



**Njuguna v Kiaraho & 7 others (Environment & Land Case
1058 of 2016) [2024] KEELC 3451 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3451 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1058 OF 2016**

AA OMOLLO, J

APRIL 18, 2024

BETWEEN

JEMIMAH NYAMBURA NJUGUNA PLAINTIFF

AND

JOSEPH MWANIKI KIARAHU 1ST DEFENDANT

PAULINE NJERI KAMAU 2ND DEFENDANT

KIMANI KAIRU & CO. ADVOCATES 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

JOHNSON MWANIKI NYAGA 5TH DEFENDANT

INSPECTOR GENERAL OF POLICE 6TH DEFENDANT

ATTORNEY GENERAL 7TH DEFENDANT

**JEDIDAH WAMBUI NJUGUNA AND WILLIAM THIGANI
MUNGA 8TH DEFENDANT**

JUDGMENT

1. The Plaintiff filed a suit against the 1st to 8th Defendants vide Plaintiff dated 31st August 2016 seeking for the following orders;
 - a. A declaration that the Plaintiff is the legal owner of the freehold title comprised in a property known as L.R No.3734/457.
 - b. A declaration that the sale and transfer of lease against the suit property to the 1st, 2nd and 8th Defendants was unprocedural and illegal



- c. A permanent injunction to restrain the 1st, 2nd, 5th and 8th Defendants their servants, agents, employees or anybody claiming under them from entering into, evicting the Plaintiff, depositing materials and or constructing any structures thereon, selling, charging, alienating, disposing off, dealing with and or in any way interfering with the Plaintiff's quiet possession and or title to the property known as LR.No.3734/457.
 - d. An order for cancellation of the 1st, 2nd and 8th Defendants' names from the Land Register in respect of the Property Known as LR. No.3734/457 and rectification thereof to restore the name of Mr.David Nganga Njuguna and Jemimah Nyambura Njuguna as the proprietors of the property known as LR. No.3734/457.
 - e. In the alternative to 4 above, an order compelling the 1st, 2nd and 8th Defendants to execute and deliver up to the Plaintiff for registration a transfer of the said property known as LR. No.3734/457 to facilitate transfer of the said property to the Plaintiff within 14 days of the order hereof and in default thereof, the Land Registrar to execute the transfers and all other documents necessary to transfer ownership of the suit property to the Plaintiff at the Defendants costs.
 - f. An eviction order directing the 1st, 2nd and 5th Defendants their agents and or servants to vacate the parcel of land known as LR. No.3734/457
 - g. Damages for fraud and misrepresentation against the 1st, 2nd, 3rd, 4th, 5th, 6th and 8th Defendants.
 - h. Cost of the suit
 - i. Any other order that the Court may deem just and fit to grant.
2. The Plaintiff averred that through a sale agreement dated 2nd September February 2004 along with her late husband purchased property known as L.R No.3734/457 hereafter referred to as "the suit property" for a sum of Kenya Shillings Twelve Million Kshs.12,000,000 from Mr. D.A.W Musinde and P.C Musinde which transaction was facilitated by the 3rd Defendant who was the firm of Advocates acting for both parties.
 3. The Plaintiff impleaded that together with her late husband they invited their daughter and son in-law to contribute part of the purchase price to a tune of Kshs.5,200,000 with an agreement that they would later sell them a portion of the suit property and which fact was acknowledged by the 3rd Defendant vide a letter dated 11th March 2005.
 4. That the 3rd Defendant acknowledged receipt of the full payment of the purchase price in relation to the suit property vide two letters dated 7th and 22nd June 2005. However, despite payment of all the relevant fees needed to transfer the same to the Plaintiff and her late husband, the 3rd Defendant neglected to do the transfer forcing the Plaintiff to do it by herself. She contended that the suit property had 33 entries at the point at which she and her late husband purchased the same thus their names were registered as entry number 34.
 5. The Plaintiff stated that around the year 2005, the 3rd Defendant advised them to incorporate a management company which would oversee issuance of sectional titles for proper future development of the suit property. As such, one was incorporated on their behalf, listing them as the only two directors thereon. Further, the Plaintiff pleaded that around the year 2009, the 1st Defendant at the behest of the 3rd Defendant lodged a complaint in relation to the suit property before the Criminal Investigation department which culminated in the Plaintiff's arrest and charging under criminal case



No.69 of 2009, Kibera law Courts. That the charge was later withdrawn by the court on its own motion on 30th October 2009.

6. It is also pleaded by the Plaintiff that during the proceedings in the criminal case, the investigating officer demanded the surrender of the original title of the suit property from the Plaintiff vide a letter dated 13th January 2009. She fully complied vide the letter dated 16th January received by the Criminal Investigation Department on the same day. The Plaintiff stated that after the collapse of the criminal charges, she made attempts to have the original title returned back to her vide letters dated 9th March 2009 to the Kenya Police Headquarters, 28th January 2013 to the Director of Criminal Investigation Department. That she received two letters dated 18th February 2013 and 21st February 2013 from the said departments directing the concerned office to release the original title but the same was not returned.
7. She further stated that on the evening of 24th May 2013, the entire section of her guest house was demolished, her vehicles and valuable goods damaged at her residence on the suit property. She reported the matter to Muthangari Police Station and informed the Director of Criminal Investigation vide her letter dated 3rd June 2013 of the incident.
8. Later, she filed a Petition HCC No. 514 of 2014 and that during the pendency of the Petition, the Respondents reproduced a copy of the search which indicated a cancellation of the Plaintiff's entry 34 and an additional six (6) other entries which were leases recorded on the title of the suit property. She added that the Investigation Officer who initially demanded the title from the Plaintiff informed the court (in the Petition hearing) that he had handed over the title to the suit property to the 3rd Defendant.
9. The Plaintiff pleaded that when she applied for a search on the suit property, the Registrar responded that she should attach a copy of a title with all the 40 entries yet the suit title had only 34 entries when it was handed over to the 6th Defendant for investigations. The Plaintiff stated that on 3rd April 2016 while she was erecting a gate on the suit property, she was physically assaulted by the 2nd Defendant who demolished the gate on 4th April 2016 and she reported the two incidences to Muthangari police station under OB No.3/4/2016 and 4/4/2016 respectively.
10. She continued to state that on 1st July 2016 the 5th Defendant trespassed on the suit property where he mobilized building materials in preparation for constructions and which forced her to obtain a caveat from National Land Commission. The Plaintiff contended that the 3rd Defendant fraudulently conspired with the 4th Defendant to cancel her name against the suit title and transferred the suit property to the 1st, 2nd and 8th Defendant. She added that the 4th Defendant effected transfer of the suit property to the 1st, 2nd and 8th Defendants when the office ought to have known that the transfer was fraudulent and tainted with illegalities. That they cancelled the Plaintiff entry without giving her a hearing or effect the change through the authority of a court order.
11. The Plaintiff particularized the fraud by the Defendants inter alia; that the 3rd Defendant misrepresented himself as having capacity to transact against the suit property, filing a fictitious claim against the Plaintiff with intention to fraudulently obtain the suit property. That the 4th Defendant failed to disclose to the Plaintiff of the intended cancellation of her Plaintiff's beneficial entitlement to the suit property, causing a transfer of the suit property to the 1st, 2nd and 8th knowing it is tainted with illegality and the 1st, 2nd and 8th Defendant conspiring with the 4th Defendant acquiring leases to the suit property unlawfully and the 5th Defendant misrepresenting himself to being a beneficial owner of a portion hived out of the suit property with the sole intention of committing fraud upon the Plaintiff.
12. The Plaintiff stated that her claim against the Defendants is for cancellation of the unlawful entries on the title to the suit property and rectification of the register to restore the Plaintiffs name on the title



to the suit property. She contended that the suit property had 33 entries at the point at which she and her late husband purchased the same thus their entry was 34.

