



**Nurani & another (Suing as the Legal Administrators of the Estate of
Sadrudin Shamsudin Ismail Nurani) v Gulam & 2 others (Environment & Land
Case 596 of 2014) [2024] KEELC 4726 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4726 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 596 OF 2014**

**OA ANGOTE, J
JUNE 13, 2024**

BETWEEN

**FARRAH SADRUDIN NURANI 1ST PLAINTIFF
FEISAL SADRUDIN MURANI 2ND PLAINTIFF
SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF SADRUDIN
SHAMSUDIN ISMAIL NURANI**

AND

**GALEB GULAM 1ST DEFENDANT
SUN SHINE COTTAGES LIMITED 2ND DEFENDANT
DIAMOND TRUST BANK OF KENYA LTD 3RD DEFENDANT**

JUDGMENT

1. Through an Amended Plaintiff dated 21st June 2017, the Plaintiffs have sought for the following reliefs against the Defendants:
 - a. A permanent injunction restraining the Defendants either by themselves, their advocates, agents, holders of their power of attorney or whomsoever from dealing in any way of disposing, alienating, advertising for sale, charging, assigning interests in, mortgaging, transferring or in any other way dealing and/or interfering with the claiming under their titles or names or otherwise from entering upon, remaining upon or dealing with the suit premises in any other matter howsoever all that property known as L.R. No. 1160/230 (Original Number 1160/11/20).



- b. A declaration that the sale and transfer for all that property known as L.R. Number 1160/230 (Original Number 1160/11/20) by a transfer dated 14th April 1998 executed by the 1st Defendant and the 2nd Defendant was illegal, unlawful, fraudulent and nullity ab initio.
 - c. A declaration that the discharge of charge executed by the 3rd Defendant and registered as entry number 12 and registered on 22nd April 1998 was illegal, unlawful, fraudulent and nullity ab initio.
 - d. A rectification order do issue directing the Commissioner of Lands and/or the Chief Land Registrar to cancel the entries numbers 11, 12, 13 and 14 registered on 24th August 1994 and 22nd April 1998 respectively charging and dealing by way of charging to the 3rd Defendant, charging and transferring all that property known as L.R. Number 1160/230 (Original Number 1160 /11/20) on the 2nd Defendant.
 - e. A declaration that the Plaintiffs as the legal administrators of the Estate of Sadrudin Shamsudin Ismail Nurani are the absolute owner of all that property known as L.R. Number 1160/230 (Original Number 1160 /11/20).
 - f. A mandatory injunction directed at the 2nd Defendant, its assigns, subsidiaries, agents, officers of its power of attorney to deliver to the Plaintiff vacant possession of all that property known as L.R. Number 1160/230 (Original Number 1160/11/20).
 - g. A mandatory injunction directed at the Chief Land Registrar and/or the Commissioner of Lands directing them to execute such instruments and make such entries as may necessary to ensure the giving effect of prayer number (c) hereinabove to wit transfer into the names of the Plaintiffs as the legal administrators of the estate of Sadrudin Shamsudin Ismail Nurani absolutely all that property known as L.R. Number 1160/230 (Original Number 1160/11/20).
 - h. Damages against the Defendants for the fraudulent transfer and/or intermeddling with Sadrudin Shamsudin Ismail Nurani absolutely all that property known as L.R. Number 1160/230 (Original Number 2260/11/20).
 - i. The costs of this suit.
 - j. Interest on (d) and (e) hereinabove at court rate from the date of judgement until payment in full.
 - k. Such other and further relief that this Honourable Court may deem just and fit to grant.
2. The Plaintiffs' case is that at all material times, the deceased was the registered owner of the suit property, L.R. Number 1160/230 (Original Number 1160/11/20, having purchased it from Hafidh Mohammed Shante. They aver that the deceased passed away on 22nd November 1996, when he was still the registered owner of the suit property.
 3. The Plaintiffs averred in the Plaint that the death of Mr. Nurani was known to the 3rd Defendant's officers and such knowledge placed a fiduciary duty upon the 3rd Defendant to disclose to his estate and/or the Plaintiffs of any dealings he had with it during his lifetime and any securities they held under his name and that the 3rd Defendant also had an obligation in law to ensure that dealings on any securities it held was in compliance with the statutory provisions, the ITPA 1888 and the [Law of Succession Act](#).
 4. According to the Plaintiffs, after the deceased's death, proceedings were originated by the firm of Mohamed Madhani Advocates by which the 1st Defendant was subsequently confirmed as the legal administrator of the deceased's estate.



