he died and that it was dated 24/3/2010 and was registered on 30/3/2010. Mr. Kamaara Advocate explained that he drew the indenture for the transfer of the Suit Property to the 1st Defendant and also acted for James Mirie when he purchased the house in Akiba, Nairobi. No plausible explanation was given as to why the transfer of the Suit Property was not registered in August 2009 when it is alleged James Mirie executed it or soon thereafter; and why the transfer was registered after the transferor had died. The court finds that the Defendants’ actions of registering the transfer of the Suit Property after the demise of James Mirie were fraudulent. The date the transfer is deemed to take effect is the day it was registered which was after James had died.

50. The Defendants claimed Kshs. 51, 986, 315.00 as costs and expenses incurred. The Defendants also claim Kshs. 475, 895, 520.00 on account of loss and damage they suffered due to the Plaintiffs’ unjustified interference with the Defendants’ housing development project. They relied on the projected financial analysis by Kenneth Muiru Mwangi, the accountant who gave evidence.

51. Having found that the late James Mirie held the suit land in trust for his sisters, the court finds that the Defendants counterclaim does not lie. The only damages that could have been anticipated is the sum of Kshs. 5 Million which the Plaintiffs were asked to each contribute for the development. There was no evidence led by the Defendants to show that the Suit Property was developed so as to entitle them to the sums they seek in the counterclaim.

52. The court allows prayers I, II, II (b), III, IV, V, VI, and VII of the Amended Plaintiff dated 21/7/2017 and dismisses the Defendants’ Amended Counterclaim. The Plaintiffs will have the costs of the suit and of the Amended Counterclaim.

Dated and delivered at Nairobi this 12th day of November 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Monirei holding brief for Dr. Kamau Kuria for the Plaintiffs

No appearance for the Defendants

Mr. V. Owuor- Court Assistant