Defence and counter claim

13. The 1st, 2nd, 3rd, 5th and 8th Defendants filed statement for defence and counter claim dated 20th December 2017 seeking for the following orders;
 - a. A declaration that the transfer of the suit property LR.No.3734/457 from Dickson Abner Wanyama Musinde and Peter Cleophas Masinde as tenants in common to David Ng'ang'a Njuguna and Jemimah Nyambura Njuguna was unprocedural, unlawfully, illegal and tainted with fraud which in effect means the cancellation done by the Land Registrar on 30th December 2008 was lawful and procedural.
 - b. A declaration of the transfer to Chalbi Gardens Limited its registration as the legal owner of the suit property LR.No.3734/457 was procedural, lawful and legal.
 - c. A declaration that the 1st, 2nd, 5th and 8th Defendants being contributories to the purchase of property LR. No.3734/457 are the registered legal owners of property LR.No.3734/457 registered under the company Chalbi Gardens Limited.
 - d. A declaration that the registration of the leases on 19th October 2011 (entry numbers 35 to 40) herein below listed was procedural, legal, unlawful:-
 - i. Lease to Joseph Mwaniki Kiaraho and Margaret Muthoni Mwaniki all that House No.2 as shown in the plan registered in Vol.D1 Folio 78/1274 file mmx vide I.R 132457;
 - ii. Lease to Pauline Njeri Kamau all that House No.3 as shown in the plan registered in Vol.D1 Folio 78/1274 file mmx vide I.R.132458;
 - iii. Lease to Jedidah Wambui Njuguna all that House No.6 as shown in the plan registered in Vol.D1 Folio 78/1274 file mmx vide I.R 132459;
 - iv. Lease to William Thigani Munga and Jedidah Wambui Njuguna all that House No.7 as shown in the plan registered in Vol.D1 Folio 78/1274 file mmx vide I.R. 132460;
 - v. Lease to William Thigani Munga and Jedidah Wambui Njuguna all that House No.8 as shown in the plan registered in Vol.D1 Folio 78/1274 file mmx vide I.R. 132461; and
 - vi. Lease to William Thigani Munga and Jedidah Wambui Njuguna all that House No.1 as shown in the plan registered in Vol.D1 Folio 78/1274 file mmx vide I.R 132462.
 - e. A permanent injunction restraining the Plaintiff her servants, agents, employees or anyone claiming under her from entering, evicting, selling, alienating, disposing off, dealing with or in any way interfering with the 1st, 2nd, 5th and 8th Defendants quiet possessions and or title to their registered leases for their portions and common areas of the suit property L.R No.3734/457.
 - f. Damages for fraud and misrepresentation.
 - g. That the Plaintiff's suit be dismissed with costs to the defendants together with interest therein at court rates.
 - h. Any other relief the court may deem fit.



14. These Defendants pleaded that the Plaintiff and her late husband sought to purchase the suit property from D.A.W and P.C Masinde at an agreed price of Kshs.12,000,000/= and after payment of the 10% deposit they were unable to raise the balance of the purchase price within the completion period which exposed them to forfeiture of their deposit on recession of the agreement.
15. The Defendants assert that the Plaintiff pleaded with the vendors to be given more time to find a solution which was to invite the 1st,2nd,5th and 8th Defendants to jointly contribute to the purchase price in order to own the suit property collectively. That the arrangement was the property to be subdivided into eight (8) subleases with each party owning their respective subleases in line with their contribution as follows;

Name of Co. Purchasers	Plots taken	Consideration paid (Contribution) Kshs.
1. Jemimah N.Njuguna & David Njuguna	Two (2)	3,000,000/=
	Four (4)	6,000,000/=
2. Jedidah Wambui Munga & William T.Munga(Daughter & son in law)	One (1)	1,500,000/=
	One (1)	1,500,000/=
3. Pauline Njeri Kamau		
4. Joseph Mwaniki Kiaraho		
Total	Eight (8)	Kshs.12,000,000/-

16. The Defendants plead further that the Plaintiff and her late husband instructed a surveyor called Top Land Engineering Surveys to subdivide the suit property into 8 sub plots with the intention to create eight subleases to ease transfer to the persons who participated in acquisition of the said land. They also aver that a management company was incorporated, Chalbi Gardens Limited, hereafter referred to as “the company” not for the Plaintiff and her deceased husband but to hold the revisionary interest with each purchaser getting a registered sub lease of their plots and acquiring the corresponding number of shares in the company after payment for their respective plots.
17. The Defendants contended that after the Plaintiff fraudulently transferred the title of the suit property in their names, she was arrested and charged with a criminal case. Later, she (Plaintiff) willingly contacted the 3rd Defendant to acquiesce to the registration of the sub-leases to the Defendants as the respective owners of the sub plots and the 3rd Defendant proceeded with registration of the sub leases from the company to the various contributories as follows;
- i. Lease to Joseph Mwaniki Kiaraho and Margaret Muthoni Mwaniki all that House No.2 as shown in the plan registered in Vol.D1 Folio 78/1274 file mmx vide I.R 132457
 - ii. Lease to Pauline Njeri Kamau all that House No.3 as shown in the plan registered in Vol.D1 Folio 78/1274 file mmx vide I.R 132458
 - iii. Lease to Jedidah Wambui Njuguna all that House No.6 as above said folio3 as shown in the plan registered in Vol.D1 Folio 78/1274 file mmx vide I.R 132459
 - iv. Lease to William Thigani Munga and Jedidah Wambui Njuguna all that House No.73 as shown in the plan registered in Vol.D1 Folio 78/1274 file mmx vide I.R 132460



- v. Lease to William Thigani Munga and Jedidah Wambui Njuguna all that House No.83 as shown in the plan registered in Vol.D1 Folio 78/1274 file mmx vide I.R 132461
 - vi. Lease to William Thigani Munga and Jedidah Wambui Njuguna all that House No.1 as shown in the plan registered in Vol.D1 Folio 78/1274 file mmx vide I.R 132462
18. That the 5th and 6th Defendants sold their two portions of their property to the 4th Defendant and one other person who is not a party to this suit and as a result of the Plaintiff's constant interferences, the 1st, 2nd, 4th, 5th and 6th Defendants have suffered much loss due to inability to quietly and peacefully use their property. They added that there is no other suit pending between the parties in respect of the suit property other than Nairobi Petition Number 514 of 2014.
 19. The 4th, 6th and 7th Defendants also filed their defence dated 11th May 2017 denying the averments by the Plaintiff and specifically that the 4th Defendant colluded with any person to defraud the Plaintiff as alleged. The 4th Defendant stated that he is not interested in the suit property. These set of Defendants contended that any registration or entries made herein and effected as against the title were done after the necessary and proper documents were presented and stipulated procedure followed.
 20. The 4th, 6th and 7th Defendants further contended that the Plaintiff is not entitled to the reliefs sought because no statutory notice was served upon them in accordance with the [Government Proceedings Act](#).

