



**Obanyi v Lubanga (Substituted With Rogers L Nandwa & Juvenile Mandela Nandwa) & 2 others
(Environment & Land Case 35 of 2012) [2024] KEELC 1751 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1751 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 35 OF 2012**

**LA OMOLLO, J
APRIL 11, 2024**

BETWEEN

STELLA NYANDUKO OBANYI PLAINTIFF

AND

**MARGARET LUBANGA (SUBSTITUTED WITH ROGERS L NANDWA &
JUVENILE MANDELA NANDWA) 1ST DEFENDANT**

SHIRLEY NANDWA 2ND DEFENDANT

THE DISTRICT LAND REGISTRAR NAKURU DISTRICT ... 3RD DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a Complaint dated 22nd October, 2012. She avers that together with Stephen Makuku Nandwa (deceased) they are legitimate owners of parcel of land Njoro/Ngata Block 1/1223.
2. She avers that sometimes on or about the 16th March, 2011, letters of administration of the estate of Stephen Nandwa Makuku were issued to the 1st and 2nd Defendants herein. She avers that on or about the 3rd August, 2012, she instructed her advocates to conduct a search on the property and it is only then that she learnt that the property was transferred without her consent or involvement.
3. It is her averment that there is a tenant on the said parcel of land by the name Moses Belsoi Kipiatoro and that by a letter dated 1st August, 2012, the 1st and 2nd Defendant through the law firm of Anziya & Company advocates asked the tenant to vacate the suit premises for the reason that the Defendants want to put the premises for their own use.
4. She avers that the tenant was served with a notice of termination with effect from 1st November, 2012 failure to which the Defendants threatened to evacuate him. The Plaintiff avers that her advocates replied to the above letter via a letter dated 21st August, 2012 demanding that the 1st Defendant



withdraw the notice against the tenant. She avers that they further did a reminder on 2nd October, 2012 but both have not elicited any response and the termination notice has not been withdrawn to date.

5. The Plaintiff avers that on or about 19th September, 2012, her advocates on record wrote to the land registrar Nakuru seeking an explanation on the circumstances surrounding the irregular transfer of the parcel of land to the Defendants and further requested to be furnished with all the documents pertaining to the transfer.
6. The Plaintiff avers that the District Land Registrar replied to the letter on 21st September, 2012 admitting that there was an omission done excluding the Plaintiff in the title and the Defendants have been requested to surrender the title for inclusion of the Plaintiff and to date the same has not been complied with.
7. She avers that the transfer of the parcel of land is irregular and was done fraudulently as she is still holding the original title and that the 1st and 2nd Defendants should be compelled to surrender the title issued irregularly to them and the 3rd Defendant should be compelled to correct the same.
8. The Plaintiff lists the particulars of fraud as:
 - a. Conspiring to dispossess the plaintiff of her interest in the suit property.
 - b. Failure to disclose material facts to the court and the 3rd Defendant.
 - c. Inducing the 3rd Defendant to act on misrepresentation by alleging that the title was lost whereas they knew or ought to have known that the Plaintiff was holding the original title.
 - d. Applying for succession cause number 309 of 2011 in Kakamega High Court without disclosing all the dependents of Stephen Makuku Nandwa, the deceased.
9. The Plaintiff prays for judgement in her favour for:
 - a. A declaration that the plaintiff is the legitimate owner of parcel of land Njoro/Ngata Block 1/1223 having become the sole owner after the death of Stephen Makuku Nandwa.
 - b. An order of (sic) to issue compelling the 1st and 2nd Defendants to surrender the title of the above parcel of land to the 3rd Defendant for cancellation and correction of the entries in the register to reflect that the Plaintiff is the sole owner of the property and to have the title registered only in the plaintiff's name.
 - c. An order to issue compelling the 3rd Defendant to cancel the title issued to the 1st and 2nd Defendant and register it in the Plaintiff's name.

In the alternative and without prejudice to A, B and C above;
 - d. An order of (sic) to issue compelling the 1st and Defendants (sic) to surrender the title of the above parcel of land to the Nakuru district land registrar for correction to include the plaintiff in the title.
 - e. An order to issue compelling the 3rd Defendant to correct the title and include the plaintiff's name in it.
 - a. An order compelling the 1st and 2nd defendants to withdraw the Notice of termination of tenancy against the plaintiff's tenant.
 - b. A temporary injunction restraining the 1st and 2nd defendants, their agents to evict the tenant from the said parcel of land.



- c. The costs of this suit.
 - d. Such further or other relief that the court may deem fit and just.
10. The 1st and 2nd Defendants filed their statements of defence on 20th August, 2013. They deny the averments in the Plaintiff.
11. The 1st and 2nd Defendants state that they are the proper and rightful next of kin to administer the Estate of Stephen Makuku Nandwa.
12. The 1st and 2nd Defendants deny that the tenant lawfully occupies the premises situated upon the property in question and any notices to the said tenant were justifiable in the circumstances and during trial the Defendants shall crave leave of court to demonstrate that the so-called tenant is unjustly in occupation.
13. The 1st and 2nd Defendants also deny that there was any irregular transfer on the property in issue. The 1st and 2nd Defendants admit that the District Land Registrar Nakuru did send out correspondence and before they could make a formal response to the said communication, the Plaintiff served them with summons to enter appearance and Plaintiff.
14. The 1st and 2nd Defendants state that at the time of trial, they will crave leave of court to adduce evidence to the effect that the Plaintiff was all along aware that the property in question belonged to the family of the late Stephen Makuku Nandwa whose consents she did not seek when she errantly included her name into this property that belongs to the Nandwa family from which the Plaintiff is not a dependent.
15. The 1st and 2nd Defendants state that they shall put the Plaintiff to strict proof to show what her interest would be in the estate of Stephen Makuku Nandwa and how the 3rd Defendant was induced.
16. The 1st and 2nd Defendants deny that at no time did the Plaintiff demand and notify them of her intention to sue them.
17. The 3rd Defendant filed a statement of defence dated 14th on 15th October, 2013. He denies each and every allegation of fact and law contained in the plaintiff.
18. The 3rd Defendant admits receiving a letter seeking explanation on transfer from the plaintiff and avers there was no irregular transfer as the transaction was based on documents provided then.
19. The 3rd Defendant also states that while the transfer could have been irregular, he denies any fraudulent intent and more so the particulars of fraud against it. The 3rd Defendant also states that the suit discloses a cause of action against him.

Factual Background

20. The 1st Defendant moved this court vide a Notice of Motion application dated 18th February, 2020. He sought the following orders:
 - a. That this Honourable Court do grant leave for substitution of 1st Defendant Margaret Lubanga with Rogers L. Nandwa and Juvenile Mandela Nandwa as the 1st Defendant.
 - b. That cost of this Application be provided for.
 - c. The application was not opposed and on 19th February, 2020 when the matter came before the court granted leave for substitution of 1st Defendant Margaret Lubanga with Rogers L. Nandwa and Juvenile Mandela Nandwa as the 1st Defendant.



Plaintiff's Evidence.