5. The Plaintiffs assert that in breach of its duty to the deceased's estate and its obligations in law, the 3rd Defendant deliberately failed to make an inquiry as to the administration of the estate, and failed to notify the probate court in Succession Cause No. 714 of 1997: In the Estate of Sadrudin Shamshudin Esmail Nurani, that it was the custodian of the original title of the suit property and the extent of the deceased's liability to the 3rd Defendant.
6. They assert that the 3rd Defendant also purported to execute a discharge of charge in respect of the charge posthumously and illegally permitted dealings on the suit property which were illegal and fraudulent.
7. The particulars of illegality by the 3rd Defendant, it was alleged, include not disclosing to the probate court the existence of the suit property as an asset of the deceased; not lodging its interest as a secured creditor in respect of the suit property; failing to call into inquiry the conduct of the 1st and 2nd Defendants in intermeddling with the estate of the deceased by purporting to enter into an illegal sale agreement; delivering a discharge of charge and original title document to complete an illegal and fraudulent sale and purporting to exercise a statutory power of sale by way of private treaty when such right had not accrued.
8. The Plaintiffs averred that in breach of his obligations under the *Law of Succession Act* and the Registration of Titles Act, the 1st Defendant executed a transfer of the suit property to the 2nd Defendant dated 14th April 1998. They depone that this was illegal, fraudulent and constituted an act of intermeddling with the deceased's estate.
9. The listed particulars of fraud are that the 1st Defendant had no legal capacity to deal with the suit property at the time of execution; the suit property was deliberately not listed in the asset register in the probate matter; the transfer was registered simultaneously with a discharge of charge, grant of probate and transfer on 22nd April 1998; at the time of executing the transfer in favour of the 2nd Defendant, the property had not been validly transmitted to the 1st Defendant under the Registration of Titles Act and that the Plaintiffs, who are the children of the deceased, were never made aware of the property's existence.
10. The Plaintiffs averred that the fraud on the part of the 2nd Defendant was failing to make inquiries as to the 1st Defendant's capacity to transfer the suit property; failing to conduct a search on the property, which would have revealed that at the time of executing the transfer, the 1st Defendant had not brought himself under Section 52 of the Registration of Titles Act; failing to peruse the court file, which would have revealed that the suit property had not been disclosed as an asset of the deceased and purporting to purchase a property from a person without title to the property.
11. It is the Plaintiffs' case that the transfer dated 14th April 1998 had no legal effect and was a nullity ab initio, and that the 2nd Defendant could not have obtained good title on the strength of such transfer. They aver that as the legal representatives of the deceased and as the surviving children and beneficiaries, they have been permanently dispossessed of their legal interest in the suit property.
12. In its Defence dated 29th June 2014, the 1st Defendant admitted that the suit property was registered in the name of the deceased at his demise on 22nd November 1996, but it is now registered in the name of the 2nd Defendant.
13. He averred that he was duly appointed as the deceased's estate in Succession Cause No. 714 of 1997; that the grant of probate and the certificate of confirmation issued to him mandated him to deal with the deceased's estate according to his will; that he complied with all the applicable laws in dealing with