Evidence

21. The Plaintiff gave evidence as PW1 by adopting her recorded witness statement dated 31/8/2016 and filed in court on 1/9/2016 as her evidence in chief. She stated that she has lived on the suit property since the year 2008 and that its title was stolen at the C.I.D office. That she is being harassed by the Police and the Defendants who are stealing and destroying her building materials and her reports made at Muthagari Police Station have not been acted upon hence she is seeking the reliefs sought in the Plaintiff.
22. In support of her case, she adduced a bundle of documents dated 31/8/2016 and a further list dated 23rd October 2019 which were;
 1. Sale agreement dated 2nd September 2004 for the purchase of the suit property,
 2. 3rd Defendant letter dated 11th March 2005 directed to Mr. Thigani
 3. 3rd Defendant Letter dated 31/1/2005 directed to Mr. and Mrs. Njuguna
 4. 3rd Defendant Letter dated 7/6/2005 directed Mr.D.A W Musinde ad P.C Musinde
 5. 3rd Defendant letter dated 22/6/2005 directed to Mr.& Mrs. Njuguna
 6. Letter dated 6/7/2005 from Mugambi Imanyara directed to Mr.and Mrs.Njuguna
 7. Payment receipts issued by the 3rd Defendant to the Plaintiff
 8. Certificate of incorporation and list of Directors in respect to Chalbi Gardens issued by the 3rd Defendant to the Plaintiff
 9. Court proceedings in respect to Criminal Case 69 of 2009 against the Plaintiff
 10. Demand Notice dated 13/1/2009 by the investigation officer in Kibera Law Courts Criminal case 69 of 2009 and by forwarding letter in response dated 16/1/2009
 11. Letter by the Plaintiff directed to the 3rd Defendant dated 22/1/2009



12. Letter directed to the 6th Defendant dated 9/3/2009
 13. Letter directed to the 6th Defendant dated 28/1/2013
 14. Response by the 6th Defendant dated 18/2/2012
 15. Letter by the 6th Defendant dated 21/2/2013
 16. Letter directed to the 6th Defendant dated 3/6/2013
 17. Copy of the OB Nos issued
 18. Ruling in Petition 514 of 2014
 19. Caveat lodged on the suit property
 20. Photos of encroachment by the 5th Defendant on the suit property
 21. Official search of the suit property dated 27/7/2016
23. In her recorded statement, PW1 stated that the sale agreement in subject was done by the 3rd Defendant which is the law firm that was acting for them and the Vendor. She added that her daughter Jackline and son in law David Kairaho contributed to the purchase price and after full payment of Kshs.12,000,000 they were given vacant possession where she has been living to date with her family. It is her evidence that the 3rd Defendant was selling the suit property on behalf of his clients. She avers to not having receipts for payment of the purchase price as the same were destroyed when her house on the suit property was demolished.
24. The witness testified that the 3rd Defendant incorporated Chalbi Gardens Ltd with the only two directors; Mr. David Nganga Njuguna and Mrs. Jemimah N. Njuguna and confirmed that the suit property was already transferred to the said company.
- That after close to 3 years after the death of her husband, the witness decided to visit the 3rd Defendant's office to inquire why the suit property had not been transferred to their names despite having paid all the requisite fees. That on demand, the 3rd Defendant handed the original title and other documents to her and she did the land transfer.
25. She continued in evidence that 4 months after transferred the title to her name, she was intimidated to submit the title which she handed over to the Police and who assured her that they just needed to see it and conduct investigation and if she is innocent would return it back. PW1 stated that after the state withdrew the criminal case filed against her she headed to get back her title from CID office but was not given causing her to file Petition 514 of 2014 Nairobi to demand for the release of the title from Police Department. That while in Court, the officer summoned confessed that he had given the title to the 3rd Defendant and when he produced a copy of the title it showed that her title had been cancelled on 30/12/2008.
26. She added that during pendency of Petition 514 of 2014, she visited the survey of Kenya where she realized that the 3rd Defendant had misrepresented where the actual beacons were. The witness testified that on 3/4/2016 the 2nd Defendant physically assaulted her while she was erecting a gate on the suit property and on 4/4/2016 demolished the said gate and she reported the two incidences to Muthangari police station OB No.3/04/2016 and 4/04/2016 respectively.



27. PW1 stated that the property is invaded by people who have placed a tractor and have cleared the compound and poured building materials with the 5th Defendant initiating construction on the premises creating a great destruction to the property and creating a security risk to her and the family.
28. She stated that the 5th Respondent construction has created a great destruction namely;
- i. They destroyed her newly constructed building foundations
 - ii. Destroyed all plants like bananas, sugarcane, arrowroots, vegetables
 - iii. Ploughed the driveway living in heaps of mud making it difficult to get to the house
 - iv. Destroyed building materials such as building stones, sand ballast, metal bars
 - v. Removed her buses by forcing movement to a different place damaging the body and tyres of one and covering the tyres with mud
 - vi. Interfering and blocking drainage system causing great damage to the entire unit of the staff quarters
 - vii. Cutting down trees and selling firewood out of it
 - viii. Pouring building materials in front of her house causing damage to her furniture and electronics in addition to possessing a health hazard to her and the family.
 - ix. Judgement in HCCC 168 of 2017 delivered on 12th July 2018
 - x. Receipts issued to her by the 3rd Defendant
 - xi. Letter dated 17th November 2017 by the Registrar of Companies
29. During cross examination, PW1 stated that the criminal complaint against her was part of intimidation scheme and the same was withdrawn by the court on its own motion and not because the matter had been settled as the prosecution alleged that the parties agreed to settle the matter.
30. She added that together with her husband, daughter and son in law paid the full purchase price for the suit property as indicated in the letter dated 22/6/2005 contending that the letter by the 3rd Defendant dated 6/4/2006 addressed to her and the husband where more people are added as contributors was not received by them and that it was the first time to see it and termed it as a forgery. Further, she stated that she did the transfer herself after the 3rd Defendant failed to effect the same. According to the Plaintiff, she only knew the 8th Defendant; that she sued the Land Registrar for transferring the land without consultation; and the Inspector General of Police because it was the police who took her title deed on 16/1/2009 who instead of returning it to her released it to the 3rd Defendant.
31. On cross examination by the court, the witness confirmed that she was charged with altering documents in the criminal case after she went to collect the title from the 3rd Defendant noting that the same was cancelled while she still held it.
32. DW1, Joseph Mwaniki Kiaraho, who introduced himself as a contractor testified on his own behalf and that of 1st, 2nd, 3rd, 5th, 7th and 8th Defendants. He adopted his witness statement dated 30/6/2021 as evidence in chief. He stated that David Kiaraho who is married to Jackline Njeri, the Plaintiff's daughter is his brother and he came to know of the transaction through him which he also informed the Plaintiff.