21. The first witness to testify in support of the Plaintiff's case was one Stella Nyanduko Obanyi (hereinafter referred to as PW1). She stated that she had filed a written statement dated 2nd October, 2012 and prayed that it be adopted as part of her evidence, which prayer the court acceded to.
22. She stated that she is the Plaintiff and explained the suit concerns a parcel of land known as Njoro/ Ngata Block 1/1223 and that the property has a certified copy of title which she produced as Exhibit P1.
23. She testified that the property was purchased by herself and Stephen Makuku Nandwa (deceased). She went on to testify that the suit parcel was initially registered in the name of Stephen Makuku Nandwa and it was developed jointly by herself and the deceased.
24. It was her testimony that at the time she was cohabiting with the deceased and the property was subsequently registered jointly. She testified that they developed the property and after that Dr Nandwa passed away.
25. She testified that she subsequently went to work abroad. She testified that she became aware that the property had been transferred to unknown people without her knowledge and consent sometime in 2012.
26. She testified that she did a search and found that the property was registered in the name of the 1st and 2nd Defendant adding that she did not know how the property was registered in the name of the 1st and 2nd Defendant. She further testified that she found a gazette notice that indicated that the original title was lost and the applicants were requesting for a replacement. She produced Gazette Notice of 21st April, 2011 as Exhibit P2.
27. PW1 testified that it came to her attention that the 1st and 2nd Defendant were the administrators of the Estate of the late Stephen Nandwa. She had letters of grant issued to them on 16th March, 2011 which she produced as Exhibit P3.
28. She further testified that there was a tenant staying at the house on the suit parcel and stated that the defendants issued an eviction notice to the tenant and added that it was sent through Anziya Advocates. The said eviction notice was marked and produced as Exhibit P4.
29. She testified that she subsequently instructed her lawyer to get an injunction so that the tenant is not evicted and also asked her lawyer to write to Anziya Advocates a letter is dated 21st August, 2012. The same was marked and produced as Exhibit P5.
30. PW1 testified that she also asked her advocates to find out how the land was transferred from the land registrar and she produced the letter to the land registrar as Exhibit P6. She also testified that the land registrar responded and stated that there was an error registering the 1st and 2nd Defendant as she produced it as Exhibit P7.
31. It was also her testimony that after she received the letter from the land registrar, she asked her advocate to write to Anziya advocates and the letter is dated 2nd October, 2012. She produced it as Exhibit P8.
32. PW1 also testified that she never received any response from the advocate of the 1st and 2nd Defendant. She prayed that since the property was jointly registered in her name and that of the deceased and it should be given back to her.



33. In her witness statement, dated 22nd October, 2012; PW1 states that on 3rd August, 2012, she instructed her advocates Messrs. Migos Ogamba and Company Advocates to conduct a search on the suit property and it is only then that she learnt that the suit property had been transferred to the 1st and 2nd Defendants and title issued to them on 13th July, 2012 without her consent or involvement.
34. PW1 also states that she instructed her advocates on record to write to the land registrar Nakuru seeking an explanation on the circumstances surrounding the irregular transfer of the parcel of land to the defendants and further requested to be furnished with all the documents pertaining to the transfer which they did by a letter dated 19th September, 2012.
35. She further states that the District Land Registrar replied to the above-mentioned letter on 21st September, 2012 admitting that there was an omission in excluding her name in the title and that the 1st and 2nd Defendants have been requested to surrender the title for inclusion of her name. She states that to date the same has not been complied with.
36. It is PW1's written statement that the transfer of the parcel of land is irregular and that the Defendants should be compelled to surrender the title and the registrar should be compelled to correct the same.
37. Upon cross examination, PW1 stated that she is not employed but she is an agricultural consultant. She stated that she previously worked for Kenya Agricultural Research Institute.
38. PW1 confirmed that she was cohabiting with the late Nandwa and that he was her supervisor while undertaking her post graduate studies. She stated that she knew Nandwa from 1988 and they cohabited from 2001 until 2004 when he passed on.
39. PW1 stated that she knew that he had a first wife who was known as Dr Jane Nandwa and she knew he had a son by the name Michael and daughters by the name Phoebe and Rhoda. She also stated that she did not know his second family.
40. PW1 stated that she lived with the deceased in Nairobi. She explained that he was staying in Ngumo but when they started cohabiting, he moved to Buruburu. She stated that before that, she lived at her house in Kawangware. She stated that Buruburu is where she lived with the deceased.
41. She stated that she never knew about the children from the second family. She went on to stated that she never saw the children for the three years that she stayed with the deceased. She stated that Dr Nandwa passed away in Mombasa and that he had retired at the time of his demise.
42. PW1 was referred to Exhibit P1 and confirmed that she and the deceased purchased the land together. She explained that he daughter was attending Mustard Seed School and went on to narrate that whenever her and the deceased visited her daughter, they saw a parcel of land next to it, they were interested in it and Dr Nandwa (the deceases) handled the purchase.
43. PW1 stated that she does not have a sale agreement but she knows that the property was previously registered in the name of David Karuga Kuria as shown on the green card.
44. PW1 stated that her name was introduced into the title a year later and it was first registered in the sole name of the deceased because his daughter Phoebe was going to study abroad and in order to support her he needed to prove that he owned some property.
45. PW1 stated that it is not true that Dr Nandwa was suffering from mental incapacity. She confirmed that he suffered a stroke and that's why they started living together. She stated that apart from the suit parcel, there were three other parcels that they own. She stated that one was in her name, another in joint names and the third was in the name of the deceased.



46. PW1 stated that the deceased brought her two title deeds and one is in his name and another in their joint names. She stated that the original is with her lawyer and she does not know why they did not bring the original. PW1 stated that Exhibit 1 does not have a search and she did not take advantage of his incapacity to have the land registered in their joint names. She stated that if that was true, she would have taken all the property.
47. PW1 referred to Exhibit P7 which is a letter to her advocate. She stated that she does not have anything to show that the title was cancelled and/or correction made after the writing of the letter by the District Land Registrar. She stated that she did not talk to the in-laws to inform them of her interest in the property. She stated that she had the original title with her.
48. PW1 confirmed that there was a tenant in the house on the suit property. when referred to Exhibit P4, she stated that he was not her tenant adding that she is not the one who entered into a tenancy agreement with him.
49. She confirmed that a notice was filed in court on 26th October, 2015 and further confirmed that she was asked to produce a notice of particulars of receipts and rent received and it is dated 22nd October, 2015. She informed the court that she is not aware of the details.
50. She stated that she does not know the person currently occupying the house. She also stated that at the time of the notice, a person by the name Moses was a tenant and she added that he was not her tenant.
51. PW1 confirmed that she knew Michael Nandwa and explained that Michael requested that she puts a tenant in the house to recover costs relating to the expenses of the funeral. PW1 confirmed that she went out of the country in 2014.
52. PW1 stated that she has been to the suit land severally and that she was last there in 2018 but did not find anyone adding that the gate was locked.
53. PW1 also reiterated that she has been out of the country and lives in Ghana and also reiterated that she has another residence in Kiserian.
54. Upon re-examination, PW1 testified that she has not been actively in possession. PW1 testified that the issue of the registration of title in the names of the 1st and 2nd Defendant came to her attention in 2012. She stated that the suit against the Defendants was filed on 25th October, 2012.
55. She testified that Exhibit P1 is a copy and the green card and is the same one in the Defendants list of documents. She explained that entry number 5 shows that the suit property was in the name of the deceased and herself. She further testified that Exhibit P1 shows that title is in their joint names.
56. It was her testimony that the property was purchased by herself and the deceased and she contributed to the purchase of it. On Exhibit P7, PW1 stated that it was written on 21st September, 2012. PW1 stated that she filed the suit in October 2012.
57. On Moses Bersory's tenancy, PW1 stated that she was travelling in and out of the country and that the son of the deceased asked to put a gate and have a tenant to recover some of the expenses incurred by them at the funeral. She confirmed that she gave him authority to use her property.