- the suit property and that the transfer of the suit property was done legally and in accordance with the powers granted to him by the deceased under the will.
14. The 1st Defendant asserted that the Plaintiffs had deliberately failed to disclose the contents of two deeds of settlement filed in Succession Cause No. 714 of 1997, dated 16th November 2011 and 31st December 2013, which were adopted as an order of the court on 4th February 2014. He asserted that these deeds were fully satisfied with accounts rendered by him with regard to the estate and further discharged him from all his obligations in relation to the management of the estate.
 15. On this basis, the 1st Defendant averred that the Plaintiffs are estopped from alleging that full accounts, including his dealing with the suit property, have not been rendered. He asserted that the sale of the suit property was necessary to liquidate the liability with Diamond Trust Bank who held a legal charge over the same and that this suit is res judicata as all issues pertaining to the estate of the deceased have been determined by the succession court.
 16. The 2nd Defendant, through its Amended Defence dated 31st October 2017, admitted that the 1st Defendant had been appointed as administrator of the deceased's estate and had the legal capacity to transfer the property to him.
 17. In the alternative, the 2nd Defendant pleaded that even if the 1st Defendant lacked capacity to sell the property, it has in its possession a copy of the certificate of confirmation of the Grant of probate and was not aware of any deficiency in the 1st Defendant's capacity when it purchased the property.
 18. It asserted that it took all reasonable steps required ahead of and in the purchase of the property; that it is the lawful owner of the suit property, which it purchased as an innocent purchaser for value without any notice of any defect and that the Plaintiffs' remedy, if any, is against the 1st Defendant for breach of trust or breach of statutory duty.
 19. Through its Defence dated 20th July 2017, the 3rd Defendant deponed that the deceased was the legal owner of the suit property; that in July 1994, a company known as Dale Investments Limited, in which the deceased was a shareholder sought a working capital finance of Kshs. 30,000,000/- from the 3rd Defendant, which was to be paid over a 5-year period, and that this facility was secured by two charges, dated 23rd August 1994 registered on the same date over the suit property and Subdivision No. 1677 (Original 67 Rev./746) of Section No. 1 Mainland North Mombasa respectively.
 20. The 3rd Defendant denied that it had any fiduciary duty or positive obligation towards the estate of the deceased which had not been catered for by the 1st Defendant, as a personal representative of the deceased's estate. It also denied that its dealings with the 1st Defendant breached any duty to the deceased's estate.
 21. The 3rd Defendant averred that the financial facility was regularly serviced until the demise of the deceased, after which there was default and there was an outstanding sum which was accruing interest; that the 1st Defendant as the deceased's personal representative, lawfully negotiated with the 3rd Defendant for the settlement of the outstanding amounts owed to the 3rd Defendant, which involved the sale of the suit property to reduce the outstanding amounts owed to the 3rd Defendant by the deceased's estate.
 22. The 3rd Defendant asserted that having been paid the proceeds of sale, they issued a discharge of charge dated 23rd August 1994 to enable the 2nd Defendant to register itself as the proprietor of the suit property. It stated that it did not exercise any statutory power of sale; that the sale was done between a willing seller and buyer for due consideration and that the suit property was not free property under the [Law of Succession Act](#), as it was encumbered by the charge dated 23rd August 1994.



23. The Plaintiff responded to the 3rd Defendant's Defence and denied that the deceased has ever been a shareholder of Dale Investments Ltd, which company together with its principal shareholder, was in fact a debtor to the deceased. They claimed that this debt was the subject of proceedings originated by the 1st Defendant in Nairobi HCCC Number 393 of 2003 *Galeb Gulam & Another v Cyrus S. Jirongo*.
24. The Plaintiffs denied that the deceased charged the suit property to secure any liability by Dale Investments Limited; that contrary to the 3rd Defendant's defence, the suit property was never charged to the 3rd Defendant but was disposed of pursuant to an order issued in HCCC 393 of 2003 to settle a liability that the judgement debtor, Cyrus S. Jirongo had with the deceased's estate and Eldomart Holdings Limited. They also denied that the deceased was indebted to the 3rd Defendant.
25. They averred that there was no demand or statutory notice issued to the estate by the 3rd Defendant and that the 1st Defendant executed an affidavit executed in Succession Cause Number 714 of 1997 that stated on oath that the estate had nil liabilities.

