



**Nyambura & 2 others (Suing as the administrators of the Estate of Harrison Njoroge Igiria) v Muchiri & 4 others (Environment and Land Case Civil Suit 238 of 2012 & Environment & Land Case 261 of 2012 (Consolidated)) [2024] KEELC 3773 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3773 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND CASE CIVIL SUIT 238 OF 2012 &**  
**ENVIRONMENT & LAND CASE 261 OF 2012 (CONSOLIDATED)**

**OA ANGOTE, J**

**APRIL 24, 2024**

**BETWEEN**

**PETER IGIRIA NYAMBURA ..... 1<sup>ST</sup> PLAINTIFF**  
**KEVIN NJOROGE MUGWE ..... 2<sup>ND</sup> PLAINTIFF**  
**MARGARET NJOKI MUCHIRI ..... 3<sup>RD</sup> PLAINTIFF**  
**SUING AS THE ADMINISTRATORS OF THE ESTATE OF HARRISON**  
**NJOROGE IGIRIA**

**AND**

**MARGARET NJOKI MUCHIRI ..... 1<sup>ST</sup> DEFENDANT**  
**WELLS PUBLISHING LIMITED ..... 2<sup>ND</sup> DEFENDANT**  
**DISTRICT LAND REGISTRAR, NAIROBI ..... 3<sup>RD</sup> DEFENDANT**  
**PETER IGIRIA NYAMBURA ..... 4<sup>TH</sup> DEFENDANT**  
**KEVIN NJOROGE MUGWE ..... 5<sup>TH</sup> DEFENDANT**

**AS CONSOLIDATED WITH**  
**ENVIRONMENT & LAND CASE 261 OF 2012**

**BETWEEN**

**MARGARET NJOKI MUCHIRI ..... PLAINTIFF**

**AND**

**PETER IGIRIA PETER IGIRIA NYAMBURA ..... 1<sup>ST</sup> DEFENDANT**



## JUDGMENT

1. This Judgment is with respect to two suits being ELC No. 238 of 2012 and ELC No. 261 of 2012 which were consolidated by an order of the Court on the 9<sup>th</sup> July, 2012. The Court directed that ELC 238 of 2012 would be the lead file.
2. Vide an Amended Plaint dated the 26<sup>th</sup> October, 2018, the Plaintiffs seek as against the Defendants jointly and severally, orders;
  - i. Declaring the transfer of Land Reference Numbers Dagoretti/Riruta/4080, 4084 and 4085 from the deceased Plaintiff to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, fraudulent, irregular, unlawful, null and void.
  - ii. Directing the District Land Registrar, Nairobi to cancel the name of Margaret Njoki Muchiri from the register of Land Reference Number Dagoretti/Riruta/4080 and the name of Wells Publishing Limited from the registers of Land Reference Numbers 4084 and 4085.
  - iii. That the Land Registrar do reinstate the name of the deceased proprietor, Harrison Njoroge Igiria on Land Reference Numbers Dagoretti/Riruta/4080, 4084 and 4085.
  - iv. That the Defendants do pay the costs of the suit.
  - v. That the Defendants do pay damages to the Plaintiff.
  - vi. That any other relief that this Honourable Court may deem just and fit to grant.
3. It is the Plaintiffs' case that at all material times, the deceased, Harrison Njoroge Igiria, was the registered owner of all those parcels of land known as Dagoretti/Riruta/4080, 4084 and 4085 (hereinafter the suit properties) which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, in collusion with other people, caused to be fraudulently transferred into their names; that Harrison Njoroge Igiria has never disposed off any property, be it by way of sale, mortgage, transfer, assignment or conveyance to anybody without consulting with his immediate family and that any dealings purportedly conducted by him without his family's involvement were or must have been effected through fraud, forgery, misrepresentation, mistake and/or manipulation.
4. According to the Plaintiffs, the Defendants colluded to have the transfer deeds for the parcels 4080, 4084 and 4085 registered in their names, which transfer deeds had been executed prior to the issuance of the irregular letters of consent of the Land Control Board, obtained contrary to the [Land Control Act](#) and that the Defendants actions were designed and calculated to deprive the aged Harrison Njoroge Igiria of his land without his knowledge.
5. The Plaintiffs set out the particulars of fraud by the 1<sup>st</sup> Defendant in the acquisition of parcel 4080 to include forging the vendor's signature in the application for consent of the Dagoretti Land Control Board and omitting relevant details in the application for consent as well as setting out wrong details.



6. It was averred in the Plaint that in particular, the application for consent was unsigned by the purchaser, undated, missing details with respect to the purchaser's identity and address and that the developments affecting the value of the property have not been indicated whereas the property has permanent and semi-permanent structures.
7. Further, it was averred that the size of the land purchased is wrongly stated to be 0.10Ha whereas it is 0.20Ha; that the value of the land is understated at 5million whereas the land was valued at Kshs 22 million in September, 2011 and that the farming experience information has not been indicated yet the 1<sup>st</sup> Defendant owns agricultural lands in the neighborhood.
8. The Plaintiffs assert that no control board sat to consider any application and the special land board which purportedly issued the consent does not exist in law; that no sale agreement was executed between the 1<sup>st</sup> Defendant and the deceased; that the deceased's signature was forged on the transfer deed and no monies were transferred to him as payment for the parcels and that the 1<sup>st</sup> Defendant transacted with strangers who could not show her the boundaries and beacons.
9. As regards the 2<sup>nd</sup> Defendant, the Plaintiffs set out the particulars of fraud against it as follows: not disclosing the person signing the declaration on behalf of the Company and his authority therein; not stamping and dating the purchaser's declaration in respect of the application for consent of the Board for parcel number 4085 and not indicating the purchaser's nationality.
10. It was averred by the Plaintiffs that the 2<sup>nd</sup> Defendant did not legibly set out the consideration for parcel number 4084; undervalued the suit parcels; obtained a fraudulent LCB consent purportedly issued by a special board that does not exist in law and did not execute any sale agreement.
11. According to the Plaintiffs, further evincing fraud is the fact that the purchasers paid monies to an unqualified advocate; that the deceased was not legally capable of making or execute any sale, application for consent or transfer deed on account of his elderly and sickly status and that the 2<sup>nd</sup> Defendant's Director pretended to act for the deceased to secure monies from other parties and colluded with them to defraud the deceased.
12. According to the Plaintiff, the 3<sup>rd</sup> Defendant acted fraudulently and irregularly in registering the transfers in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants despite the glaring irregularities in the applications for the LCB consent which were incomplete, missing relevant information and were full of misinformation and that the signature on the application for consent and the transfer plainly do not originate from the same person.
13. It was averred that there is variance in size and value of the suit property; that the transfer deeds were executed before the consents were obtained rendering the consents void and that the properties were grossly undervalued.
14. The 1<sup>st</sup> Defendant filed an Amended Defence and Counterclaim in which she denied the assertions as set out in the Amended Plaint save for the fact that the deceased was the registered owner of all that parcel of land known as Dagoretti/Riruta/4080 measuring 0.21Ha, and the pendency of a suit between the Plaintiffs and the 1<sup>st</sup> Defendant over the same subject matter and cause of action.
15. Vide the Amended Counterclaim, the 1<sup>st</sup> Defendant seeks;
  - i. Vacant possession of the subject property namely, Title No Dagoretti/Riruta/4080;