Defendants Evidence

58. The first witness to testify in support of the Defendants case was one Juvenile Mandela Nandwa (herein after referred to as DW1). He testified that he lives in Nairobi and he was involved in the business of



- internet networking. He testified that he wrote and signed a statement dated 9th September, 2021. He prayed that his witness statement be adopted as part of his evidence which prayer the court acceded to.
59. DW1 testified that Margaret Lubanga is his biological mother and that they are five children adding that he is the youngest. He testified that Shirley Nandwa is the 2nd Defendant and is his mother's second child.
 60. It was his testimony that he does not know the Plaintiff and he only knew her during the case.
 61. He also testified that the Plaintiff is claiming the suit parcel. He testified that his father had two wives and the first wife is Jane Nandwa and has four children. She testified that the second is his mother Margaret Lubanga who has three children one being deceased.
 62. He testified that their family does not know the Plaintiff. He testified that his mother had filed a statement in this case and he supports the contents of her statement dated 23rd September, 2013. He testified that his statement supports the contents of his mother's statement.
 63. He testified that his father was one Stephen Nandwa Makuku. He stated that he has a list of documents dated 17th March, 2022. He further testified that he has grant of letters of administration obtained by his mother Margaret and Shirley which he produced as Exhibit D1.
 64. He testified that his mother reported the loss of the title deed of the suit land and obtained a police abstract dated 11th April, 201. The same was marked and produced as Exhibit D2. He testified that his mother swore an affidavit in respect of the loss. The said affidavit was marked and produced as Exhibit D3.
 65. DW1 testified that the land registrar issued a new land certificate dated 11th April, 2011. It was marked and produced it as Exhibit D4. He testified that subsequently, there was a gazette of parcels Block 1/1222 and Block 1/1223. He testified that the parcels are adjacent to each other and there is a house that their father built and it sits on the two parcels.
 66. He testified that the suit is in respect of Njoro/Ngata Block 1/1223. He testified that the other one is not in contention but the house sits on the second one. The gazette notice was marked and produced as Exhibit D5.
 67. DW1 testified that his mother conducted a search on 2nd July, 2009 and that the search was in respect of Njoro/Ngata Block/1223. He testified that it states that the owner is Stephen Makuku Nandwa and Stella Obanyi. He stated that this is mischievous and entry number 3 and 4 state that the sole owner is Stephen Makuku. The search was marked and produced as Exhibit D6.
 68. He testified that there is a house partly on parcel numbers 1222 and 1223 and added that the house is habitable. He testified that they used to live in it whenever they visited their deceased father. He testified that there is a tenant occupying the house and he pays rent to the three of them (DW1, Shirley and Rogers). He explained that that they are administrators and he is the one who collects the rent.
 69. DW1 testified that there was a time a tenant lived there under the authority of the Plaintiff. He testified that the said tenant was given a notice to vacate after the title was issued in the name of his mother and sister. He testified that he has the notice to vacate and it is dated 1st August, 2012. He testified that Anziya & Company Advocates issued it on the instruction of his mother. The said notice was produced as Exhibit D7.
 70. He testified that parcel number 1223 is registered in the name of Margaret Lubanga and Shirley Nandwa. He testified that they are co-administrators of the estate of his father. The certificate of lease was produced Exhibit D8.



71. He testified that his father passed away in April 2004 and added that he used to live in the house on the suit land from the time when he was in school; in class 5. He went on to testify that his father was sickly and worked as a research scientist. He went on to state that that he had a mental ailment and they have a medical report by his doctor.
72. He testified that because of his mental state, they restricted the number of people seeing him. He testified that sometimes he would chase them away and the next time, he would accept them. He testified that they understood that he was ailing. He went on to produce the medical report as Exhibit D9.
73. DW1 testified that the Plaintiff must have taken advantage of the condition of their father and changed the title to their joint names. It was his testimony that their deceased father purchased three parcels of land together but they could not find the third.
74. He testified that his mother met Stella (the plaintiff) when she was served with court documents and also upon performing a search. DW1 referred to a pensions declaration form and testified that his step mother died before he was born. He testified that as at the time of his father's death, only his mother was alive, his step mother having died. He explained that his mother was drawing pension and added that he had a copy of a pension's declaration form. He testified that his mother was receiving pension from his father's benefits. The said form was marked and produced as Exhibit D10.
75. He further explained that the pension declaration form shows that his deceased father only had two wives; his mother and step-mother.
76. DW1 denied that his mother got the title at the expense of the Plaintiff. He testified that in respect of parcels 1223 and 1222, entry number 3 and 4 are the same. He went on to testify that Stephen Nandwa (his deceased father) was the sole owner of the two parcels and added that during his illness, the ownership of one of the parcels was changed. He explained that this is because the plaintiff could only find one title and forgot that the house stands on both.
77. In his witness statement dated 9th September, 2021, DW1 states that he is aware that his late father owned several properties including the suit parcel of land Njoro/Ngata Block 1/1223 and with time he learnt that he purchased the property in question along with two others in the year 2001.
78. DW1 states that on this particular suit parcel of land, their father built a family house thereon which they all knew was their home in Nakuru and would live there with their father. He states that their father also maintained a traditional home in a place known as Khwisero where their mother lived and they also had another home in Nairobi.
79. He states that together with his brother and sister, they take care of the suit property and the Plaintiff wrongly claims ownership of land which does not belong to her as they are in constructive control of the same.
80. Upon cross-examination by counsel for the Plaintiff, DW1 stated that he agrees with his mother's statement. He was referred to Exhibit P6 which is an official search and confirmed that his father and the Plaintiff got joint ownership in 2002 and also confirmed that his father passed on in April 2004 adding that at the time he died, the land was jointly owned by his father and the Plaintiff.
81. DW1 stated that he had no proof that there was mischief in respect of the transfer to the Plaintiff and his dad. When referred to Exhibit D9 which is a medical report, he stated that the report was obtained in 2013 and his mother got it. He stated that the medical report says that he succumbed in 2004 from the illness that was first attended to in the year 2000.