33. That the Plaintiff and her late husband entered into a sale agreement for the purchase of the suit property and on payment of 10% deposit, the transaction commenced however they were unable to pay the balance within the completion period. He testified that the Plaintiff and the deceased pleaded with the vendors for more time to raise the balance. After the lapse of the time given, they presented to the vendor through the 3rd Defendant a solution whereby some friends and relatives would jointly contribute to the purchase price and own the property collectively. That David Kiaraho decided to call his relatives to pool their resources to buy the one-acre land and they all went to the 3rd Defendant who informed them of the price.
34. He added that the suit property was subdivided into 8 plots at Kshs.1.5 M for each. That he bought one plot at Ksh1.5 M, Pauline Njeri one plot at Kshs.1.5 M, Mr.Munga and his wife bought four plots and the Plaintiff and the husband one plot at a total of Kshs.7M and lastly Mr.Muriithi (ceaser) bought the last plot at Kshs.2 M. (This was contradictory to the tabulation in the witness statement).
35. DW1 continued that after payment, they put up 4 town houses where they stay and that the company has 8 shares of which he holds one. It is his evidence that the title was held by the 3rd Defendant which title was released on request to the Plaintiff for purposes of making a copy across the road. That instead she disappeared with the title and the matter was reported to the C.I.D leading to the criminal charges levelled against her.
36. That the criminal charges were later dropped after his brother who is Plaintiff's son in law and her daughter petitioned and on 10th June 2009, the Plaintiff through her then Advocate wrote to the 3rd Defendant also requesting that the case be withdrawn and the respective owners get their leases. This proposal was accepted vide letter dated 3rd July 2009 with the 3rd Defendant writing to CID confirming that parties were ready to resolve their issues amicably.
37. The witness contended that during the time which the Plaintiff had taken the title, she did some forgeries and transferred the land to her name and that of her husband without paying stamp duty which entry was canceled. DW1 testified that after withdrawal of the criminal case the title to the suit property was released to the 3rd Defendant who transferred it to the company and the Defendants who had contributed towards the purchase price were issued with leases.
38. The 1st Defendant asserted that on 5th June 2006, the Plaintiff had written to him and the 2nd Defendant while they were undertaking construction of their houses complaining that they were trespassing on her sub plots number 2 and 4. On 28th May 2008, the Plaintiff also wrote to the 3rd Defendant demanding to be reimbursed some expenses she allegedly had incurred in developing the common areas. Again, on 26th August 2008, she wrote to the 3rd Defendant with some complaint against the structural engineers, who prepared drawings for the houses to be constructed on the sub-plots.
39. Besides his oral testimony, DW1 produced the following documents as a bundle (20/12/2017) DExh1 which consist of;
1. Copy of the Memorandum and Articles of Chalbi Gardens Limited
 2. Copy of the Certificate of Incorporation of Chalbi Gardens Limited
 3. Copy of Letter dated 20th December ,2004 addressed to the Plaintiff and her late husband
 4. Copy of the Letter from the Surveyor dated 1st December 2005 with a plan for the eight sub plots
 5. Statement of account as at 15th December 2005



6. Copy of Letter dated 6th April 2006 addressed to the contributories
 7. Copy of CR12 as of 31st October 2008
 8. Copy of letter dated 8th December 2008 by Kimani Kairu & Co. addressed to the Plaintiff
 9. Copy of letter dated 4th December 2008 by Kimani Kairu & Co. Advocates
 10. Copy of summons from the Registrar of Titles addressed to the Plaintiff dated 8th December 2008
 11. Copy of letter dated 30th December 2008 from the Registrar of Titles addressed to the Plaintiff
 12. Copy of Letter dated 10th June 2009 from the Plaintiff's Advocate to M/S Kimani Kairu & Co. Advocates
 13. Copy of letter dated 23rd June 2009 by M/s Kimani Kairu addressed to the Plaintiff's advocate in response to their 10th June 2009 letter.
 14. Copy of letter dated 3rd July 2009 by M/S Kimani Kairu addressed to the Officer in charge of Criminal Investigation Department.
 15. Copy of title deed to L.R No.3734/475, suit property.
 16. Copy of letter dated 28th May 2008 addressed to the 3rd Defendant from the Plaintiff together with a tabulation of the alleged expenses incurred in developing the common area
 17. Copy of letter dated 26th August 2008 addressed to the 2nd Defendant.
40. On cross-examination, the witness stated that the agreement for sale of the suit property was between the Musinde's and the Plaintiff and her deceased husband. That the Plaintiff was only able to raise Ksh.1 Million thus unable to raise purchase price for the agreement between the Plaintiff and Musinde's dated 2/9/2004. He stated that when the company was formed in the year 2007, the directors were the Plaintiff and the deceased husband. However, they did not own all the shares and they were sold to the contributors of the purchase price which enabled them become directors.
41. DW1 testified that he is a lawfully appointed director /shareholder to the company as shown in the letter from the Registrar of Companies dated 17/11/2017. He added that the 8th Defendant had 4 shares after paying Kshs.6,000,000 but confirmed that on the letter from the 3rd Defendant dated 11/3/2005 to the 8th Defendant refers to Ksh.5,200,000/=. Further that initially, the Plaintiff had 2 shares but gave Ceaser a lot of problems that he decided to sell his one share to her thus she ended up with 2 shares.
42. DW2, the 3rd Defendant adopted his written statement dated 28/11/2019 as evidence in chief and produced documents in the bundle dated 30th June 2021 and supplementary bundles dated 31st October 2022 as exhibits in support of his defence. They were as follows;
1. Copy of the Sale Agreement dated 2nd September 2004
 2. Copy of receipts issued to the 2nd Defendant, Pauline Njeri Kamau
 3. Copy of the statement of accounts of Chalbi Gardens Limited as at 15th December 2005
 4. Copy of the letter addressed to the Plaintiff dated 23rd February 2006
 5. Copy of Chalbi Garden Limited certificate of registration



6. Memorandum and Articles of Association of Chalbi Gardens Limited
7. Chalbi Garden Limited CR 12 dated 31st October 2008
8. Chalbi Garden Limited CR 12 dated 17th November 2017(gives a brief outline on the formation of the company)
9. Copy of letter dated 1st December 2005 from Topland Engineering Surveys, together with the registered plan for the eight sub-plots
10. Copy of the letter dated 8th December 2008 addressed to the Plaintiff by the 3rd Defendant
11. Copy of the letter dated 4th December 2008 addressed to the Registrar of Titles by the 3rd Defendant
12. Copy of summons to the Plaintiff dated 8th December 2008 from the Registrar of Titles
13. Copy of letter dated 30th December 2008 from the Registrar of Titles.
14. Copy of letter dated 10th June 2009 from the Plaintiff's advocate, Mr David K.Gichuki
15. Copy of the letter dated 23rd June 2009 in response to the 10th June 2009 letter
16. Copy of the letter dated 3rd July 2009 addressed to the Criminal Investigation Department
17. Copy of the registered site plan for the eight (8) plots on LR. No. 3734/457
18. Copy of transfer from the vendors, Dickinson Abner Wanyama Musinde and Peter Cleophas Musinde, to Chalbi Gardens Limited
19. Copy of the title deed of L.R No. 3734/457 registered to Chalbi Gardens Limited.
20. Copies of the registered lease from Chalbi Gardens Limited to the 1st Defendant, Joseph Mwaniki Kiaraho.
21. Copies of the registered lease from Chalbi Gardens Limited to the 8th Defendants' Jedidah Wambui and William Thigani Munga.
22. Copy of the letter from the Plaintiff dated 8th May 2008 together with the enclosed tabulations therein.
23. Copy of the letter from the Plaintiff dated 26th August 2008
24. Copy of the letter from the Plaintiff's advocate, Kinyanjui Njau, dated 14th November 2011
25. Copy of the response to the letter from the Plaintiff's advocate, Kinyanjui Njau, dated 25th November 2011
26. Copy of the Agreement for sale between the 5th Defendant, Johnsson Mwaniki Nyaga and the 8th Defendants, Jedidah Wambui and William Thigani Munga with respect to plot numbers 7 and 8 on L.R No. 3734/457.
27. Copy of the Transfer Leases from the 8th Defendants to the 5th Defendant with respect to plot numbers 7 and 8 on LR. No.3734/457; and
28. Copy of the Plaintiff's sworn affidavits.