- ii. A Permanent Injunction to restrain the Plaintiffs by themselves, their servants or agents or otherwise howsoever from interfering, wasting, disposing, alienating, remaining on, or continuing in occupation of the said subject property;
  - iii. An order that the restriction registered by the 1<sup>st</sup> Plaintiffs' grandson, Peter Igiria Nyambura, on the suit property be immediately removed;
  - iv. Aggravated Damages against both the Plaintiffs;
  - v. Mesne Profits amounting to Kshs 100,000/= per month from the 2<sup>nd</sup> February, 2011 until possession is delivered up;
  - vi. Costs of the suit;
  - vii. Further or other relief as the Court may deem fit.
16. It is the 1<sup>st</sup> Defendant's case that by a contract dated 7<sup>th</sup> September, 2010, the deceased agreed to sell to her all that parcel of land known as Title No Dagoretti/Riruta/4080 containing by measurement 0.21 hectares inclusive of all buildings, developments and improvements erected or maintained thereon for Kshs 5,000,000; that both parties' signatures to the agreement of 7<sup>th</sup> September, 2010 were witnessed by Advocates and that she paid the purchase price in full and the relevant transfer instruments were executed and successfully registered in her favour.
17. According to the 1<sup>st</sup> Defendant, the deceased, in flagrant breach of his contractual obligations and notices thereto, and further in total disregard of the fact that a new title deed has been issued in her name as the new absolute proprietor of the suit property, refused to grant her possession and that the 1<sup>st</sup> Plaintiff who has no registrable interest in the Title Dagoretti/Riruta/4080 has caused to be registered a restriction against the title further frustrating her attempts to get possession of the suit property.
18. The 1<sup>st</sup> Defendant averred that the Plaintiffs' actions in informing the press that the title deed to the subject property was stolen from the deceased by his house help and the land sold without his knowledge and signing any document were malicious and spiteful; that the aforesaid actions are intended to humiliate her and that unless restrained, the Plaintiffs intend to remain in wrongful occupation of the suit property.
19. The 2<sup>nd</sup> Defendant filed an Amended Defence and Counterclaim in which it denied all the assertions as set out in the Plaint stating that the suit as framed constitutes a misjoinder by combining claims and actions over unrelated transactions and that contrary to the Plaintiffs' allegations, they entered into a valid sale for the properties with the deceased and that the negotiations were carried out between the deceased and the 2<sup>nd</sup> Defendants' Director.
20. It was averred by the 2<sup>nd</sup> Defendant that it duly conducted a search and confirmed ownership of the suit property; that it paid the purchase price for each of the two plots being Kshs 4,500,000; that the transfers were duly effected and registered on 8<sup>th</sup> October, 2010; that the 2<sup>nd</sup> Defendant received the title documents and that the only outstanding issue was the pointing out of the beacons and boundaries.
21. The 2<sup>nd</sup> Defendant averred that although the LCB consent was obtained, it was not necessary as the parcels being sold were not controlled under the *Land Control Act*; that the LCB consent was applied for and obtained by the parties with the full consent and participation of the deceased and that the details in the application form were sufficient for obtaining the consent of the LCB which consent was duly given and any minor omissions were not fatal thereto.



22. It is the 2<sup>nd</sup> Defendant's case that there was neither a mistake, collusion, misrepresentation nor manipulation as alleged; that the seller acknowledged receipt of all payments and signed all documents and that although old, the deceased did not display loss of memory nor was he impaired by sickness.
23. It is the 2<sup>nd</sup> Defendant's case vide the Counterclaim that the Plaintiffs were unaware of the transactions with respect to the suit property, only becoming aware of the same when its Director sought to have the properties beacons pointed out to them; that the Plaintiffs are merely seeking to pursue their own agenda which includes bringing up a dispute to prevent the 2<sup>nd</sup> Defendant from developing the properties, attempting to enhance their own chances of inheritance and seeking to have the 2<sup>nd</sup> Defendant pay more for the properties.
24. According to the 2<sup>nd</sup> Defendant, the deceased developed issues with his Advocates, Macharia Gakaria, over payment of proceeds relating to parcel 4080 and sought the assistance of its Director to intervene, stop payments and recover Kshs 5,00,000 paid to Macharia Advocates as stakeholder; that its Director took steps and instructed the purchaser's Advocates to make payments directly to the deceased's account and that the 2<sup>nd</sup> Director further advised the deceased to make a complaint to the Advocates Complaints Commission which he did and the Advocates were convicted vide a Judgement delivered on 6<sup>th</sup> January, 2012.
25. According to the 2<sup>nd</sup> Defendant, in an apparent shift from these positions and at the prompting of the Plaintiffs, the deceased recorded a statement with the DCI to the effect that his title deeds had been stolen and plots transferred fraudulently; that the police carried out investigations which concluded that he had given false information but excused him from prosecution due to his advanced age and that the Plaintiffs' actions have frustrated the 2<sup>nd</sup> Defendant's intentions and plans and it will continue to suffer loss and damages unless the Court intervenes.
26. The 2<sup>nd</sup> Defendant seeks vide the Counterclaim for the following Orders:
  - i. The suit by the 1<sup>st</sup> Defendants to the Counterclaim and Plaintiff in the original action be dismissed with costs.
  - ii. A declaration that the sale of Title No Dagoretti/Riruta Block 8044[4084] and Dagoretti/Riruta 8045[4085] by the deceased Defendant herein to the Plaintiff by Counterclaim, was valid and the Plaintiff is the lawful proprietor of the parcel.
  - iii. An order directing the Defendants whether by themselves, their agents, servants or persons acting under their instructions, to point out the beacons or boundary lines in respect of Title No Dagoretti/Riruta/Block 8044 and Dagoretti/Riruta/8045 in the alternative the District Land Registrar Nairobi and/or District Land Surveyor Nairobi to demarcate the said boundary.
  - iv. An order of injunction restraining the Defendants whether by themselves, their agents, servants, employees or persons acting on their behalf or instructions from interfering with the Plaintiffs' access, use, possession and quiet enjoyment of Title No Dagoretti/Riruta/ Block 8044 and 8045.
  - v. Damages and mesne profits.
  - vi. Costs of the original suit and counterclaim.
27. The 3<sup>rd</sup> Defendant did not participate in the proceedings.