Hearing and Evidence

26. PW1, Gildine Gatweri Karani, a Land Registration Officer at the Chief Land Registrar's office, court's section, appeared in compliance with the court summons.
27. PW1 stated that entry No. 10 on the title shows the transfer of the land to the deceased, trading as Eldochem; that entry No. 11 is a charge to Diamond Trust of Kenya Limited with the chargor being Nurani; that entry number 12 is a discharge of charge registered on 22nd April 1998 and that entry No. 13 is a grant of probate of will in the estate of Sadrudin, which contains a fourth name, that is not indicated in entry No. 10.
28. PW1 informed the court that the difference in entry No. 10 and 13 would have necessitated verification of the names by writing to the Deputy Registrar and confirming with the probate documents presented including the will; that she would therefore have rejected the registrations that was done in 1998; that the name of the person at entry No. 10 is not the same as the one in entry No. 13 and that entry No. 13 only shows one executor. PW1 stated that if the property was not listed in the schedule of the grant, she would reject the documents.
29. It was the evidence of PW1 that she did not have the original file, but a skeleton file which was opened on 1st March 2022 under a Deed of Indemnity which was registered on 14th December 2021; that the skeleton file contains the deed of indemnity, statutory declaration, the title which she referred to, a certificate of incorporation and a letter to the Chief Land Registrar dated 8th December 2021 authored by Sunshine Cottages Limited and that the grant of probate and the will were not in his file.
30. PW2, Farah Sadrudin Nurani, adopted her statement dated 16th May 2014 as her evidence in chief. She also produced two bundles of documents marked as PEXB1 and PEXB2. It was her evidence that herself and her brother (the Plaintiffs) became administrators of their father's estate in 2011, and that the 1st Defendant was one of the original administrators, as the will appointed him and Mohmoud Karim as executors.
31. She testified that the Deed of Settlement signed in November 2011, was adopted as a settlement in the succession cause; that it was through the said Deed that the 1st Defendant, at the Plaintiffs' request, stepped down as executor of the estate and that they were not made aware of the suit property before they took over as administrators of the estate.