29. Copy of counterpart receipts issued to all the contributories for the purpose of LR.No.3734/457 registered to Calbi Gardens Limited
30. Statement of Accounts for the purchase LR. No.3734/457 registered to Chalbi Gardens Limited.
43. He stated that he represented both the vendors and the purchasers during the purchase of L.R. 3734/475 situated on Chalbi Drive Nairobi. That after payment of the 10% deposit by the Plaintiff and her late husband, they were unable to pay the balance of the purchase price within the completion period and they sought to be given more time. That after lapse of some time, the Plaintiff and her husband presented to the vendors through the office of DW2 of inviting other parties who were the Defendants to raise the balance of the purchase price and to own the suit property together as tabulated in the filed counter claim.
44. It is the 3rd Defendant's evidence that to show their commitment, the Plaintiff incorporated a company Chalbi Gardens Ltd which the suit property was to be transferred to. He asserted that upon assurance of obtaining long term leases, all the contributors paid for their plots and shares in the company. He avers that the Plaintiff and the contributors engaged Topland Surveyors to subdivide the land into eight subplots with intention to create eight subleases to the persons who participated in the acquisition of the land. He also stated that the Plaintiff obtained the original title deed from him on 26th September 2008 to go and make a copy but which she never returned culminating into entry 34 which the defendants refer to as fraudulent.
45. DW2 continued in evidence that the matter was reported to the police and the Principal Registrar of Titles. The Plaintiff was summoned to appear before the Registrar and the Registrar after conducting a hearing cancelled the entry. He told the court that the police had also proceeded with their investigations, arrested and charged the Plaintiff. The witness said he received information that from the 1st Defendant that after several court attendances (in the criminal case), the Plaintiff made overtures to him of her willingness to let matters proceed as earlier agreed and for the criminal case to be withdrawn. That it is on this background that the letter of 10th June 2009 was written by David K. Gichuki advocate for the Plaintiff.
46. The 3rd defendant responded vide his letter dated 23rd June 2009 and thereafter several correspondences exchanged. He stated that it was therefore not true for the Plaintiff to assert that she has been deprived of her property through his office. The 1st Defendant said the suit against him is malicious and aimed at tarnishing his name. He urged the court to find in favour of the 1st, 2nd, 5th and 8th Defendants as pleaded in the counter-claim.
47. On cross examination, the 3rd Defendant confirmed that in the sale agreement he was acting for both the parties and a transfer was effected to the company and not to the Plaintiff and her deceased husband as they had been unable to raise the Purchase price. That part of the purchase price amounting to Kshs.6 M was paid to Masinde in the U.S by the son in law of the Plaintiff and the daughter Jedida, Pauline 1.5 M, Joseph Mwaniki Ksh.1.5 M and Mr. & Mrs. Njuguna paid Ksh.3M.
48. He stated that the letter dated 7.6.2005 was to inform the estate agents of who the purchasers were and as at the time, the transfer had not been registered while letter dated 1.7.2007 confirms the registration of the suit property to the company on 29.3.2010. That the registration of the company was the idea of the Plaintiff, her husband and their family. He clarified that the Plaintiff and her late husband were the subscribers of the company at the time of the registration and the other shareholders came later being added by the company secretary called Njagi.



49. That the entry to the Plaintiff dated 15.10.2008 was cancelled because it was a forgery and also due to Nairobi City Council Regulations, it was not possible to subdivide the suit property thus David prepared a scheme to issue subleases. DW2, stated that the lease at page 69 of the bundle was signed by Joseph Mwaniki and Pauline Njeri and that there was a resolution made for the transaction but they are filed in a parallel transaction. That when witnessing the signatures of Joseph and Pauline, he was shown minutes of the company authorizing the transaction.
50. He stated that letter dated 4.12.2008 explained that the title was taken from him by the Plaintiff and was not returned except it was the CID who retrieved it from her. That the Plaintiff had made entry 34 in her name and that of her late husband to the title but the Registrar of titles, having followed the due process, including conducting a formal hearing, cancelled the fraudulent entry number 34.
51. DW2 stated that after a transfer was done to the company, being entry No.34 on 29th March 2010, respective subleases for the involved parties were registered against it but the Plaintiff refused to come forward and execute the leases for her sub-plots thus they remain unregistered.

Submissions

52. The Plaintiff filed submissions dated 12th October 2023 while the 1st, 2nd, 3rd, 5th and 8th Defendants filed submissions dated 30th January 2024. The Plaintiff submitted that they had produced the sale agreement dated 2/9/2004 executed by her and the deceased husband for the purchase of the suit property and the same was witnessed by the 3rd Defendant while Defendants have alleged to have been involved in the purchase without presenting any agreement or clause indicating the allegation of the involvement of the 1st, 2nd, 5th and 8th Defendants in the purchase.
53. She added that her daughter and son in law who paid to the vendors who were also living in the USA as they should only be entitled to the money they paid as nothing in the sale agreement mentioning any share to them after purchase.
54. She submitted that the 2nd transfer done by the 3rd Defendant appearing in the Defendants documents at page 51 is a clear forgery, which ought to be investigated to clearly demonstrate how the 3rd Defendant was in the transaction after six years after the 1st transfer was effected and after the 3rd Defendant having witnessed the sale agreement dated 2/9/2004. Further, that the 2nd transfer done clearly demonstrates mischief and fraud, among the defendants herein who had managed to subdue the Plaintiff by the use of the CID officers and using the land registrar to cancel the entry without involving the court.
55. The Plaintiff submitted that Leases issued herein were never issued with her blessing being the bonafide purchaser and the proprietor of the suit property. That there is no entry without evidence of any sale agreement and transfer to replace the canceled entry No 34 which transfer the property from entry No. 33 to the Plaintiff and her deceased husband.
56. She submitted that the 3rd Defendant altered the list of directors in the company without any consultation with her and without any resolution and or minute which the 3rd Defendant never produced before court. That it was not the duty of the 3rd Defendant to source for funds to pay on behalf of the Plaintiff noting that the letter dated the 7th day of June, 2005 confirms that the purchasers had paid the full purchase price and was given possession to the property therefore the property belongs to her.
57. She added that the right procedure was not followed in adding the defendants as directors in the company stating that it is trite law that whenever there is a resolution to be made the directors must



be in attendance and notice issued and minutes made and a resolution in form of agreement made to which any action is to be taken. That the 3rd Defendant did not produce any sale agreement by the Musindes to the company which is the entry she questions, as there is no sale agreement between the Musinde and the company nor is there any transfer executed in favour of the company which therefore is a forgery.