## **Hearing and Evidence**

28. PW1 was Peter Nyambura, a grandson and Administrator of the Estate of the deceased-Harrison Njoroge Ngiria, who produced the documents attached to the Plaint as PEXHB1. It was his evidence that the suit is with respect to three parcels of land being Dagoretti/Riruta 4080, 4084 and 4085 measuring 0.21Ha, ¼ and ¼ acres respectively and that his grandfather informed him that the titles for the aforesaid parcels were missing.
29. According to PW1, he resides on parcel number 4075 which is a sub-division of his grandfather's land; that his grandfather's house, his business as well as several other businesses including a bar, shop, rental houses and other structures are on parcel number 4080 and that most of the houses are permanent while others are made of timber and iron sheets.
30. According to PW1, all the family members are on this parcel of land including himself, his sister and his Cousin; that his grandfather had five children all of whom are deceased; that his Cousins live are on parcel number 4081 and that his grandfather died when he was 96 years old.
31. It was PW1's evidence that sometime in 2012, he was approached by their neighbor, Margaret, who informed him that she had purchased the property from their grandfather for the sum of Kshs 5 million; that she was in the company of a man who informed him that he had bought parcels number 4084 and 4085 and that they informed him that his grandfather had refused to show them the beacons.
32. According to PW1, he asked them (the Defendants) to approach the entire family; that together with an uncle who had a bar on parcel 4080, they approached their grandfather who informed them that he had not sold the suit properties; that the Defendants showed him copies of the titles in respect of parcels 4080, 4084 and 4085 which turned out to be coloured copies of the originals and that they reported the matter to Kabete Police station.
33. PW1 stated that his grandfather had informed them that he had at one time found the titles on the table and his worker had informed him that he was the one who had put them there and that even when his grandfather died, he believed that the titles were original and it was only upon taking them to the bank that he realized that they were coloured copies.
34. According to PW1, their grandfather informed them that he did not know Margaret Njoki and Ojiambo Adrian and that if they had indeed purchased the suit properties, they would have been shown the boundaries and that his grandfather was an old and sickly man with poor memory and lived with a maid who assisted him.
35. According to PW1, Margaret told them that she had bought the suit property from the deceased who was in the company of Njoki Kamande; that they did not know Njoki but later realized that she had conspired with their grandfather's house maid and were the ones taking the money; that the acreage of the property in the sale agreements is different from one that is indicated in the applications for the LCB consent and that further, in the application for consent with respect to parcel 4080, the purchaser's signature is not indicated.
36. It was the testimony of PW1 that although the consents were issued, there were no valid applications; that as per the house maid Salome's statement, no family member accompanied the deceased to the Land Control Board and that the deceased was very close to his family and told them all his dealings.
37. It was the evidence of PW1 that he was personally very close to the deceased, his father and mother having been deceased at the time; that the deceased had only one son, Richard Mugwe, who was 56



- years old; that the deceased used to say that their uncle (his only son) was a mad man although he was not and that the signatures on the transfer forms is not his grandfather's signature.
38. According to PW1, it is not possible for the deceased to have sold ½ acre of developed land for Kshs 5 million while selling ¼ acres of undeveloped land at Kshs 4.5 million; that Margaret and Adrian reached out to him to show them the beacons but he refused; that at the time of his death, he only had Kshs 180,000 in his account and that he did not bother to follow up on whether the purchase price was paid because the deceased denied selling the land.
39. It was PW1's testimony on cross-examination that there is a sale agreement between the deceased and the 1<sup>st</sup> Defendant; that the statement in the deceased's bank account at Equity Bank shows the deposit of Kshs 4.5 million; that there is a cheque for Kshs 500,000 drawn in favour of Macharia Advocates; that the deceased complained to the Advocates Disciplinary Committee and that a purchase price is subject to the agreement of parties and it is a willing buyer, willing seller situation.
40. It was his further evidence on cross-examination that there is no report with respect to the allegations of forgery of the deceased's signature; that the signature in the verifying affidavit, verifying the Plaintiff, does not belong to his grandfather; that the witness statement of the deceased is in English; that he does not know if the deceased visited the bank; that they have never filed a complaint against the bank nor questioned the authenticity of the account and that he does not know Advocate Macharia and has no claim against him.
41. PW2 was Beatrice Wangechi, the deceased's daughter in law. She adopted her witness statement dated 30<sup>th</sup> March, 2012 as her evidence in chief. It was her oral evidence that her husband is deceased; that the land belonged to her late Father in Law and that they were never involved in the sale of the suit property.
42. It was the evidence of PW2 that the land has been sub-divided into plots; that the plots in issue are 4080, 4084 and 4085; that plot 4080 is ½ acre and others are ¼ acres; that she lives on Plot 4080 on which the deceased also lived and had a permanent structure; that the plot has stone houses as well as mabati houses which they have rented out and that the deceased used to collect rent through Eunice Wanjiru who was employed by an estate agency.
43. According to PW 2, the estate agency carried out the collection of rent until 2011 after which they just disappeared; that the deceased was about 98 years in 2010 and they all used to look after him; that Salome and Peter Kimemia took care of the deceased daily; that he was sick but not very sick and that during the time he sold the property to Irene, the entire family was involved.
44. It was the testimony of PW2 that the deceased could not have sold the suit parcels in their absence; that they were informed about the sale by Peter Igeria who found out after Margaret and Ojiambo called him asking to be shown the beacons and that Peter refused to show them the beacons because the owner is the one who should have shown them.
45. PW1 testified that after the foregoing developments, they had a meeting and reported the matter to the Police; that Harrison denied having sold the land as alleged; that they learnt that it was Eunice Wanjiru and her sister Njoki whom she didn't know who colluded to sell the land and that she doesn't know how they sold the land and that none of the family members took Harrison to the land control board.
46. During cross-examination, PW2 stated that the deceased kept the titles by himself; that he had the keys to his house; that he was assisted by his son; that she didn't know about an account the deceased had with Equity Bank but knew about the account at Standard Chartered and that it is Salome and Peter who were very close to him.



47. PW2 stated that Harrison had a right to sell the suit properties; that if he had informed them, they would have stopped him; that he had 14 plots out of which he sold 3; that the remaining plots are occupied by his other children; that she never went to the bank with him; that 8 plots are still in his names; that they are in quarters; that 2 acres are available now; that the 8 plots are hers because she is the only beneficiary.
48. DW1 was John Patrick Kimani Kamau, a banker residing in Ruai. It was his testimony that he was summoned by the Police and recorded a statement therein dated 22<sup>nd</sup> September, 2011 which statement he adopted as his evidence in Chief.
49. He testified that the procedure for opening an account includes; a physical attendance by the account opener with documents including the ID and other relevant documents; that the person fills the forms and after validation of the ID and PIN, the account is opened and that this procedure was undertaken when the deceased went to open the account with the bank.
50. DW1 told the Court that he was the operation manager at Equity Bank when the deceased visited the bank to effect a funds transfer of Kshs 4.5 million; that he went to vet him to confirm that he was the account holder; that because of his age, they conducted further due diligence; that he interviewed him to establish if he knew about the transaction; that he told them that he knew about the transaction and knew how much was in the bank account and that he informed them that the monies were from the proceeds of the sale of land.
51. DW1 stated that the deceased went to his office with two ladies; that he requested the other two ladies to exit the office; that the deceased had completed a bank transfer form that he presented to them; that the funds were from Kinoti Advocates; that the deceased came back the following day; that he was however not around but someone else was there being Linda Ngendo who assisted him and that he has never been summoned since recording his statement.
52. In cross-examination, DW1 stated that the deceased was mentally fit; that he went to the bank walking and did not seem to be under any duress or compulsion; that the official language is English but he interviewed the deceased in Kiswahili his mother tongue; that the deceased told him that the two ladies accompanying him were his daughters who lived with and took care of him and that he later learnt that one of the ladies was a beneficiary of the funds.
53. DW2 was Linda Ng'endo Wariara, a cash officer at Equity Bank. It was her evidence that on 26<sup>th</sup> February, 2011, she was sitting in for John Kimani who told her that he had other duties; that she attended to the deceased who informed her that he had been in the bank the previous day and had been asked to bring the documents and that he gave her a Sale Agreement and title deed.
54. According to DW2, a transfer of Kshs 4.5 million was effected in favour of the deceased; that she confirmed that the money had been received legally and was in his account; that he transferred the money to Salome through an internal transfer on the same day; that the entire transaction was above board and that after recording the statement with the Police, they have not been summoned again and that they followed the deceased's instructions who knew what he was doing.
55. DW3 was Margaret Njoki Muchiri, the 1<sup>st</sup> Defendant. She adopted her statement dated 16<sup>th</sup> May, 2012 as her evidence in chief. She adduced her documents dated 28<sup>th</sup> July, 2014 as 1DEXB1. It was her evidence that a lady in the neighbourhood informed her that the deceased was selling the land and that she met the deceased and they completed the transaction.
56. According to DW3, the purchase price for the land was Kshs 5 million; that she paid the deposit; that she can see the application for consent; that she is not the one who completed the form; that the letter