82. He stated that succession to the Estate of his father started in 2009 and his mother realized that the Plaintiff's name was included in the suit property. He explained that this happened when he conducted a search while commencing the succession proceedings in 2009.
83. DW1 stated that the Plaintiff was not involved in the succession process which was concluded. DW1 was referred to Exhibit P7 which is a letter dated 21st September, 2012. He stated that the letter is asking the proprietors to return the title deed because they omitted a name of a co-proprietor. He stated that the title deed was not returned and it is still in their possession.
84. DW1 confirmed that there was a tenant in occupation of the house on the suit land and further confirmed that they asked him to vacate. He confirmed that they did not disclose who the tenant was paying rent to until after the notice. He confirmed that the tenant was paying rent to the Plaintiff.
85. With regard to parcel number 1223, DW1 stated that they used to live on it but because of work and school, they have since rented it out. He stated that none of their parents is buried on it.
86. Upon cross-examination by counsel for the 3rd Defendant, DW1 stated that succession was done in 2009 and the search which is Exhibit D6 is dated 2nd July, 2009. He stated that the Plaintiff and his father were registered as owners. DW1 stated that while doing succession, they did not intentionally leave out the Plaintiff.
87. He stated that Exhibit D10 is a pension declaration form and it states that there were two wives and Jane Awinja was involved and included. He reiterated that they did not intentionally leave out the Plaintiff and the land does not belong to her.
88. DW1 stated that they were in school but would visit and they had several homes. He stated that they approved for a new title deed and his mother knew that the parcel was registered in the name of the Plaintiff and his father. He stated that they did not mislead the land registrar and they also had the documents.
89. Upon re-examination and in regard to proof of mischief on the part of the Plaintiff, DW1 testified that the first title shows that the sole owner was Stephen Nandwa and there are no documents to show that Dr Nandwa initiated the process of transfer to the Plaintiff.
90. With regard to the medical report, DW1 explained that it states that his father had a chronic illness and that he succumbed to it in 2004. He testified that there was no deliberate effort by his mother to exclude the Plaintiff. He testified that the only link was the tenant who refused to disclose who had allowed him to stay until after he was served with a notice to vacate.
91. DW1 stated that it was not possible for his mother to correct records of the Land Registrar apart from Exhibit P7 which is dated 21st September, 2012 and there has been no other notice served in respect of parcel number 1223.
92. In respect of the pension form which is Exhibit D10, DW1 stated that if the Plaintiff was his father's wife, then she would not have been left out. He testified that both the chief in Kakamega and Kiamunyi wrote letters confirming that his mother was the wife of his father and it does not mention the Plaintiff. He testified that Kiamunyi is where the suit land is.
93. On 8th February, 2023, Shirley Nandwa testified as DW2.
She stated that she lives in Kakamega county, Lugari. She stated that she is a house wife but a hotelier by profession. She testified that she trained as a hotelier but fell ill and she was in a comma and she suffered dementia which she is currently recovering from.



94. She stated that she wrote a statement on 23rd September, 2013 and added that she is a co-administrator with her late mother to the Estate of her late father.
95. DW2 prayed that her witness statement be adopted as part of her evidence which prayer the court acceded to. She stated that this suit was in respect of property known as Njoro Ngata Block 1/1223.
96. In her witness statement dated 23rd September, 2013, DW2 states that she is aware that the deceased, Stephen Nandwa who is her father did not have a third wife. She states that the Plaintiff is unknown to her and the family.
97. She states that she only learnt about the Plaintiff after service of summons upon her mother by the Plaintiff and learnt that she was her father's colleague.
98. DW2 states that after the demise of her father in 2004, her mother applied for Letters of Administration in the year 2005 and she was advised that she needed to include an adult member of the family in the application and that is how she was included as a co-administrator since most of her siblings resided abroad and/or were not adults.
99. She states that in the process of including the deceased properties in the administration of the estate, the 1st Defendant could not locate titles on some of the parcels of land one being the suit parcel of land. She states that she reported the loss of the title since a copy of the original title deed was available.
100. She states that the loss was then put on the Kenya Gazette Notice Number 4259 of 21st April, 2011 for purposes of issuance of a new Title deed giving it a period of sixty days before issuance of a new title. She states that after the expiry of the sixty days, the title deed was re-issued and registered in her name and that of the 1st Defendant.
101. DW2 states that during this period of applying for Letters of Administration, they realized that the suit parcel of land Njoro/Ngata Block 1/1223 had changed ownership in the year 2002 under mysterious circumstances from his father Stephen Nandwa to a joint ownership of Stephen Nandwa and the Plaintiff.
102. She states that the suit parcel Njoro/Ngata Block 1/1223, his father had built a family house which the Plaintiff rented out to one Moses Belsoi Kipiatoro. She states that on 1st August, 2012, her mother (the 1st Defendant) issued a three-month termination to the said tenant as required by law to vacate the said premises so that she could put the same to her personal use.
103. Upon cross-examination by counsel for the Plaintiff, DW2 stated that the deceased Stephen Makuku Nandwa is her father and also stated that he died in April, 2004.
104. She stated that the suit parcel does not belong to the Plaintiff. When referred to document number one on the 3rd Defendants List of documents which is a copy of green card for Njoro/Ngata Block 1/1223. She stated that entry number 5 is on 14th November, 2002 and it lists Stephen Makuku Nandwa and Stella Nyanduko Obanyi as the registered proprietor. DW2 stated that entry number 6 shows the title deed was issued on 14th January, 2002. DW2 confirmed that it is true that prior to his death, the title was in his name and that of the Plaintiff.
105. Upon re-examination, DW2 was referred to document number one on the 3rd Defendants list of documents which is a copy of the green card for Njoro/Ngata Block 1/1223 and testified that the document has nine entries. She testified that entry number one shows David Karuga Kuria dated 27th February, 1997; Entry number two is a title deed dated 2nd May, 1997; Entry number three lists Stephen Makuku Nandwa dated 24th October, 2001; Entry number four is a tile deed dated 24th October, 2001