58. The Plaintiff submitted that the title was given to the CID on 16/1/2009 and her entry was canceled on 30/12/2008 as seen in the 3rd Defendant's documents at page 61 which therefore leaves the contents of cancellation as imaginary act since the title was taken by the CID for safe keeping and anything done on the title should have been a conspiracy by the police too. That she and her late husband were indeed the Purchasers from the owners of entry no 33 who successfully transferred to them vide in entry no 34. In any case if the vendors wanted to transmit the title to Chalbi Gardens ltd, they could only do so after the title was successfully transferred to them.
59. She contended that by dint of section 259 of the Land Title Act and section 26(1) of the [Land Registration Act](#) 2012, cancellation of entry 34 was fraudulent because it could only be done on the strength of a court order revoking the sale agreement and the transfer executed by Musinde's. Further, the 3rd defendant's letter confirming the successful purchase of the property by the Plaintiff and her husband defeats the logic of cancellation which if allowed their property remains with the vendors, as the cancellation deems there is no sale.
60. The Plaintiff also submitted that the 3rd Defendant asserted that at the time of subleasing subdivision was not allowed yet the Defendants claim to own plot No. 2 and No. 3 as testified by DW2.
61. In support of her case, the Plaintiff cited the court of appeal case of Munyu Maina vs Hiram Gathiha [2013] eKLR and Section 80(1) of the [Land Registration Act](#) stating that her certificate of title counts as a prima facie evidence that she is the proprietor of the property, and is the absolute and indefeasible owner. She also relied on the decision by the Supreme Court Petition No. 8[010] of 2021 which ruling has implication of due diligence. That the defendants herein due to lack of diligence were involved in the un-procedural acquisition of leases drawn and executed by people without authority since the plaintiff was not in any manner involved in the processing and signing of the said sub-leases which them must be revoked and expunged from the record as they were un-procedurally obtained.
62. To start off their submissions, the Defendants pointed out Constitutional Petition Number 514 of 2014 which has been produced by the Plaintiff as evidence highlighting that the Petitioner, (the Plaintiff) and her husband were unable to raise the funds necessary for the purchase of the land. They invited others, including the interested parties, to purchase the property with them and that the evidence before court showed that she somehow fraudulently obtained a title to the suit property in which she with others, had an interest. That the Petitioner acknowledges that there are other persons in occupation of the land and it was the court's view that, not having found anything to demonstrate that there was a violation of the petitioner's right under [the constitution](#) the Judge proceeded to strike out the petition for being devoid of merit.
63. The Defendants then submitted that the Plaintiff is not entitled to the orders sought as she had not produced proof of payment of the full purchase price Kshs,12,000,000 for the suit property other than the letter dated 22nd June 2005 authored by the 3rd Defendant. That from the said letter, the company had been incorporated with the sole intention of acquiring the suit property and holding the same for the benefit of the purchasers of the town houses to be constructed thereon and that also the Plaintiff admitted during cross-examination; confirmed by her averments in the Plaintiff and witness statement, that the 8th and 9th Defendants contributed to the purchase of the suit property.



64. They added that they had produced statement of accounts detailing all the payments made by all the parties, and the receipts issued thereof thus proving their contribution to the purchase price. Therefore, they are entitled to their portions on the suit property. Further that the letter dated 6th April, 2006 by the 3rd Defendant gives a breakdown of how the stamp duty should be paid by each contributor of the sub-plots proving that all the contributories not only paid the part of purchase price, they also remitted the requisite stamp duty.
65. The Defendants submitted that the Plaintiff and the deceased vide letter dated 5th June 2006 wrote to the 1st and 2nd Defendants regarding dumping of soil on their plots which was affecting their plans on the property. That this was proof that she knew the Defendants and did in fact contribute to the purchase price hence their possession, occupation and development of the land way back in the year 2006 prior to the death of the Plaintiff's husband.
66. The Defendants also submitted that the Plaintiff wrote in a letter dated 10th June 2009 to have the suit property divided as per the other co-owners and by a letter dated 14th November 2011 she once again indicated her intention to have sub-leases for the sub-plots processed for registration. That the 5th Defendant, is merely an innocent purchaser for value, having bought his sub-plot from the 8th and 9th Defendants whom the Plaintiff admits contributed to the purchase of the property.
67. The Defendants continued to submit that the Plaintiff's and the deceased entry was cancelled by the Registrar of Titles having followed the due process and conducted a hearing to find that the entries made were fraudulent on account of forgeries for the documents presented. That the Plaintiff was arrested and charged with making a document without authority contrary to Section 357 (a) of the Penal Code and uttering a false document contrary to Section 357 of the Penal Code.
68. The Defendant also pointed out that the Plaintiff's husband died on 19th September 2007 and she purported to register the suit title to her name and that of her already deceased husband on 15th October, 2008 noting that there is no life in the dead so they cannot hold property. That it is an illegality to effect let alone allow for any property, suit property included, to be registered in the names of a deceased as they have no capacity.
69. They added that the entry 34 that records the registration of the company as the registered owners of the suit property, is valid as the Registrar of title was handed the requisite documents being a transfer of ownership from the vendors to the said company and the 3rd Defendant provided all the necessary documents in compliance with the law.
70. The Defendants also submitted that there are issues raised by the Plaintiff which are Res judicata to those in Constitutional Petition 514 of 2014 and the doctrine of estoppel should also be applied to estop the Plaintiff from depriving the Defendants of their lawfully and legally acquired property.
71. That the judgment in Constitutional Petition 514 of 2014 enunciated that the Plaintiff was undisputedly unable to raise the necessary funds for purchase of the land (Paragraph 28 on Page 12), that there was uncontroverted evidence that the case was withdrawn as a result of the Plaintiff and the Defendants coming into an arrangement to the effect that the title be released to the 3rd Defendant to enable the transfer and registration of the Sub-leases from Chalbi Garden Limited (Paragraph 29 and 30 on Page 13) and that the Plaintiff fraudulently obtained the title and had it registered in her name and that of her dead husband See (Paragraph 33 on Page 12).
72. Further, that the Plaintiff should be estopped from claiming that she is not aware of the cancelled entry number 33 and the registration of entry number 34 because on letter dated 29th June 2009 it was made very clear to her via her advocates at the time that the property will first be registered in the name of



the company who will then in turn issue long term leases to the proprietors. That vide letter dated 14th November 2011, the Plaintiff requested that the lease to her sub-plot (portion) be given to her for review in order and later registration of the lease in her name, confirmed that there were common areas through the letters to the 3rd Defendants requesting reimbursement on account of taking over construction of these common areas.

73. That also she was well aware of the Defendants in the suit property as they had ownership from the onset of transaction, late 2004, where they proceeded to construct their houses and in fact the 5th Defendant purchased their sub-plots way back in the year 2012 and even proceeded to construct their town house prior to the Plaintiff ever approaching this court.

Analysis and determination:

74. I have read the pleadings filed by the parties, considered the evidence tendered and submissions filed in support of their respective cases and following is my determination of the case. The initial owners of the suit property, the Musinde's entered into a sale agreement dated 2/9/2004 with the Plaintiff together with her deceased husband for the purchase of the whole suit property with the 3rd Defendant being the Advocate representing both sides during the transaction.
75. The evidence presented show that after payment of the 10% of the purchase price, the Plaintiff and her late husband were unable to raise the full balance by completion date which as per the agreement was on or before ninety days from the date of execution of the agreement. For instance, the letter drawn by the 3rd Defendant to 8th Defendant dated 11th March 2005 (in the Plaintiffs original bundle) asking them to pay the Musindes the equivalent of Kshs 5,200,000 being their purchase price for part of the suit property. The letter provided the telephone contact for Mr D.A.W Musinde and asked them to confirm to him (3rd Defendant) as soon as they did the payment.
76. At page 134 of the 3rd Defendant's bundle and page 123-129 of the 1st Defendant's bundle is an affidavit sworn by the Plaintiff in HCCC 168 of 2017 where she deposed at paragraph 4 thus; "that upon payment of part of the purchase price, we invited our daughter and son in law to contribute part of the purchase price to a tune of Kshs 5,200,000 which fact was duly acknowledged by then our advocate Kimani Kairu & Co advocates vide a letter dated 11th March 2005. It was also agreed that we would later sell a piece of the property to our daughter and son in law. Annexed is true copy of the letter as evidence"
77. The Plaintiff also allowed contributions to the purchase price from Mr & Mrs. Joseph Mwaniki Kiaraho, Mr and Mrs John Muriithi and Pauline Njeri to pool the balance to pay the vendors as indicated in paragraph 7 of the witness statement of the 3rd Defendant as well as the statement of accounts provided at page 7 of that bundle. According to the evidence of the Defendants, these payments were made on the promise that they would own a portion of the suit property together.
78. There is no dispute as evidenced by entry number 34 on the suit title that the Plaintiff was registered as owner together with her late husband. There is also no dispute that this entry was cancelled by the Registrar of Titles allegedly because it was fraudulent. Subsequently, entries were made in favour of Chalbi Gardens company Ltd and subleases registered in favour of the defendants who had contributed to the purchase price. The Plaintiff's claim is for recovery of the suit property on account that the sale agreement was between them (husband and wife) and the vendors, and that they paid in full the purchase price.
79. On the other hand, the Defendants have counterclaimed that they are entitled to the portions of the suit property having contributed to the purchase price and have acquired interest in the same.