- of consent was issued and it describes the property that she bought; that she has never taken possession of the property that she bought and that the Plaintiffs are benefitting financially from the property.
57. During cross-examination, she stated that she knows Mr Ojiambo, the Director of the 2<sup>nd</sup> Defendant; that he has been her lawyer; that she informed him about the plots after being informed that they were being sold; that she connected him with Joyce Njoki who was an agent; that she met the old man through an agent and that Mr Ojiambo met the deceased in her absence.
58. It was the evidence of DW3 that she saw the suit property before buying it; that she went to Riruta for the Land Control Board consent; that the deceased chose the special land board consent; that he does not know how much the deceased paid for the special land board and that she does not know what a special land board entails.
59. It was her further evidence on cross-examination that the application for consent that she signed had the correct acreage; that the consent has the correct measurements; that it was Mr Ojiambo, for the 2<sup>nd</sup> Defendant, who was to negotiate a price for the plots he was buying; that Mr Ojiambo bought two undeveloped plots while hers has structures and that the deceased was elderly man.
60. During re-examination, DW1 stated that she did not fill the application for consent of the Board; that a signed and stamped letter of consent was given to her; that the deceased complained to the Police but the special prosecutor found that the transactions were above board; that she filed the suit because the Plaintiffs were trying to defraud her of the land.
61. DW4 was Salome Nduta, the deceased's house help (maid). She adopted her witness statement dated 28<sup>th</sup> March, 2014 as her evidence in chief. It was her evidence that she knew Wanjiru as an agent but didn't know which company employed her; that she was a house girl who had stayed with the deceased for 24 years; that the deceased told Wanjiru that he would give her (DW4) a plot in her presence; that Wanjiru brought Joyce who agreed to buy the plots and came in with a buyer who met the deceased.
62. According to DW4, the deceased told her that he would sell the plot and give her the money; that Richard and other family members were around and agreed with the deceased's decision to give her the land; that after the land that he was to gift her, the deceased gave her [Salome] money at Equity Bank and that no family members were present at the bank.
63. It was the testimony of DW4 that the deceased was literate and no one forced him to sign any documents; that he needed a translation from English to Kikuyu which translation was done by the bank employees; that the deceased gave her Kshs 4.5 Million out of which she gave Joyce Kshs 3 million to buy for her another plot and that Joyce bought for her another plot at Kayole.
64. DW4 testified that she knows where Joyce lives; that Joyce received 3.5 million; that the deceased was sick and she doesn't know who had his ATM card; that she never withdrew any of his monies; that he would frequently go to town alone as he was not sick all the time; that he sold one plot to Margaret and informed her that he would sell others to "enjoy" and that the deceased knew Advocate Macharia.
65. It was DW4's evidence on cross-examination that the after his wife's death, the deceased used to do things on his own; that he was mentally sound and made his own decisions and that his grandchildren and daughter in law were not happy with the fact that the deceased gave her a parcel of land as a gift.
66. She testified that she was present when the deceased transferred Kshs 4.5 million to his account; that the deceased was literate and could read, write and sign documents and that she was accused of having stolen the titles but the Court acquitted her of the charges.



67. DW5 was Aldrian Ojiambo, an Advocate practicing in the firm of Ojiambo & Co Advocates. It was his evidence that he is an Advocate of the High Court having been in practice since 1999 and a Director of the 2<sup>nd</sup> Defendant which he co-owns with his wife. He adopted his witness statement dated 26<sup>th</sup> July, 2012 as his evidence in chief and produced the documents as 2DEXB2.
68. It was his evidence that the suit should be dismissed and the 2<sup>nd</sup> Defendant declared the legitimate owner of parcels number 4084 and 4085 and the Plaintiffs mandated to show them the beacons; that when he went to the site, he had a meeting with the vendor and that although the vendor (deceased) was elderly, he looked fit and there was no reason to doubt his ability to transact.
69. According to DW5, he wanted to buy the land for Kshs 3.5 Million but the vendor insisted that he had sold the neighboring plot for Kshs 5 Million; that the vendor asked him to buy two plots for Kshs 9 Million; that the vendor pushed the bargain and had a presence of mind; that he was willing to pay Kshs 1 million more because the two plots were next to each other and that he paid Kshs 9 million to the vendor's lawyer and the land was transferred to him.
70. It was his evidence that there was no dispute between him and the vendor; that when he wanted vacant possession, he was told to await completion of the sale by the other buyer which took a while; that the deceased disclosed to him that his lawyer had refused with Kshs 1.7 Million from what he had paid and also withheld Kshs 500,000 from what the 1<sup>st</sup> Defendant had paid and asked him as an Advocate for assistance to recover the same.
71. It was the evidence of DW5 that the deceased asked him to tell the 1<sup>st</sup> Defendant to pay the balance of Kshs 4.5 million into his bank account which was done; that the deceased lodged a complaint with the Advocates disciplinary tribunal with respect to the 1.7m and the 500,000 withheld by his advocate and that the disciplinary tribunal decided in his favour.
72. DW5 stated that he later learnt that the deceased had complained that he had been defrauded by the 1<sup>st</sup> Defendant; that he did not want to venture into those issues and paid Kshs 9 million to Macharia Advocates; that he did not defraud the deceased and that there was no legal requirement that the deceased consults his family, especially his grandchildren before selling the land.
73. It is the 2<sup>nd</sup> Defendant's Director's case that the Plaintiffs have refused to give him possession of the suit property; that he was to construct apartments thereon; that he has been inconvenienced by the delay in taking possession of the property and that the deceased showed him the entire sub-divisions and he chose parcels number 4084 and 4085.
74. It was his evidence on cross-examination that he refused to give the deceased man money and asked him to appoint an Advocate; that he met the deceased with Joyce Njoki; that Joyce Njoki informed him that she was the agent for the seller; that Macharia Advocate was appointed by the deceased to act for him in the sale and that he did not need a letter of instructions to that effect.
75. DW5 stated that the deceased informed him that he was unhappy with his family and further that he was sick and needed medication; that the deceased informed him that once he gets the purchase price, Nyambura would show him the beacons; that he used to reach the deceased through Joyce; that he personally did not have his number; that Nyambura looked for Peter to show them the beacons and that he had never met Nyambura before and it is the 1<sup>st</sup> Defendant who arranged for a meeting with them.
76. It was his testimony that the LCB application was made by the seller; that he never attended the land board; that the signatures on the application for the LCB consent was by the agent; that the agent of



the company was his clerk; that he authorized him to do it and that no criminal proceedings have ever been undertaken against him.