- and Stephen Makuku Nandwa was issued with title on 24th October, 2001; and Entry number five is dated 14th November, 2002 and the names are listed as Stephen Makuku Nandwa and Stella Obanyi.
106. DW2 testified that it is true that on 24th October, 2001, the property was solely owned by his father. She testified that in 2002, her father was married to her mother (the 1st Defendant). She testified that in 2002, her father became ill and she does not know the circumstances under which the transfer to joint ownership happened.
 107. She testified that he was seriously ill and succumbed in April, 2004. She testified that she does not believe that her father was able to undertake the purported transfer in 2002. She stated that this is in consideration of the medical report as to the state of his health. DW2 testified that her position is that the land belongs to her father and by extension to them as administrators.
 108. On 14th June, 2023, Collins Liyeli Aliela herein after referred to as DW3 testified in support of the 3rd Defendant. He introduced himself as the is the Land Registrar currently working in Nakuru.
 109. He testified that the property in dispute is Njoro/Ngata Block 1/1223. He stated that that the Plaintiff is Stella Nyanduko and explained that her claim is that the land registrar omitted to include her name in the process of registration. He testified that this is not correct.
 110. It was his testimony that he has a certified copy of the green card to the suit parcel and he took the court through the entries. He testified that the register is of edition number one and the opening date is 27th February, 1997 and the area of the parcel is 0.1012 Hectares. He testified that it can be traced from map sheet number one and it is a subdivision of parcel number 231.
 111. He testified that entry number one is dated 27th February, 1997 and the parcel of land is registered to David Karuga Kuria of identification card number 0331734/63 of address 10554 Nakuru. He testified that the current registered owner can be traced at entry number 8 and 9. He testified that entry number 8 is dated 13th July, 2012 and it is registered to Margaret Lubanga of identity card number 0578649 and Shirley Nandwa of identity card number 22897337 of address number 1 Khwisero.
 112. DW3 testified that the registration was based on transmission and the process of succession was done and concluded and he was shown the documents. He produced the green card as Exhibit DW3 (1) and testified that the documents that were shown to him were: a) reference to succession cause number 307 of 2009 and the matter was handled by the Kakamega High Court, b) Grant of letters of administration intestate dated 16th March, 2011, c) certificate of confirmation of grant originating from the same high court matter dated 16th November, 2011, d) Gazette Notice No 4259 dated 21st April, 2011 and e) Form RL 19 registered on 24th October, 2011.
 113. He testified that in respect of the certificate of confirmation of grant, the beneficiaries of parcel No 1223 are Margaret Lubanga and Shirley Nandwa.
 114. DW3 stated that the Plaintiff is not one of the beneficiaries. He testified that he also has form RL7 and explained that it is a form that transfers land from the administrators to the beneficiaries and RL 19 is used to transfer land from the deceased to the administrators. He produced form RL 7 as Exhibit DW3 (2).
 115. DW3 produced the certificate of confirmation of grant dated 16th November, 2011 in the High Court of Kakamega Succession Cause No 307 of 2009 and he produced it as Exhibit DW3 (3).
 116. Upon cross-examination by counsel for the Plaintiff, DW3 confirmed that he works at the Land Registry. When referred to Exhibit DW 3 (1), He stated that Entry No 3 is dated 24th October, 2001 showing the land was transferred to Stephen Makuku Nandwa of identification number 1578831 of



address 6657 Nairobi; Entry number 4 is a title deed issued on 24th October, 2001; entry number 5 is dated 14th November, 2002 and it shows land transferred to Stephen Makuku Nandwa and Stella Nyanduko Obanyi; Entry number 6 is a title deed issued on 14th November, 2002 issued to Stephen Makuku and Stella Obanyi who is the Plaintiff in this case and Entry number 7 is dated 24th October, 2011 and it reads Margaret Lubanga of identity number 0578649 and Shirley Nandwa of identity number 22897337 succession cause 307 of 2009 Gazette Notice number 4266 of 1st April 2011 High Court Kakamega LR 19.

117. DW3 confirmed that the Plaintiff was at some point the registered owner of the suit property and her name then disappears. He stated that it was omitted apart from the succession cause. He also stated that the name cannot just be omitted and there must be justification. He stated that the interest of the Plaintiff and Stephen should have been resolved at the High Court in Kakamega and her interest was in the succession cause.
118. Upon cross-examination by counsel for the 1st and 2nd Defendant, DW3 confirmed that he has documents from the parcel files. He stated that the parcel file should ordinarily have all documents of transactions relating to a parcel of land.
119. DW3 stated that in respect of this parcel, he has the original title surrendered for Entry number 3 and he has also seen the original title for entry number 5. He stated that he also does not have the transfer documents for entry number 3 to entry number 5. He stated that he cannot comment on documents relating to entry number 3 to number 5. He confirmed that he does not know how after Stephen Nandwa at entry number 5 it moved to the Plaintiff.
120. He stated that the only record is in the green card and the title of Stephen was returned and another issued and he does not have one for Karuga. He stated that they have a problem of filing at the lands registry and some documents are missing from the parcel file.
121. DW3 stated that he does not know or has not been told that the original title for entry number 5 was also produced before this court. He stated that it is true that they registered the end product of a succession cause after being shown or presented with official documents.
122. He stated that R.L 7 was processed by the land registrar and it is signed but not stamped and added that it is the document relating to entry No 8 and 9. He stated that the third column of the green card has consideration and remarks and a signature column. DW3 confirmed that he has the certified photocopy and the original is in the binder.
123. DW3 stated that whoever made the entries found that they were proper and registered to them. DW3 stated that as per the record, the rightful registered owners are Margaret Lubanga and Shirley Nandwa. He stated that from his records, there is no encumbrance registered on the suit parcel.

Issues For Determination

124. The Plaintiff filed her on 14th August, 2023. She identifies the following issues for determination:
 - a. Whether the Plaintiff is the legitimate joint owner of suit property land parcel Njoro/Ngata Block 1/1223 with the deceased?
 - b. Whether the certificate of title issued to the 1st and 2nd Defendant was acquired fraudulently or through a corrupt scheme?
 - c. Who between the Plaintiff and the 1st and 2nd Defendants is the lawful owner of the suit property?



- d. Whether the Plaintiff is entitled to the relief sought in her Plaintiff?
125. The Plaintiff submits that together with the deceased, they acquired joint ownership of the suit property on 14th November, 2002 while the deceased was still alive. She submits that a title deed was issued to that effect and the same is in the Plaintiff's possession. She submits that the fact of ownership was confirmed by a copy of the green card produced by the 3rd Defendant which clearly shows the legal transfer, registration and issuing of the title deed to both parties.
 126. She submits that the deceased later on died in the year 2004 thus by operation of the law, the disputed land belonged to the Plaintiff wholly and should have never become part of the estate of the 1st and 2nd Defendants late father.
 127. The Plaintiff relies on Section 2 of the Land Act No 6 of 2012, Section 91 (4) of the Land Registration Act No 3 of 2012 and Section 49 of the Land Act No 6 of 2012. She submits that land held under joint tenancy is held in undivided shares. She also relied on the judicial decision of Isabel Chelangat vs Samuel Tiro (2012) eKLR.
 128. She submits that the said Stephen Makuku Nandwa (deceased) could not have transferred his interest to anyone or even to the 1st and 2nd Defendants once the joint tenancy was registered and upon his demise, the suit land automatically devolved to the surviving co-tenant who is the Plaintiff.
 129. She submits that on 13th July, 2012, the 1st and 2nd Defendants through transmission acquired ownership of the suit property vide succession cause No 307 of 2009 being the matter of the estate of Stephen Makuku Nandwa.
 130. It is her submission that the aforesaid succession cause was done without the knowledge and consent of the Plaintiff and the time when the succession cause was filed, the 1st and 2nd Defendants were well aware of the fact that the suit property was jointly owned by the Plaintiff and their father Stephen Makuku Nandwa (deceased) since they carried out a search at the Land Registry and were issued with the certificate of search dated 2nd July, 2009 confirming the same.
 131. She submits that however, the 1st and 2nd Defendants instead alleged that the title deed was lost, obtained a police abstract dated 11th April, 2011, notice of issue of new land certificate and Kenya Gazette thus giving misrepresenting facts to the 3rd Defendant.
 132. The Plaintiff relies on the judicial decision of Teresia Wangari Mbugua v Jane Njeri Nduati & another [2020] eKLR and submits that the 1st and 2nd Defendants fraudulently caused the suit property to be registered in their favour through dishonesty and giving false information to the court and misrepresenting to the 3rd Defendant to irregularly register them as owners thus obtaining an illegal title.
 133. The Plaintiff submits that the allegations raised by the 1st and 2nd Defendants that the said transfer and registration of co-ownership between the Plaintiff and their deceased father was fraudulent were mere allegations not supported with any sufficient proof.
 134. She submits that the Defendants have not adduced any evidence that the title deed issued and held by the Plaintiff was not genuine. They submit that no evidence has been produced to show that the title deed issued to the Plaintiff was ever lawfully and validly cancelled and that the same was re-allocated to the 1st and 2nd Defendants.
 135. The Plaintiff relies on the judicial authority of Salome Wangari Wamunyu v Irene Jane Njambi & 2 other [2021] eKLR. She submits that her title to the suit property remains indefeasible.