Issues for determination

- a. Whether the sale agreement dated 2/9/2004 was completed
- b. Whether the defendants have an interest in the land
- c. Whether the cancellation of the plaintiff's title was proper
- d. Whether the reliefs sought by each set of the parties should be granted.
- e. Who bears the Cost of the suits

Whether the sale agreement dated 2/9/2004 was completed

80. It is not disputed that the transaction of the suit property emanated from the sale agreement dated 2/9/2014 between the vendors, the Musindes and the Plaintiff and her deceased husband. The agreed purchase price was Kenya Shillings Twelve Million (Ksh.12 million) with 10% of it being paid during execution of the agreement and the balance of it payable before or on the completion date.
81. The Plaintiff has not shown evidence of their payment of the balance of the purchase price by relying on the letter by the 3rd Defendant 22nd June 2005 indicating that the full purchase price had been paid. It is noteworthy, that the 3rd Defendant, advocate for the vendors and the Plaintiff in the transaction, declared that the purchase price in full for the suit property had been paid and requested for a cheque of Kshs.587,575 to finalize the registration exercise of the Transfer at the Lands Office. The title documents having been surrendered confirms that the transaction between the purchasers and the vendors as per the terms of agreement was completed. Thus, the sale agreement was complete notwithstanding the sources of balance of the purchase price which seem to be pegged on oral agreements outside the sale agreement.
82. By virtue of meeting her obligations in the agreement, the Plaintiff would automatically be entitled to exclusive use and enjoyment of the suit property. However, the court will not grant the reliefs sought in the plaint without considering the defence and counter-claim raised by the Defendants.

Whether the defendants have a stake in the suit property;

83. Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested. I agree with the Plaintiff that there is neither any agreement for disposition of the interest in land between the vendors and the 1st, 2nd, 8th and 9th Defendants nor with the company. That the expected registration of the disposition of the interest in the suit property by vendors was to the Plaintiff and her late husband who then would be accountable to the arrangements made between them and the Defendants.
84. It cannot be ignored that the 1st, 2nd, 8th and 9th Defendants contributed to the purchase price on what they described as a promise that each would own a portion of the suit property equivalent to their contribution. Details on how and when the payments were made were provided in the statement of accounts produced by the 1st to 3rd, 5th and 8th Defendants in their list of documents dated 3rd October 2022 (Dex 7a); and the receipts issued on the dates to match (Dex 6).
85. The promise was not only a verbal discussion between the Plaintiff and the respective defendants, rather it was expressed in the communication from the 3rd Defendant who then acted for the Plaintiff. In the affidavit referred to earlier herein above in a case whose judgement the Plaintiff as produced as exhibit to support her case, she stated under oath that the contributions made towards payment of the



purchase price would entitle them to a portion of the suit property. Further in a letter dated 10th June 2009 drawn by David K. Gichuki & Co advocates acting on behalf of the Plaintiff wrote thus;

“That it is her wish to have the plot I.R. No. 13988 subdivided to the respective owners as per the requirement of the company which owns the said plot. We have further instructions that after the formalization of the registration and subdivision of the above plot, your office do take the initiative and the necessary action to have the criminal case number 69 of 2009 which is pending at Kibera Court withdrawn against our client”

86. While responding to the above letter on 23rd June 2009, the 3rd Defendant said they would make arrangements to have the criminal case withdrawn and added that once the property was registered in the name of the company, the company would issue long term leases for the individual plots to the respective shareholders. This letter was copied to 1st and 2nd Defendants for information. In paragraph 2 of the Plaintiff's written statement and paragraph 10 of the plaint, she acknowledges that the 8th Defendant also contributed to the purchase price.

87. Under paragraph 16 of the plaint, she averred that the 1st Defendant lodged a criminal complaint against her at the behest of the 3rd Defendant. Yet, she still went ahead to give proposal for withdrawal of the criminal complaint through her advocate assuring each party will get their plot. If these Defendants were not entitled to a share of the suit property, why would the Plaintiff request the withdrawal of the criminal case and propose issuance of titles to these complainants (see paragraph 18 of plaint)? From the facts of the case with relation to how the full purchase price of the suit property was raised and the evidence of the payment receipts and incorporation of the company thereof, there was common intention as is testified by DW2, between the Plaintiff and the 1st, 2nd, 8th and 9th Defendants in relation to suit property. Thus, the Defendants raised the balance of the purchase price believing that they would own the agreed portion of the suit property as was confirmed by the Plaintiff with regard to their contributions.

88. Section 120 of the *Evidence Act* provides as follows:

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

89. Thus, the Plaintiff is estopped by the doctrine of equitable estoppel from acting inconsistently with the promise that she made since that promise or representation had the effect of inducing the 1st, 2nd, 8th and 9th Defendants to reasonably rely on it and make payments to the purchase price. The doctrine of estoppel was discussed in the decision of *Carol Construction Engineers Limited & another v National Bank of Kenya* [2020] eKLR by Justice Joel Ngugi as follows;

“25. Lord Denning seems to have gone a little further than this statement of the law in the celebrated case of *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] K-B. 130 (1946) (the "High Trees Case"). In the High Trees case, the plaintiff was a lessor of a block of flats. The lessor represented to the lessee, that the lessee could pay reduced rent due to the economic conditions during the second War. The lessee proceeded to pay the reduced rent for four years. By the fourth year, all the flats in the block were fully let and the lessor demanded for payment of rent in full-including the arrears for the period when the lessee had paid reduced rent. The lessor instituted proceedings seeking



a declaration that the rent payable was that which was stated in the lease agreement on the ground that the subsequent arrangement for reduced rent was not supported by consideration. Lord Denning held that the lessor could not recover the arrears that had accrued reasoning as follows:

The law has not been standing still since *Jorden v. Money*. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said the promise must be honored The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it.”