77. During re-examination, DW5 stated that there is a letter confirming that the transaction was legal and that the investigators found that the deceased had given a false report to the police

### **Submissions**

78. The Plaintiffs' Counsel rehashed the facts of their case and the evidence as adduced during trial. Counsel submitted that all the deceased's titles were stolen from his house and that those with the best opportunity to do so were his house help Salome Nduta Githendu in collaboration with Eunice Njoki and Joyce Njoki, the alleged land agent.
79. Counsel submitted that the process of obtaining the Consent from the Dagoretti Land Control Board was ambiguous and the applications were full of misinformation and suspicious signatures and that the fact that neither the Defendants met with the deceased after completion of the transactions of transfer of his land to them, despite all of them residing in Nairobi raises questions.
80. It was submitted that there is no evidence that the deceased hired any Advocates to act for him in the transactions as alleged nor that the deceased accessed any of the monies; that whereas the money was deposited into his accounts, the massive and frequent withdrawals were not undertaken by the deceased but by persons who were in possession of the ATM card being either Salome Nduta or Joyce Njoki and that ultimately, the circumstances of the transfer of the Plaintiffs' parcel of land to the two parties i.e. Wells Publishing Limited and Margaret Njoki was fraudulent.
81. The 1<sup>st</sup> Defendant's Counsel submitted that the Plaintiff has not proven the allegations of fraud; that the evidence adduced affirmed that the sale was lawful and in compliance with the law and that the Plaintiffs cannot prove fraud in the transaction by relying on omission on the application for consent and the consent for the Land Control Board.
82. The 1<sup>st</sup> Defendant submitted that the Court of Appeal in Civil Appeal 134 of 2017- George Chayuga Alianza and Zephania Khisa Saul expressing itself on the lack of LCB consent stated that the Courts ought not rubber stamp fraud and dishonesty by holding as null and void agreements freely entered into by sellers of agricultural land and which have been fully acted upon by the parties thereto, when those sellers, often impelled by no higher motives than greed and impunity seek umbrage under the *Land Control Act*, an old statute of dubious utility in current times.
83. Counsel submitted that the 1<sup>st</sup> Defendant has proved that there was no fraud in the Sale of L.R. No. Dagoretti/Riruta/4080 and that she is yet to get vacant possession.

### **Analysis and Determination**

84. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are;
- i. Whether or not the titles to Dagoretti/Riruta/4080, 4084 and 4085 were acquired fraudulently?
  - ii. What are the appropriate orders to issue?
85. The Plaintiffs have instituted this suit seeking, inter-alia, for a declaration that the transfer of parcels Dagoretti/Riruta/4080, 4084 and 4085 from the deceased to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are fraudulent,



- unlawful, irregular, and void and orders directing the Land Registrar to cancel the titles in the Defendants' names and reinstate the same into the names of the deceased.
86. It is the Plaintiffs' case that their deceased grandfather did not sell parcels of land known as Dagoretti/Riruta/4080,4084 and 4085 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as alleged and that any alleged sale of the parcels of land was procured through forgery, misrepresentation, mistake and or manipulation beyond his control.
  87. The Plaintiffs adduced into evidence demand letters to the Defendants, copies of the titles and transfers in respect of L.R No Dagoretti/Riruta/4080, 4084 and 4085; copies of the applications for consents and letters of consent of the LCB board in respect of the parcels Dagoretti/Riruta 4080, 4084 and 4085; copies of application for registration of transfer for Dagoretti/Riruta/4084 and a copy of the cancelled title deed for Dagoretti/Riruta/4080.
  88. The Plaintiffs further adduced into evidence the registry map sheet number 11 and 12; correspondences; agreement for sale of L.R No. Dagoretti/Riruta/4077; Equity Bank Account statement for Harrison Njoroge for the period 1<sup>st</sup> September, 2010 - 12<sup>th</sup> July, 2011 and an Abstract from Kenya Police with respect to loss of titles.
  89. On her part, the 1<sup>st</sup> Defendant seeks, inter-alia, for vacant possession of parcel Dagoretti/Riruta/4080, permanent injunctive orders restraining the Plaintiffs from interfering with the property, removal of a restriction placed on the property by the 1<sup>st</sup> Plaintiff and aggravated damages and mesne profits.
  90. She maintains that she is the lawful proprietor of the suit property by way of purchase; that the purchase was procedural and lawful and that despite the foregoing, she has not been granted possession of the property.
  91. The 1<sup>st</sup> Defendant adduced into evidence the copy of the Sale Agreement dated 7<sup>th</sup> September, 2010; a copy of cheque No. 000077 for Kshs 500,000; a copy of transfer of land instrument dated 9<sup>th</sup> September, 2010 and registered on 2<sup>nd</sup> February, 2011; a copy of the letter of consent dated 8<sup>th</sup> September, 2010 from Dagoretti Land Control Board and a copy of the title deed registered on 2<sup>nd</sup> February, 2011, amongst others.
  92. The 2<sup>nd</sup> Defendant similarly asserts that it is the lawfully registered proprietor of the parcels Dagoretti/Riruta/4084 and 4085 by virtue of having purchased them from the deceased and that the sale was lawful and procedural. The 2<sup>nd</sup> Defendant seeks inter alia to be declared the legitimate owner of the suit property and the Plaintiffs directed to point out the beacons of the suit property.
  93. The 2<sup>nd</sup> Defendant adduced into evidence copies of the Title Deeds in respect of L.R Dagoretti/Riruta 4084 and 4085; a copy of the deceased's ID card; sale agreements with respect to parcels 4084 and 4085; correspondence from Macharia Advocates to Ojiambo & Co Advocates in respect of parcels 4084 and 4085 and KRA stamp duty declaration assessment & pay in slip; copies of cheques dated 2<sup>nd</sup> August, 2010 and 9<sup>th</sup> August, 2010 for Kshs 4,500,000, amongst others.
  94. The dispute herein turns on the ownership of the suit parcels of land which the Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants lay claim to. Each party is therefore obligated to prove its case on the required standard of proof being on a balance of probabilities.



95. This position is succinctly captured in Section 107, 109 and 112 of the *Evidence Act*. The said sections provide as follows:

- “(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.”