136. The Plaintiff also relies on Section 24 (a) of the [Land Registration Act](#), Section 26 (1) of the [Land Registration Act](#) and Section 80 (1) of the [Land Registration Act](#). She submits that the 1st and 2nd Defendants failed to demonstrate the illegality of the Plaintiff's title deed to the suit property issued to her and the deceased on 14th November, 2002 thus the said title is indefeasible.
137. The Plaintiff submits that she is the rightful registered owner of land parcel Njoro/Ngata Block 1/1223 and she is entitled to the prayers sought in her plaint.
138. The 1st and 2nd Defendants filed submissions on 16th October, 2023. They identify the following issues for determination:
- a. Whether the Plaintiff has a genuine legal interest and thus the legitimate owner of the suit property land parcel Njoro/Ngata Block 1/2223 with the deceased?
 - b. Whether the certificate of title issued to the 1st and 2nd Defendant was acquired fraudulently?
 - c. Who between the plaintiff and the 1st and 2nd Defendants are the lawful owners of the suit property?
 - d. Whether the Plaintiff is entitled to the relief sought in her plaint?
139. They submit that the suit property parcel Njoro/Ngata Block 1/1223 was initially registered in the name of the deceased and ownership changed under mysterious circumstances from Stephen Nandwa to a joint ownership of Stephen Nandwa and one Stella Nyanduko Obanyi, the Plaintiff herein.
140. They also submit that the Plaintiff alleges that she is the legitimate joint owner of the suit property land parcel Njoro Ngata Block 1/1223 with the deceased but fails to give evidence of how she became a joint owner of the said suit property.
141. The 1st and 2nd Defendants submit that the Plaintiff has no genuine interest in the suit property parcel Njoro Ngata Block 1/1223 as she does not claim to be a dependent of the deceased. They submit that she does not demonstrate how she acquired the joint ownership with the deceased.
142. They rely on Section 91 of the [Land Registration Act](#) and reiterate that the Plaintiff has not provided any evidence how the joint ownership was attained and whether it was by leave of court.
143. They also submit that she did not testify that the deceased and her were a couple. They submit that the Plaintiff did not produce any document or agreement between her and the deceased signifying that they agreed to sever the joining of ownership and the severance would be complete by registration in the prescribed register of the joint tenants or tenants. They rely on the judicial decisions of Hubert L Martin & 2 others vs Margaret J Kamar & 5 others [2016] eKLR, Munyu Maina vs Hiram Gathiha Maina [2013] eKLR, Siriekesi Morris Wanjala vs Bonface Bruno Wanjala [2021] eKLR and Samuel Kamere vs Land Registrar Kajiado [2015] eKLR.
144. They submit that the suit property is purportedly registered in the Plaintiffs name whereas records of the 3rd Defendant show that the 1st and 2nd Defendant are the registered owners to the land in question. They submit that the title to the suit property is under challenge and it is therefore incumbent upon the Plaintiff to show the root of the title which she failed to do. They submit that the Plaintiff has not discharged evidential burden of proof because she has failed to demonstrate the root of her title.
145. The 1st and 2nd Defendants submit that the Plaintiff's claim that they acquired certificate of title illegally, fraudulently and by misrepresenting information to the 3rd Defendant, is a very serious allegation that should have been supported by evidence. They submit that the title that the Defendants reported to be lost and for which they were issued with a police abstract was that which was in the name of the



- deceased. They submit that after obtaining the necessary letters of administration, they went through the normal process to register the said title to themselves in the interest of the beneficiaries to the estate of the deceased.
146. The 1st and 2nd Defendants submit that the 3rd Defendants representative when giving his testimony showed that his records confirmed that they were the registered owners and that he did not have anything to show how the Plaintiff could claim ownership of the land in question. They submit that allegations of fraud must be proved by evidence, as required by law and from the maxim “He who alleges must prove.”
 147. They rely on Section 107, 108 and 109 of the *Evidence Act*, Section 33 of the *Land Registration Act* and Regulation 28 of the Land Registration (General) Regulations 2017. The 1st and 2nd Defendants also rely on the judicial decisions of *Silas Samoei & 8 others v Permanent Secretary, Ministry of Lands and Physical Planning & 3 others* [2020] eKLR, *Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party* [2019] eKLR, *General Properties Limited v Saika Two Estate Developers Limited* [2021] eKLR and *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others* [2013] eKLR.
 148. They submit that the Plaintiff herein alleges that the 1st and the 2nd Defendant conducted a search dated 2nd July, 2009 and thus gave false information to the court and misrepresenting to the 3rd Defendant to irregularly register them as owners thus obtaining an illegal title. They submit that the 1st and 2nd Defendants acquired the certificate of title lawfully and procedurally and with no intention to defraud. They submit that the Plaintiff has not proved or produced any documents to prove fraud by the Defendants.
 149. The 1st and 2nd Defendants submit that they acquired ownership of the suit property legally vide succession cause No 307 of 2009 with no intentions to defraud the Plaintiff. They submit that the Defendants did not have the knowledge that the suit property was under joint ownership. They also submit that the Plaintiff has not adduced any evidence that the 1st and 2nd Defendants acquired the certificate of title fraudulently or through a corrupt scheme.
 150. The 1st and 2nd Defendants submit that the Plaintiff has not shown the root of her title and that the certificate of title to the suit property was acquired legally and procedurally and cannot therefore claim that the title is indefeasible.
 151. They further rely on the judicial decisions of *Republic vs Land Registrar Kilifi & Another ex parte Daniel Ricci* (2013) eKLR, *Funzi Island Development Limited & 2 others vs County Council of Kwale & 2 others* (2014) eKLR and *WW vs Severin Kinyanjui & Another* [2021] eKLR.
 152. The 1st and 2nd Defendants submit that they are the dependents of the late Stephen Nandwa Makuku and they are the lawful administrators of the estates of the deceased. They submit that the 1st Defendant is the wife to the deceased and the 2nd Defendant is his daughter. They submit that they are the rightful proprietors of the suit property and they followed the due procedure in acquiring title to the suit property.
 153. The 1st and 2nd Defendants submit that in light of the authorities relied on, possession of title is not sufficient proof of ownership and where there are two titles legally issued to two different parties, they are expected to demonstrate the root of the purported title. They submit that the Plaintiff has not demonstrated how she became a joint owner and that the due procedure was followed in acquiring the joint ownership.