32. PW2 stated that she came to know of the suit property in March 2014 when she got a call from Mr. Luseno, who said that he had come across her father's name in a property in Karen; that she took notice that her brother had filed an affidavit in 2003 in HCCC 393 of 2003 in which he stated that he knew that the suit property had been sold through an agreement dated 10th May 2002; that the names indicated in entry 10 and 13 on the title both refer to her father and that the sale of the suit property was a transfer as it is indicated that the purchase price was Kshs. 12,000,000 (twelve million).
33. PW2 stated that her father was a pharmacist and Eldochem Limited was a sole proprietorship; that she has dealt with several assets that were not part of the schedule; that the affidavit sworn on 11th September 2003 regards the debt by Cyrus Jirongo to the deceased for Kshs. 50 million and that her brother went to see Cyrus Jirongo who claimed that he owned the suit property, although this is not indicated on the title.
34. PW2 asserted that through an application, the Plaintiffs sought for accounts in the succession cause, which the court allowed, noting that the grant was confirmed when they were minors; that they also had a dispute with Eldoret properties and that in a letter from Mr. Luseno Advocate to the 1st Defendant, they complained about the fraudulent transaction of the Eldoret land, which was recovered in the Deed of Settlement.
35. The 1st Defendant, DW1, adopted his statement dated 27th June 2014 as his evidence in chief. He produced in evidence a bundle of documents. DW1 informed the court that him and the Plaintiffs were cousins and that he petitioned the grant of probate and came up with the schedule of assets and liabilities, under which he indicated nil liabilities.
36. It was the evidence of DW1 that he did not indicate the suit property in the schedule of the deceased's assets as it was held as a security by the bank; that the suit property measures 10 acres and is located in Langata/Karen and that he engaged the 2nd Defendant for sale of the suit property as they were under pressure to repay the debt to the bank and that they signed the agreement in 1997.
37. According to DW1, the will provided for two executors, but he was the sole signatory to the sale agreement; that it was brought to his attention by his lawyer, Mohamed Madhani, that there were willing buyers for the suit property and that it was Madhani advocate who drew the petition and left out the suit property from the list of the deceased assets.
38. DW1 stated that he did not receive a demand letter from the 3rd Defendant for the money owed; that he did not open a bank account in the name of the estate; that the property was not auctioned because they negotiated the sale and that Mr. Madhani acted for the bank and the estate.
39. DW2, Sukhvinder Singh Jandu, a shareholder and director of the 2nd Defendant, relied on his statement dated 27th October 2019, which he adopted as his evidence in chief. He produced two bundles of documents as 2DEXB1 and 2DEXB2. He stated that they were introduced to the seller in August 1997 by an agent, Ramesh.
40. It was the evidence of DW2 that they did their due diligence; that the suit property was bought from the estate of Sadrudin Shamshudin Ismail Nurani; that the 2nd Defendant was incorporated on 12th September 1997 for the purpose of buying the land in question and that he signed the sale agreement on behalf of the 2nd Defendant while the 1st Defendant signed for the deceased's estate.
41. According to DW2, the 2nd Defendant paid the full purchase price of Kshs. 12 million to the 1st Defendant, through his lawyers; that neither the will nor the certificate of confirmation listed the suit property as an asset of the deceased and that it was the seller's advocate who obtained the discharge of charge.



42. He stated that there was no board resolution for the purchase of the land; that they did not value the land before buying the same; that they were not aware that the land was charged for KShs. 30 million and that they never did a search on Eldochem.
43. The Legal Officer of the 3rd Defendant, DW3, relied on his statement dated 2nd March 2022, and the bundle of documents marked as 3DEXB1 and filed on 18th May 2018. DW3 asserted that in July 1994, Mr. Sadrudin Shamsudin Ismail Nurani approached the Bank in his capacity as director of Dale Investments Limited, seeking for Kshs. 30 million.
44. It was the evidence of DW3 that two charges were created on 24th August 1994; that the two charged properties were the suit property and the Nyali Mombasa property and that the deceased, through a letter dated 3rd September 1994, from Eldochem, forwarded to them a corporate guarantee by Dale Investment Limited.
45. He asserted that the sale was by way of private treaty; that the charge was for Kshs. 30 million and the bank was paid Kshs. 6 million; that the bank was satisfied as it had another property securing the facility and that the bank did not look at the will or the schedule.
46. DW3 stated that when a customer dies and the loan is owing, they issue notices to the next of kin using the address given; that he did not have any record to show that such a notice was issued; that a sale of charged property can proceed by way of private treaty but the bank must consent, and that while the sale agreement in this case did not have the bank's endorsement, that of the Nyali property has their endorsement.