96. Sections 109 and 112 of the same Act states as follows:

“

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

97. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

.....The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

98. On the question of burden of proof, the learned Judges of Appeal in the case of *Palace Investments Limited vs Geoffrey Kariuki Mwenda & another* [2015] eKLR, posited thus:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”



99. The evidence adduced by the parties shows that parcel of land number Dagoretti/Riruta/4080 is registered in the name of Margaret Njoki Muchiri, the 1<sup>st</sup> Defendant herein having been so registered on 2<sup>nd</sup> February, 2011, whereas parcels number 4084 and 4085 are registered in the name of Wells Publishing Limited, the 2<sup>nd</sup> Defendant having been so registered on 8<sup>th</sup> October, 2010.

100. It is noted that the three titles are governed by the Registered Land Act, Cap 300 (repealed). By dint of the provisions of Sections 107 of the Land Registration Act, the law applicable to the titles aforesaid is the Registered Land Act, CAP 300 (repealed). Section 27(a) thereof provided as follows:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

101. Under Section 28 of the repealed Registered Land Act, the rights acquired by a proprietor were only subject to any leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, or the overriding interests that were provided in Section 30 of the said Act.

102. The indefeasibility of title was also provided in Section 143 of the RLA which stated thus:

“143.

- (1) Subject to sub-section (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake”

103. Section 26(1) of the Land Registration Act now provides as follows in this respect:

“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.”

104. In the case of Esther Ndengi Njiru & another vs Leonard Gatei Mbugua [2020] eKLR, the Court of Appeal stated thus;

“We agree with the finding of the learned judge. In deed, it is in tandem with a five-Judge-Bench decision of this Court, Embakasi Properties Limited & Anor. vs. Commissioner of Land & Anor. [2019] eKLR in which this Court expressed itself as follows:

“Although it has been held time without end that the certificate of title is: “... conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the



ground of fraud or misrepresentation to which the proprietor named is proved to be a party.. Section 26 of the [Land Registration Act](#), 2012...confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme”

105. The Plaintiffs contend that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ titles to the suit properties were procured by fraud. The Black’s Law Dictionary defines fraud thus:

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another.”

106. It is trite law that fraud must not only be pleaded and particularized but strictly proven. This position was affirmed by the Court of Appeal in *Demutilla Nanyama Pururmu vs Salim Mohamed Salim* [2021] eKLR relying on an earlier exposition by *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another*[2000]eKLR as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

107. As regards the standard of proof, the Court of Appeal in *Demutilla Nanyama Pururmu vs Salim Mohamed Salim* (*supra*) looked to its earlier decision in *Kinyanjui Kamau vs George Kamau* [2015] eKLR wherein it had held;

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

108. In this instance the Plaintiffs have pleaded and indeed particularized the elements of fraud as against the Defendants. The only question is whether they have proved the same.

109. Beginning with the contest to the Defendants’ acquisition of te suit property, the first challenge falls on the legitimacy of the sale agreement. The Plaintiff has mounted several challenges to the sale to wit;



no sale agreement was executed by the deceased and his signatures thereon were forged and that the deceased did not have the capacity to enter into any sale agreement.

110. The Court has considered the sale agreements. They are all in writing, have been signed by both the vendor and purchasers and their signatures attested. The Plaintiffs state that the deceased's signature therein has is a forgery. However, no evidence has been adduced in this respect. PW1 admitted on cross-examination that there is no report with respect to the allegations of forgery of the deceased's signature. Ultimately, it is the Courts finding that the agreements meet the parameters of Section 3(3) of the [\*Law of Contract Act\*](#).
111. Through their evidence, the Plaintiffs strongly asserted that that the deceased was elderly and sickly and was as such incapable of entering into any sale as alleged. Subsequently, the next point of concern is whether the contracts though duly executed were vitiated by incapacity. The law of contract recognizes and respects the freedom of parties to enter into agreements setting out the parameters within which they are to be governed. The law equally places a high value on ensuring parties have truly consented to the terms that bind them.
112. In *Wiltshire vs. Cain* [1958–60] 2 Barb. L. R149, the Supreme Court of Barbados noted that the contention made by the Defendants that the seller who was 83 years, was, for at least one year prior to the signing of the contract, suffering from loss of memory, mental debility and senile decay, and was incapable of understanding the meaning and effect of the agreement as at the time. The Court held that;
- “... for the defence to succeed it must show (a) the incapacity of the defendant due to mental illness in one form or another, and (b) that the plaintiff knew of the condition of the defendant. The burden in respect of both of these matters rests on the defence – see *Imperial Loan Co. v. Stone* Lord Eastern [1892] IQB 599...”
113. In the case of *Grace Wanjiru Munyinyi & Another vs Gedion Waweru Githunguri & 5 Others* [2011] eKLR the Court persuasively observed thus;

“The starting point is the presumption that must always exist, until it is proved otherwise, that every person is of sound mind. It is a logical presumption otherwise no one would be held responsible for their actions. It is also the position in law, and we find persuasive authority for it in the *Wiltshire Case* (supra), that the burden of proof lies on the person who asserts the incapacity. In the *Wiltshire Case*, those who were asserting mental incapacity as cited in paragraph (6) above, called a medical practitioner who had been attending to the defendant for forty years, and testified that he examined the defendant three months after the sale agreement and “found symptoms of senile degeneration in that he was delusional, confused, and incoherent” and in his opinion the defendant was “incapable of managing his own affairs by reason of mental infirmity”. A neighbour of the defendant was also called to testify that she saw him “doing stupid things”, while the defendant's married daughter also testified that “he stayed away from home one full day,” “talked and walked about and loosed other peoples animals” and “tore up dollar bills”. All that evidence was rejected by the court as insufficient to avoid the transaction. The Supreme Court stated: “A person may be or become of sound mind because he has lost the ability to reason by disease, grief or other accident. Where a person in such condition can be shown not to have understood because of his mental condition, what he was doing and further that the other party was aware of this incapacity, then any contract, other than a contract for necessities, made by such a person is not binding on him.”\*The court proceeded to hold that: “...it was not sufficient to establish



the mental incapacity of Mbogo or the knowledge of such incapacity by the appellants when the power of attorney was executed. Both required proof but there was none. The presumption is therefore that Mbogo was in control of his faculties when he appeared before an Advocate & Commissioner for oaths, one Githiru N.M. on 22<sup>nd</sup> February, 2002 and executed the Power of Attorney.”