154. They submit that without any documents to support the registration of the Plaintiff as a joint owner of the land, the subject matter of the suit, the Plaintiff must discharge the evidentiary burden of proof as required, and demonstrated the root of the purported title to the property.
155. They submit that Article 40 (6) of *the Constitution* removes protection of title to property that is found to have been unlawfully acquired. They submit that the Defendants are the rightful registered owners of land parcel Njoro/Ngata Block 1/1223 and the Plaintiff is not entitled to the prayers sought and her title should be cancelled and the land remain the property of the rightful owners who are the 1st and 2nd Defendant.
156. The 3rd Defendant did not file any submissions.

Analysis And Determination

157. After considering the pleadings, submissions and the testimony of the Plaintiff, Defendants and their witnesses, the following issues arise for determination:
 - a. Whether the Plaintiff is the legitimate owner of the parcel of land Njoro/Ngata Block 1/1223?
 - b. Whether the certificate of title issued to the 1st and 2nd Defendant was acquired irregularly or fraudulently or through a corrupt scheme?
 - c. Who should bear the costs of this suit?

A. Whether the Plaintiff is the legitimate owner of the parcel of land Njoro/Ngata Block 1/1223?

158. It is the Plaintiff's case that together with Stephen Makuku Nandwa (deceased), they are the legitimate owners of parcel of land Njoro/Ngata Block 1/1223. It is her case that the suit property was initially owned by the deceased Stephen Makuku Nandwa (deceased) who acquired the same in the year 2001 and later on transferred part ownership of the same to the Plaintiff in the year 2002 thus making them joint owners.
159. The Plaintiff claims that the said transfer was legally done in the year 2002 before the demise of Stephen Makuku Nandwa who later dies in the year 2004.
160. It is her case that on or about 3rd August, 2012, the Plaintiff instructed her advocates to conduct a search on the property and it is only then that she learnt that the suit property was transferred to the 1st and 2nd Defendant without the consent and involvement of the Plaintiff.
161. The 1st and 2nd Defendants on the other hand state that they are the proper and rightful next of kin to administer the Estate of Stephen Makuku Nandwa. They state that the Plaintiff has no genuine interest in the suit property parcel NJORO NGATA BLOCK 1/1223 as she does not claim to be a dependent of the deceased. They state that the Plaintiff has failed to prove the root of her title and/or demonstrate how she acquired joint ownership with the deceased.
162. The 3rd Defendant in its witness statement dated 3rd May 2023 and oral testimony states that the registration of Margaret Lubanga and Shirley Nandwa as proprietors of PARCEL NO LR NJORO/ NGATA BLOCK 1/1223 was as a result of orders in Succession Cause No 307 of 2009 at the High Court at Kakamega. He states that the parcel as indicated on the copy of the green card was registered in the names of Stephen Nandwa and Stella Nyanduko Obanyi on 14th November, 2012.
163. He further states that during the registration of the succession, an omission was made in that the two beneficiaries of the share of the late Stephen Makuku Nandwa were registered and the name of Stella Nyanduko Obanyi was left out. He states that it is in the best interest of both parties that the title



issued to the beneficiaries be surrendered to have the name of the Plaintiff included and a new title issued to the three.

164. During the hearing of the case, the Plaintiff produced a copy of a title deed issued to her and Stephen Makuku Nandwa as Exhibit P1. The Plaintiff has also produced a letter dated 19th September, 2012 seeking clarification on the exclusion of the Plaintiff in the transfer of land to Margaret Nandwa and the 2nd Defendant.
165. The 3rd Defendant replied via correspondence dated 21st September, 2012 stating that the basis of the registration emanated from the proceedings in the succession cause no 307 of 2009 in the High Court of Kenya at Kakamega.
166. The issue before this court is whether the Plaintiff has proved her interest in the suit property. It is her evidence that the property was purchased by herself and Stephen Makuku Nandwa (deceased). She testified that it was initially registered in the name of Stephen Makuku Nandwa and it was developed jointly by herself and the deceased.
167. It was her evidence that at the time she was cohabiting with the deceased and the property was subsequently registered jointly. It was the Plaintiff's evidence that they developed the property and Dr. Nandwa passed away. She testified that she went to work abroad and she became aware that the property had been transferred to unknown people without her knowledge and consent sometime in 2012.
168. Section 101(1) of the Registered *Land Act* provides as follows:
- An instrument made in favour of two or more persons, and the registration giving effect to it, shall show-
- (a) whether those persons are joint proprietors or proprietors in common; and
- (b) where they are proprietors in common, the share of each proprietor.
169. On interrogation of Exhibit P1, it is evident that the suit parcel being Njoro/Ngata Block 1/1223 was registered on 14/11/2002 in the names of Stephen Makuku Nandwa of ID No. 0578831 and Stella Nyanduko Obanyi of ID No. 6039630.
170. The title deed does not, however, state whether the co-tenancy is a tenancy-in-common or a joint tenancy. I have noted that the plaintiff at paragraph 16 of her plaint anticipated that this may pose a challenge to her claim and therefore seeks certain declaratory orders in respect of a joint tenancy and alternative declaratory orders in respect of a tenancy -in-common.
171. My considered opinion is that under the Registered *Land Act* a tenancy-in-common must specify the share of each proprietor. In the event that the share is not specified, then the logical deduction is that the proprietorship is joint.
172. I note, however, that the *Land Registration Act* 2012 in a bid to resolve the question of whether persons who own property as co-tenants, where the title document is silent, are tenants -in-common or joint tenants at section 91 provides as follows;
- (1) In this Act, co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.



- (2) Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.
- (3) An instrument made in favour of two or more persons and the registration giving effect to it shall show—
- (a) whether those persons are joint tenants or tenants in common;
 - (b) the share of each tenant, if they are tenants in common.
173. Section 101(1) of the Registered *Land Act* is in pari materia with Section 91 (3) of the *Land Registration Act*. The difference in the two provisions is that the *Land Registration Act* provides an answer to the legal question that section 101(1) is silent on i.e. where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.
174. In the judicial of Mukazitoni Josephine V Attorney General Republic of Kenya [2015] eKLR, the Court of Appeal stated and observed as follows;
- “The title document to the property has two names and this is concurrent ownership. There is no indication as to whether the property is held on a tenancy-in-common or joint tenancy or tenancy in entirety. When a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in joint tenancy and not tenancy-in-common or tenancy in entirety.
- ...A joint tenancy cannot be severed unless one of the four unities of title, time, possession or interest is broken. A joint tenant has the right to the entire property or none – since the other joint tenant also has a right to the entire property. This is expressed in Latin as totum tenet et nihil tenet, a joint tenant holds everything and nothing”.
175. The next limb to be considered in determining this first question is the legal effect of the death of one of the joint owners of land. section 102 of the Registered *Land Act* provides as follows;
- (1) Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently –
 - (a) dispositions may be made only by all the joint proprietors; and
 - (b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly.
176. What is apparent, therefore is that where one or more joint tenants dies, the rights that accrued in favor of the deceased Joint tenant(s) lapse, terminate and/or are extinguished. Consequently, all the rights are transmitted to and vest in the survivor.
177. In the judicial decision of Tesha Njoki Mahihu – vs – Doris Nyambura (2021) eKLR the Learned judge cited with approval the decision in MWANGI GAKURI VERSUS BENARD KIGOTHO MAINA & ANOTHER (2016) eKLR. It was stated and observed as follows;
- “The principle of survivorship also known as jus accrescendi operates as was explained in the case of Isabel Chelangat vs Samuel Tiro (2012) eKLR, as follows:



“A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities.” The right of survivorship (jus accrescent) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence.”