Submissions

47. Counsel for the Plaintiffs submitted that the 1st Defendant failed to make a full and frank disclosure of the assets and liabilities owned by the deceased by failing to list the suit property in the list of assets, which he admitted in their testimony and that the suppression of this material information by the 1st Defendant was deliberate, fraudulent and aimed at enabling fraudulent and illegal dealings with respect to the suit property.
48. It was submitted that the 1st Defendant sought to exercise powers under the will when the will required that such powers should be exercised by two executors and that the 1st Defendant dealt with the suit property and purported to sell it in 1997, before the grant of probate was confirmed on 23rd January 1998, and when the said property was not amongst the listed assets.
49. Counsel argued that this was in breach of Section 82(2)(b)(ii) of the *Law of Succession Act* and amounted to intermeddling under Section 45 of the Act. Further, that in not disclosing the existence of the suit property to the probate court, the 1st Defendant committed a crime under Section 52 of the *Law of Succession Act*.
50. Counsel relied on the cases of Nairobi Succession Cause No. 769 of 1988 In the Estate of Raj Gandhi (deceased) where the court found that the confirmation of grant was a nullity having been predicated on misrepresentation and concealment of facts. They also relied on the case of Meru HCC Succession Cause No. 547 of 2009 (In the Matter of the Estate of Paul M'Maria (deceased)), where it held that acquisition of land in contravention of the *Law of Succession Act* was an unlawful acquisition.
51. A similar finding was made by the court in Re Estate of M'Ajogi M'Ikungu (Deceased) [2017] eKLR when it adjudged that prior to confirmation of grant, a personal representative has no capacity to sell or transfer land.



52. Further, Counsel submitted that the powers donated under the will could only be exercised in the manner and persons envisaged therein; that the 1st Defendant could not elect to act as a sole proprietor and was to act jointly with Mohmoud Karim and that had the 2nd Defendant acted prudently, it would have questioned the 1st Defendant's capacity to act as a sole executor.
53. Counsel relied on the case of Suleiman Rahemtulla Omar & Another vs Musa Hersi Fahiye & Others, Nairobi HCCC No. 1618 of 1995, where the court held that a contract executed by a person without authority, power and capacity was void, unlawful and had no legal effect.
54. The Plaintiff's Counsel submitted that contrary to the mandatory provisions of Section 52 of the Registration of Titles Act (repealed), the 1st Defendant failed to apply to the Land Registry to be registered as a proprietor of the suit property, before executing the agreement for sale, transfer and discharge of charge. Counsel submitted that the agreement of sale, discharge and transfer were therefore null and void, and incapable of transferring an interest in the suit property.
55. Counsel quoted the case of Kakamega Succession Cause No, 268 of 2014 In the matter of the Estate of Sarah Chitameb v Luka Mutsami Samwel, where it was noted that the purpose of having the deceased's assets registered in the Administrator's name after confirmation of grant is provided under Section 83 of the *Law of Succession Act*.
56. It was Counsel's submission that the 2nd Defendant was not an innocent purchaser and that the 2nd Defendant enabled or actively participated in the fraudulent sale and transfer of the suit property; that the 2nd Defendant admitted that it never conducted an official search on the suit property before entering into the sale agreement, and that it never valued the suit property before the sale.
57. It was submitted that the 2nd Defendant did not refer to the liability of the bank in the agreement; that there was no board resolution for the acquisition of the land by the 2nd Defendant and that it had no evidence of the payment of the purchase price.
58. Counsel relied on the Supreme Court cases of Torino Enterprises Limited vs The Honourable Attorney General and Dina Management Limited vs County Government of Mombasa & Others. They also relied on the Court of Appeal cases of Marteve Guest House Limited vs Daniel Muiruri Njenga & Others and Weston Gitonga and Others vs Peter Rugu Gikanga & Another, the ELC case of Onesmus Kyalo Musyoka vs Faith Kemene Kimuyu & Others, the succession case of Khalid Abdi Ibrahim v Asha Ibrahim Hassan & Another and Antony Ted Andre Hoareau v Mary Muthoni Wanjohi.
59. Counsel submitted that the 3rd Defendant breached its fiduciary duty by failing to undertake any due diligence on the 1st Defendant; failing to peruse the court file in the succession cause and cause the rectification of the grant to include the suit property in the asset schedule; dealing with the suit property before the confirmation of the grant; discharging the charge to persons who were not borrowers under the charge and executors of the will and executing the discharge of charge in violation of Section 53 of the Registration of Titles Act.
60. Counsel argued that had the 3rd Defendant complied with the law and followed due process, the bank could have arrested the fraud and that as custodians of the original title deed, it was incumbent upon them to ensure that the same was dealt with lawfully.
61. Counsel lastly submitted that the suit property was not statute barred as the Plaintiffs were not aware of the sale of the suit property until 2014, when they sent letters to all the Defendants; that pursuant to Sections 7 and 26 of the *Limitation of Actions Act*, the Plaintiffs were to institute proceedings within twelve years of discovering the fraud and that the Plaintiffs were not parties to HCCC 393 of 2003