114. The Court is persuaded by the foregoing position. While it is not disputed that the deceased was elderly, old age does not in itself prove incapacity. The testimony with respect to the deceased’s alleged sickness was at variance. PW2 for example stated that the deceased was sick, though not very sick. DW1 & 2, the bank officials, testified that during their interactions with him, he was of sound mind. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants collaborated this evidence.
115. In view of the foregoing, it behooved the Plaintiffs to produce evidence in support of their assertions in this respect. They did not do so. Without evidence, the Court finds that the deceased was in full control of his faculties when he entered into the sale agreements with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and when he executed the requisite documents.
116. It has also been severally urged that the deceased did not consult his family before entering into any sale agreement if at all evincing fraud. Admittedly, the parcels in question belonged to the deceased, Harrison Igiria. This being so, there was no legal requirement mandating him to consult any other person before disposing off his property, especially his grandchildren and daughter in law.
117. The 1<sup>st</sup> Defendant testified that she duly performed her part of the sale by paying the entirety of the purchase price. The evidence shows that 4.5 million was sent into the deceased’s account while 500,000/= was held by Macharia Advocates who was the Advocate acting on his behalf. This was acknowledged by the deceased who instituted proceedings for the recovery of the Kshs 500,000/= from the aforesaid Advocate.
118. This being so, and without any evidence of any collusion, the sale to the 1<sup>st</sup> Defendant cannot be vitiated on account of the fact that deceased used the monies from the purchase in a manner the Plaintiffs deemed unfit. Once the deceased received the money, the 1<sup>st</sup> Defendant was discharged of her duty as a purchaser.
119. The fact that the 1<sup>st</sup> Defendant was unaware of the properties beacons equally does not in itself constitute fraud.
120. The next frontier of the Plaintiffs attack on the title is with respect to the LCB Consent. It has been alleged that the LCB consent was forged, no land control board having ever sat to consider the application; that the application for the consent was falsified in that the information therein is incorrect and crucial particulars are missing; that the land was undervalued in the application.
121. To begin with, it is noted that the LCB consent with respect to this transaction was issued on 8<sup>th</sup> September, 2010. The consent was issued by the Dagoretti Land Control board and executed by the District Officer, Western Division Nairobi. It was not, as alleged, issued by a “special land board”.
122. Indeed, the entity “special land board” does not exist in law. Nonetheless, the Court is aware that there are circumstances under which the land board when moved constitutes a special sitting.
123. The issuance of the consent presupposes that the board met and the burden lay on the Plaintiffs who alleged that the board did not sit, and/or the deceased did not attend the board, to establish the same. This would be best done through production of any letter or minutes from the LCB to the contrary. In the absence of the foregoing, the Court accepts the letter of consent as genuine and having been issued by the LCB following a sitting thereof.



124. As regards irregularities in the application for consent, the Court has considered the same as adduced by the Plaintiffs. Whereas it was DW3's evidence that she did not execute the aforesaid form, she has not adduced a different application form.
125. Whilst claims regarding forgery of the signature on the LCB consent have not been proved, it is noted that the same is not signed by the purchaser and some information is missing, to wit, the estimated value of the land, description of the approximate value of improvements, proposed development, and details of whether other agricultural land is held by the purchaser.
126. However, it is noted that the procedure before issuance of a consent anticipates physical attendance before the board and in view of the fact that it has not been demonstrated that no sitting of the board took place, nor that the consent is fraudulent, these irregularities cannot by themselves invalidate the consent.
127. On the allegation that the property was undervalued in the application for consent, the same does not arise. The value that the Plaintiffs make reference to is the consideration/purchase price. The deceased was at liberty to sell his property at whatever price he deemed fit.
128. Nonetheless, even if the Court was persuaded to make a finding that the foregoing irregularities invalidated the consent and as such no consent was obtained, what would be the effect of this on the transaction?
129. The consequences of failure to obtain an LCB Consent in a controlled transaction has been the subject of much litigation. The Court is aware that there are at least two contradictory decisions from the Court of Appeal of Kenya on the consequences of lack of consent of the LCB with respect to a controlled transaction.
130. For instance, in the case of *David Ole Tukai Vs Francis Arap Muge & 2 Others* [2014] eKLR the Court of Appeal held that the failure to obtain consent rendered a sale transaction null and void and of no legal effect and that the equitable doctrines of trust were inapplicable. On the other hand, the Court of Appeal constituted differently came to a contrary decision in the case of *Willy Kimutai Kitilit vs Michael Kibet* [2018] eKLR.
131. In the latter case, the Court of Appeal departed from the decision in the *Ole Tukai Case* and held, inter alia, that;
- “There is another stronger reason for applying the doctrines of constructive trust and proprietary estopped to the *Land Control Act*. By Article 10 (2) (b) of *the Constitution* of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law. (Article 10 (1) (b). Further, by Article 159 (2) (a), the courts in exercising judicial authority are required to protect and promote the purpose and principles of *the Constitution*. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential provisions in the Sixth Schedule to *the Constitution*, the *Land Control Act* should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with *the Constitution*.”
132. The Court is persuaded by the decision in the *Willy Kimutai Case* (supra), that the principles of equity are applicable to the application and interpretation of the provisions of the *Land Control Act*. The Court is further satisfied that the absence or invalidity of the consent of the LCB would not necessarily render the transaction in issue null and void for all purposes. In the circumstances of this case, the Court opines that the doctrines of equity would come to the aid of the Defendants.



133. Ultimately, it is the Court finding that there is no merit in the claim that the title was procured fraudulently.
134. As to whether there was any illegality and/or irrationality in the sale and transfer of the suit property, the Court equally finds in the negative. The Plaintiffs have not demonstrated any irregularity and/or unprocedurality in the manner of acquisition of the title by the 1<sup>st</sup> Defendant. Claims that the transfer was obtained before the consent was issued is unsupported. The transfer was registered on 2<sup>nd</sup> February, 2011 whereas the consent was obtained on 8<sup>th</sup> September, 2010.
135. Moving to the parcels Dagorett/Riruta 4084 and 4085, the Plaintiffs equally contend that no sale agreement was executed; that the deceased did not in any event have the capacity to enter into any agreement nor execute any sale, transfer or application for LCB Consent and that any such execution was procured by fraud and/or mistake.
136. The 2<sup>nd</sup> Defendant adduced into evidence a copy of the sale agreement with respect to parcels Dagoretti/Riruta/4084 dated 3<sup>rd</sup> August, 2010 and parcel Dagoretti/Riruta/4085 dated 9<sup>th</sup> August, 2010. The allegation that the deceased's signature is fraudulent has no foundation, there being no evidence demonstrating the same. The Court finds that both agreements meet the parameters of Section 3(3) of the Law of Contract Act being in writing, duly executed and attested.
137. The Plaintiffs also raised the question of capacity. As discussed herein above, they did not discharge the burden of proof and as such, the Court cannot make a finding that the deceased was incapacitated, which incapacitation vitiated the agreement.
138. Similarly, and as held hereinabove, there was no legal requirement mandating the deceased to consult his family members before selling the property.
139. The 2<sup>nd</sup> Defendant has demonstrated that it fully paid the purchase price for the suit parcels. This has been evinced through copies of cheques as follows:

Cheque dated 2/8/2010	Kshs 450,000/=
9/8/2010	Kshs 450,000/=
29/10/10	Kshs 2,000,000/=
29/10/10	Kshs 2, 050,000/=
Letter to NBK-16/12/10	Kshs 4,000,000/=