90. It is also my view that the transaction between the vendors (the Musindes), and the Plaintiff created a constructive trust in favour of all the persons who paid the purchase price. The concept of constructive trust and its importation into a land sale agreement to defeat a registered title therefrom was extensively discussed by the Supreme Court of Kenya in the case of *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (Petition 18 (E020) of 2022) [2023] KESC 106 (KLR) (28 December 2023) (Judgment) as follows;

- “66. The *Trustee Act*, cap 167 Laws of Kenya defines a “trust” and “trustee” as extending to implied and constructive trusts. The Black’s Law Dictionary, 9th edition defines a trust as; “the right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”
67. It further defines a constructive trust at pg 1649 as: “An equitable remedy that a court imposes against one who has obtained property by wrong doing.
68. Halsbury’s Laws of England, 4th edition, volume 48 at paragraph 690 states as follows on constructive trusts: “A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party’s words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate. The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement



will be conclusive. Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust. Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement. The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.”

69. A constructive trust is thus an equitable instrument which serves the purpose of preventing unjust enrichment. The Canadian Supreme Court in *Soulos v Korkontzilas*, [1997] 2 SCR 217, a case which involved a land dispute stated as follows, as to the purpose of constructive trust:

‘The constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in “good conscience” they should not be permitted to retain. While Canadian courts in recent decades have developed the constructive trust as a remedy for unjust enrichment, this should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. Under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, and to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground.’

70. Similarly, although in a matrimonial property dispute, the Canadian Supreme Court in *Murdoch v Murdoch* [1975] 1 SCR 423 stated as follows: ‘As is pointed out by Scott, *Law of Trusts*, 3rd ed., 1967, vol. 5, at p. 3215, “a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it ... The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property”; and, again, at p. 3413, quoting Judge Cardozo “a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal



title may not in good conscience retain the beneficial interest, equity converts him into a trustee.’

71. The United States Supreme Court in *Harris Tr & Sav Bank v Salomon Smith Barney Inc*, 530 US 238, 250–51 (2000) citing *Moore v Crawford*, 130 US 122, 128 (1889) stated thus: ‘Whenever the legal title to property is obtained through means or under circumstances ‘which render it unconscientious for the holder of legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same..’
72. As has been established therefore, trusts are created either expressly, where the trust property, its purpose and the beneficiaries are clearly stated, or established by the operation of the law. Like in the instant case, where it is not expressly stated, the trust may be established by operation of the law.
73. From the definitions above, we establish that a constructive trust is a right traceable from the doctrines of equity. It arises in connection with the legal title to property when a party conducts himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.”

91. Guided by the extensive reference hereinabove, this court should not allow the Plaintiff to unjustly enrich herself by exclusively retaining the suit property whose purchase price was contributed to by the Defendants on understanding that they would own parts of the suit property pro-rata their contributions. I hold that the 1st, 2nd, 8th and 9th Defendants have an interest in the suit property as per their contributions made towards payment of the purchase price.

Whether the cancellation of the plaintiff’s title was proper

92. The Plaintiff contended that her registered title to the suit property as entry 34 was cancelled by the Registrar of Titles which action was unlawful because the said cancellation was not invoked by a court order and that she was not involved in the process.
93. On the other hand, the 3rd Defendant stated that the Registrar of Titles procedurally cancelled entry 34 which had been fraudulently entered and that the Plaintiff was summoned by the Registrar of Titles for purposes of being given a hearing. I can see the summons dated 8th December 2008 from the Ministry of Lands to the Plaintiff requiring her to produce title of the suit property in her possession and all other writings and documents in her custody on 16th December 2008 for examination. I also see that vide letter dated 30th December 2008 from the Ministry of Lands, the Principle Registrar of Titles said the Plaintiff failed to heed the summons. Nonetheless the hearing proceeded and entry 34 was cancelled on account of several anomalies whose effect was to make registration of the transfer a nullity.
94. Section 59 and 60 of The Registration of Titles Act which was the applicable law at the time of cancellation provides;

“ 59.

- (1) In the case of a non-existent or fictitious person being named as proprietor, the name in the register or document of title or



other instrument may on the order of the competent authority be cancelled.

- (2) In other cases, the rectification of grants, certificates of title and other instruments shall be effected by the addition of further endorsements correcting former endorsements which are found to be insufficient or to have been otherwise made in error.

60.

- (1) Where it appears to the satisfaction of the registrar that a grant, certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or that a grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that a grant, certificate or instrument is fraudulently or wrongfully retained, he may summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected.
- (2) If that person refuses or neglects to comply with the summons, or cannot be found, the registrar may apply to the court to issue a summons for that person to appear before the court and show cause why the grant, certificate, or other instrument should not be delivered up to be corrected, and, if the person when served with the summons neglects or refuses to attend before the court at the time therein appointed, the court may issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the court for examination.”

95. The failure by the Plaintiff to attend before the Land Registrar could not confer jurisdiction upon the Registrar of Titles to cancel entry number 34. The Court of Appeal in Mombasa Appeal No. 98 of 2016 Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties) [2018] eKLR agreed with the trial Court that;

“The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”.

96. Further, the issue of who are the directors have been resolved by the High Court in Commercial case no 168 of 2017 which held that there were only two directors; the Plaintiff and her late husband. Consequently, any transfers effected by Chalbi Gardens Ltd without the signatures of the Plaintiff as a director were null and void.

Whether the reliefs sought by the parties should be granted

97. Having established that the cancellation of the Plaintiff’s title to the suit property which was entry 34 by Registrar of Titles was unlawful on the basis they exceeded their powers, it is therefore obvious the subsequent entries thereof thus falls and are void. This includes, the transfer to the company



and the leases registered on 19th October 2011(entry numbers 35 to 40). Following the analysis made hereinabove, I hold that the Plaintiff is entitled to be granted and I hereby grant her prayers 1, 2, 4 and 5 of the Plaint. However, I do not award her costs of the suit for having vexed the Defendants by not keeping her word. Instead I award costs of this suit to the 3rd Defendant only.

98. It has also been settled that the 1st, 2nd, 5th and 8th Defendants have an interest in the suit property and thus are entitled to the ownership of the suit property as per their contributions made. Consequently, I enter judgement as against the Plaintiff in terms of prayers C, and E of the counter-claim. I further make an order that once the title reverts to the name of the Plaintiff, she shall forthwith execute transfers for the subleases for each of the 1st, 2nd, 5th and 8th Defendants. She shall also pay the costs of the counter-claim to the 1st, 2nd, 5th and 8th Defendants.

99. In conclusion, I make the following final orders;

- a. A declaration be and is hereby made declaring that the transfer and registration of the subleases against the suit property to the 1st, 2nd and 8th Defendants was unprocedurally and illegally done.
- b. An order be and is issued for cancellation of the 1st, 2nd and 8th Defendants' names from the Land Register in respect of the Property Known as LR. No.3734/457 and rectification thereof to restore the name of Mr. David Nganga Njuguna and Jemimah Nyambura Njuguna.
- c. A declaration that the 1st, 2nd, 5th and 8th Defendants being contributors to the purchase of property LR. No.3734/457 have acquired an interest in the same and are entitled to be registered as legal owners of property LR.No.3734/457 in the ratio of their contributions towards purchase of the suit property as per the table given in paragraph 15 of this judgement.
- d. A permanent injunction is issued restraining the Plaintiff, her servants, agents, employees or anyone claiming under her from entering, evicting, selling, alienating, disposing off, dealing with or in any way interfering with the 1st, 2nd, 5th and 8th Defendants quiet possessions and or title to their portions and common areas of the suit property L.R No.3734/457.
- e. Costs of the original suit awarded to the 3rd Defendant
- f. Costs of the counter-claim awarded to the Plaintiffs in the counter-claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH APRIL, 2024

A. OMOLLO

JUDGE