- and High Court Misc 376 of 2012, in which the 1st and 3rd Defendants swore affidavits relating to the subject matter sale.
62. Counsel relied on the case of Ernest Sifuna Simwero (Sued as Administrator of the estate of Esteri Oteche Waburiri (Deceased) v Jared Mwimali Mukwanala [2019] eKLR.
 63. Counsel for the 1st Defendant submitted that this court has no jurisdiction under Article 162 of *the Constitution* and under Section 13 of the *Environment and Land Court Act* to make any determinations regarding any issues arising in Succession Case No. 714 of 1997. They submit that the matter was dealt with by the High Court, which is of similar status to this court and that this court cannot sit in appeal against its determinations.
 64. According to Counsel, even assuming that there was something wrong in the issuance of the grant, such finding can only be made by the succession court, and cannot invalidate the sale and transfer of the suit property to the 2nd Defendant under Section 93 of the *Law of Succession Act*.
 65. Counsel submitted that the only claim the Plaintiffs have is for the loss to the estate arising from the said sale under Section 94, which is a claim for an account, which was given by the 1st Defendant to the Plaintiffs, which was through the Deed of Settlement dated 16th November 2011 and 31st December 2013.
 66. It was Counsel's submission that the sale of the suit property was lawful as the agreement was duly executed by both parties and satisfied Section 3(3) of the *Law of Contract Act*; that the 1st Defendant was the holder of a duly issued grant of probate issued on 10th July 1997; that the transfer was duly executed and registered on 22nd April 1998, and that the grant of probate in favour of the 1st Defendant had been confirmed.
 67. Counsel argued that the 1st Defendant's power to sell arose from 22nd November 1996, after the death of the deceased and that the 1st Defendant complied with Section 52 of the Registration of Titles Act by having the grant registered simultaneously with the transfer. Counsel relied on the case of *In re Estate of Barasa Kanenje Many (Deceased)* [2020] eKLR and *Suleiman Rahemtulla Omar & Another v Musa hersi Fahiye & Others*.
 68. Counsel for the 1st Defendant submitted that DW1 and DW2 confirmed that the entire purchase price was duly paid by the 2nd Defendant through its advocates, Farouk Adam & Company Advocates, to the 1st Defendant's Advocates Oraro & Rachier Advocates. Further, it was submitted, the failure to produce bank statements by the bank was because at that time, the Bank did not keep records for more than ten years.
 69. Counsel argued that the suit property did not form part of the deceased's free property as defined under Section 3 of the *Law of Succession Act*. Counsel relied on the case of *Cecilia Igoki Nyaga v Basil Ntwiga J. Nyaga & 2 Others* [2017] eKLR.
 70. Counsel denied that the sale to the 2nd Defendant was made before the grant was confirmed, as the transfer was registered after the confirmation of grant was issued; that the Plaintiffs were aware of the existence of the sale as the 2nd Plaintiff, Feisal Nurani swore an affidavit dated 11th September 2003 in HCCC No. 393 of 2003 where he indicated that he was aware of the sale of the suit property.
 71. Counsel for the 2nd Defendant submitted that the Plaintiffs' suit is unsustainable as the Plaintiffs perjured themselves in the pleadings, sworn affidavits and oral evidence of the 1st Plaintiff and that the Plaintiffs indeed had knowledge of the existence of the suit property prior to the institution of the case,



as evidenced by the 2nd Plaintiff's affidavit sworn on 11th September 2003 and the affidavits of the 1st Plaintiff in HCCC 309 of 2003 sworn in 2005 and 2006.