140. The aforesaid payments are not disputed by the Plaintiffs who only allege that the 2<sup>nd</sup> Defendant paid monies to an unqualified Advocate who was not appointed to act for the deceased. The evidence adduced showing Macharia Advocate acted for the deceased in the sale transactions with respect to the suit property has not been rebutted. Indeed, a dispute arose within the relationship leading to the deceased filing a complaint with the Advocates Disciplinary Committee.
141. Despite alleging that monies were sent to an "unqualified Advocate", the Plaintiffs have not sought any reliefs as against the Advocate. This was admitted by PW1 during cross-examination. He stated that they have "no claim against Macharia Advocate. Critically, all the monies were sent through Macharia Advocate and not through a third party



142. Moving to the LCB consents, the Plaintiffs contention is similar to their contentions as regards parcel 4080, to wit, that the consent was fraudulent as the board did not sit and that the same was issued by a special board that does not exist in law.
143. The LCB consents with respect to parcels 4084 and 4085 were issued on 8<sup>th</sup> September, 2010 by the Dagoretti Land Control Board and not a special land board as alleged. No evidence has been adduced either through correspondence from the board or minutes therefrom indicating that there was no sitting of the board, special or otherwise, or that the deceased was not in attendance.
144. Regarding the applications for consent, the allegation that the deceased's signature therein is forged is unfounded. In the applications with respect to parcels 4084 and 4085, the declarations are indeed undated. It is also unclear who the signatory on behalf of the purchaser was. In view of the fact that the consent has not been vitiated, the Court finds that these omissions alone cannot vitiate the consent.
145. The Court finds no merit in the claim that the titles to parcels 4084 and 4085 were procured fraudulently.
146. As to whether there was any illegality and/or irrationality in the sale and transfer of the suit property, the Court equally finds in the negative. The Plaintiffs have not demonstrated any irregularity and/or unprocedurality in the manner of acquisition of the title by the 2<sup>nd</sup> Defendant. Claims that the transfer was executed before the consents was obtained is unsupported. The transfers with respect to parcel 4084 and 4085 were registered on 8<sup>th</sup> October, 2010 being a month after the consents of the LCB were obtained.
147. In the end, the Plaintiffs have failed to establish that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' acquisition of parcels Dagoretti/Riruta/4080, 4084 and 4085 were actuated by fraud and or any irregularity and illegality. Consequently, the claims against the 3<sup>rd</sup> Defendant in so far as it registered the parcels in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants names also fails.
148. The Court has found that the Plaintiffs have not proved fraud and/or irregularity in the acquisition of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' titles to the suit property.
149. In view of the foregoing, the Court finds that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the legitimate proprietors of the suit properties and are entitled to all the rights appertinent thereto.
150. The 1<sup>st</sup> Defendant seeks among others vacant possession of the suit property, permanent injunctive orders, removal of restriction placed on the property, aggravated damages and mesne profits.
151. It is not disputed that the Plaintiffs are still in possession of the suit property and as such, the prayers for vacant possession and permanent injunction are warranted. Similarly, having affirmed the 1<sup>st</sup> Defendant's title, it follows that the restriction placed thereon should be removed.
152. As to the claim for mesne profits, the same is in the nature of special damages which must be specifically pleaded and proved. This position was affirmed by the Court of Appeal in the case of Peter Mwangi Mbutia & another vs Samow Edin Osman [2014] eKLR where the Court posited;
- “We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”
153. No evidence has been led under this head and it subsequently must fail.



154. As regards aggravated damages, the Court in Francis Xavier Ole Kaparo vs the Standard & 3 others HCCC No. 1230 of 2004 (UR) stated thus;

“Malicious and/or insulting conduct on the part of the Defendant will aggravate the damages to be awarded. The aggravated damages (distinguished from exemplary damages) are meant to compensate the plaintiff for the additional injury going beyond that which would have flowed from the defamatory words or statements above, caused by the presence of the aggravating factors ...Damages will be aggravated by the Defendant’s improper motive.”

155. Considering the nature of the dispute and the conduct of the Plaintiffs, the Court is not satisfied that the claim for aggravated damages is warranted. No evidence was led under this head and the Court declines to award the same.

156. On its part, the 2<sup>nd</sup> Defendant seeks a declaration that it is the lawful proprietor of parcel 4084 and 4085 and orders directing the Plaintiff to point out the beacons to them.

157. Having found that the 2<sup>nd</sup> Defendant is the legitimate owner of parcels 4084 and 4085, the Court finds that it should be declared as such and is entitled to injunctive orders restraining any interference to the properties by the Plaintiffs. The Court also finds that the 2<sup>nd</sup> Defendant is entitled to be shown the beacons of its property.

158. As regards mesne profits, the same being in the nature of special damages must be specifically pleaded and proven. No evidence has been led on this and the same must fail. The 2<sup>nd</sup> Defendant has equally not led the Court as to the quantum of damages sought and the Court will not grant the same.

159. In conclusion, the Court makes the following final determination;

\*\*I. The Plaintiffs’ suit be and is hereby dismissed.\*\*

\*\*II. The 1<sup>st</sup> Defendant’s Counterclaim is found to be merited and is allowed in the following terms;\*\*

\*\*i. The Plaintiffs are hereby ordered to grant vacant possession of the subject property namely, Title No Dagoretti/Riruta/4080 to the 1<sup>st</sup> Defendant within 90 days of the judgement herein failure to which eviction will issue;\*\*

\*\*ii. A Permanent Injunction does hereby issue restraining the Plaintiffs by themselves, their servants or agents or otherwise howsoever from interfering, wasting, disposing, alienating, remaining on, or continuing in occupation of the said subject property;\*\*

\*\*iii. An order is hereby made directing the Lands Registrar to immediately remove the restriction placed on parcel Dagoretti/Riruta/4080.\*\*

\*\*III. The 2<sup>nd</sup> Defendants Counterclaim is found to be merited and is allowed in the following terms;\*\*

\*\*i. A declaration is hereby issued that the sale of Title No Dagoretti/Riruta Block 4084 and Dagoretti/Riruta 4085 was valid and the 2<sup>nd</sup> Defendant is the lawful proprietor of the two parcels of land.\*\*

\*\*ii. An order does hereby issue directing the Plaintiffs whether by themselves, their agents, servants or persons acting under their instructions, to point out the beacons or boundary lines in respect of Title No Dagoretti/Riruta/Block 4084 and Dagoretti/Riruta/4085; in the alternative the



District Land Registrar Nairobi and/or District Land Surveyor Nairobi to demarcate the said boundary.\*\*

\*\*iii. An order of injunction does hereby issue restraining the Plaintiffs whether by themselves, their agents, servants, employees or persons acting on their behalf or instructions from interfering with the 2<sup>nd</sup> Defendant's access, use, possession and quiet enjoyment of Title No Dagoretti/ Riruta/ Block 4085 and 4085.\*\*

\*\*IV. The Plaintiff shall bear the costs of the suits and the counter-claims\*\*

**Dated, signed and delivered virtually in Nairobi this 24<sup>th</sup> day of April, 2024.**

**O. A. Angote**

**Judge**

**In the presence of;**

No appearance for Plaintiffs

No appearance for Defendants

Court Assistant - Tracy

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ELC NO. 238 OF 2012

JUDGMENT