178. Therefore, upon the death of Stephen Makuku Nandwa, all the rights over and in respect of the suit property transmitted to and vested in the Plaintiff.
179. Section 118 of the Registered *Land Act* provides that If one of two or more joint proprietors of any land, lease or charge dies, the Registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register.
180. Taking all the foregoing into consideration, I find that the Plaintiff is the legitimate owner of the parcel of land Njoro/Ngata Block 1/1223.

B. Whether the certificate of title issued to the 1st and 2nd Defendant was acquired irregularly or fraudulently or through a corrupt scheme?

181. The Plaintiff in her plaint dated 22nd October, 2012 has alleged fraudulent transfer of the parcel of land and she lists the particulars of fraud as: Conspiring to dispossess the plaintiff of her interest in the suit property; Failure to disclose material facts to the court and the 3rd Defendant; Inducing the 3rd Defendant to act on misrepresentation by alleging that the title was lost whereas they knew or ought to have known that the Plaintiff was holding the original title and; applying for succession cause number 309 of 2011 in Kakamega High Court without disclosing all the dependents of Stephen Makuku Nandwa, the deceased.
182. It is trite law that he who alleges must prove. This is set out in section 107 of the *evidence Act*. It is as follows:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove 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.
183. Fraud has been defined in Black’s Law Dictionary 11th Edition as;
- “A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”
184. It is an established principle of law that a claim based on fraud must be specifically pleaded and strictly proved. The Court of Appeal in the decision of Vijay Morjaria vs Nansingh, Madhusingh Darbar & another [2000] eKLR held thus;
- “It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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.”

185. Bearing in mind the particulars of fraud, it was incumbent upon the Plaintiff to prove that the transfer of the suit parcel was fraudulent. However, given the testimony and evidence of the 3rd Defendant that the transfer was pursuant to succession proceedings in the High Court of Kenya at Kakamega. I shall refrain from interrogating the depositions of the 1st and 2nd Defendant prior to and during the succession proceedings.
186. The Plaintiff's further claim is that the 3rd Defendant irregularly transferred the suit parcel to the 1st and 2nd Defendant. Her case is that she wrote to the 3rd defendant demanding reasons for the irregular transfer and the 3rd Defendant responded vide a letter dated 21st September 2012 (Exhibit P5) and admitted that there was an omission in including the name of the plaintiff and also informed her that the defendants had been requested to surrender the title for inclusion of the Plaintiff.
187. In the 3rd defendant's statement of defence at paragraph 5, it admits the fact of having written the letter dated 21st September.
188. At paragraph 6 of its statement of defence, the 3rd defendant states that while the transfer could have been irregular, it denies that it was fraudulent.
189. The 3rd defendant produced the green card (Exhibit DW3(1), and form RL7 Exhibit DW3(2), and a certificate of confirmation of grant Exhibit DW3(3), as an explanation of the circumstances under which the suit parcel was transferred to the 1st and 2nd Defendant.
190. 1st and 2nd Defendant's claim that the Plaintiff has not established the root of her title. I do not agree. She has explained that the deceased transferred the suit parcel to their joint names. The plaintiff has also proved that she was in possession of the suit property and had a tenant living in it until the said tenant was served with an eviction notice in August 2012 by the 1st and 2nd Defendant (Exhibit P4) and she caused her advocated to write a letter of protesting the said termination notice.
191. I have noted that no evidence has been tendered to show that the Plaintiff was aware or took part in the succession proceedings. I have also noted that the 1st and 2nd defendant were aware, as at the time of the succession proceedings, that the suit property was jointly owned by the Plaintiff and their deceased father. This is from the official search (Exhibit D6). The search is dated 2/7/2009.
192. The affidavit sworn by the 1st Defendant alleging loss of title is sworn on 11/4/2011. Curiously, the affidavit does not mention that the suit parcel is registered in the name of her deceased husband and someone else. While it is not in my place to comment on the succession proceedings, I am doubtful that if this information was placed before the Learned Judge, he would have issued orders in respect of the suit parcel, which orders led to the registration of the suit parcel in the name of the 1st and 2nd defendant. This is the registration that the Plaintiff terms as irregular and the 3rd Defendant acknowledges to be irregular.
193. The 1st and 2nd Defendants did not file a counterclaim and I shall refrain from addressing the allegations that the Plaintiff errantly included her name into the suit property which they claim belongs to the deceased's family.
194. The 1st and 2nd Defendants when giving evidence informed the court that Stephen Makuku Nandwa was sickly and the Plaintiff must have taken advantage of his condition and had the ownership of the suit parcel changed from Stephen Makuku Nandwa (deceased) as sole owner to joint ownership between the deceased and the Plaintiff.



195. In support of this allegation of want of capacity to effect transfer of the suit property to joint ownership, the 1st and 2nd Defendant produced a medical report authored by one Dr. Paul Wangai dated 10th June, 2013. The doctor states that the cause of the paralysis (craniopathy) and the confusion (dementia) was viral encephalopathy (brain involvement of the viral infection). There is no nexus between his medical condition and lack of capacity as at the time of registration of the suit property in the joint names of the Plaintiff and the deceased. The doctor was not called to tender evidence. This court is not a medical expert.
196. I find that though the registration of the 1st and 2nd Defendants as owners of the suit parcel was pursuant to an order issued in succession cause No. 307 of 2009 by the High Court sitting in Kakamega, the same was irregular to the extent that it did not take into consideration the Plaintiff's proprietary interest in the suit parcel as evidenced in the official search certificate date 2/7/2009 (Exhibit D6) and on account of the original title deed held by her (Exhibit P1).

C. Who should bear the cost of the suit?

197. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition

198. In the result, the Plaintiff's suit succeeds and I hereby enter judgement in her favour in the following terms;
- a. A declaration is hereby made that the Plaintiff is the legitimate owner of parcel of land Njoro/Ngata Block 1/1223 having become the sole owner after the death of Stephen Makuku Nandwa.
 - b. The 1st and 2nd Defendants are hereby ordered to surrender the title of the parcel of land known as Njoro/Ngata Block 1/1223 to the 3rd Defendant for cancellation.
 - c. The 3rd Defendant is hereby ordered to correct the register in respect of the parcel of land known as Njoro/Ngata Block 1/1223 by deleting the name of the 1st and 2nd Defendant and replacing it with the name of the Plaintiff.
 - d. The Plaintiff shall have costs of this suit.
199. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 11TH DAY OF APRIL, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Plaintiff.

No appearance for the 1st and 2nd Defendant.

No appearance for the 3rd Defendant.

Court Assistant; Mr. Joseph Makori.