72. Counsel relied on the cases of *Kimotho v Kenya Commercial Bank* [2003] 1 EA 108, *James Muinge vs Freight Wings Limited* [2016] eKLR, *Mbugua v Nduta & 6 others* [2023] KEELC 18242 eKLR and the definition of perjury as set out in the *Black's Law Dictionary* as well as Section 108 of the Penal Code.
73. Counsel also sought to rely on the Court of Appeal cases of *Standard Chartered Bank Kenya Ltd vs Intercom Services Ltd & Others* [2004] eKLR, *Countryside Broadcasting Co. Ltd v Go Communication Limited & Another* [2010] eKLR and *Mapis Investment (K) Ltd vs Kenya Railway Corporation* [2006] eKLR where the court held that the court will not lend itself to aid an illegality.
74. Counsel for the 2nd Defendant submitted that the suit property is statute barred because the suit was filed on 16th May 2014, 16 years after the cause of action accrued on 14th April 1998, upon the transfer of the suit property.
75. Counsel submitted that there was no evidence that the Plaintiffs carried out a search of the suit property and it was not possible for the Defendants to conceal the existence or sale of the suit property. Counsel relied on Sections 7 and 26 of the *Limitation of Actions Act*.
76. Counsel also relied on the cases of *Safe Cargo Limited v Embakasi Properties Limited & 6 Others* [2021] eKLR, *Weyusia v Biketi* [2022] KEELC 2491 eKLR, *Mehta vs Shah* [1965] E.A. 321, and the Court of Appeal decisions in *Nyakundi Okerio & Another vs Elijah Sokobe Obot & 2 Others* [2021] eKLR, *Margaret Wairimu Magugu v Karura Investment Limited & 4 others* [2019] eKLR and *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104.
77. It was Counsel's submission that the Plaintiffs failed to adduce any evidence of the alleged fraudulent acts of the Defendants and did not discharged the burden of proof in accordance with Section 107 of the *Evidence Act* and the Court of Appeal's holding in *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
78. Counsel relied on the case of *In Re Estate of Tahir Sheikh Said Ahmed (Deceased)* [2018] eKLR where the court held that the executor steps into the testator's shoes from the date of the testator's demise. Counsel also relied on the case of *Sakina Sote Kaitany & Another v Mary Wamaitha* [1995] eKLR and *Stephen Musembi Ngui (Deceased) & 2 Others vs David Mutiso Nthenge* [2016] eKLR.
79. Counsel argued that the sale agreement did not confer any interest on the land, and the sale agreement remained a contract falling under the executor's powers under the will and Section 80 of the *Law of Succession Act*. Similarly, it was argued, there was no breach of Section 52 of the RTA. Counsel relied on the case of *Mugalo & another v Kenya Commercial Bank & Another* [2004] eKLR and *Virdee vs Bhatt* [1985] eKLR.
80. It was submitted by counsel that the failure of Mohmaud Karim to apply for a grant of probate cannot be deemed to be anybody's fault and that entering a sale agreement and discharging a charge on the suit property was consistent with the 1st Defendant's exercise of his duties as an executor in accordance with Section 79 and 80 of the *Law of Succession Act*. Counsel relied on the case of *In Re the Estate of Thiong'o Nginyayu Muthiora (Deceased)* [2013] eKLR.
81. Counsel for the 3rd Defendant submitted that succession matters are beyond the jurisdiction of this court, which should be careful not to delve into the same. They relied on the case of *Kothari v Qureshi & Another* [1967] EA 564 where the court rejected a request to question the validity of documents in a succession matter.



82. Counsel submitted that the suit was time barred under Section 7 of the [Limitation of Actions Act](#), as the Plaintiffs could have discovered the fraud with reasonable diligence in 1998. Counsel relied on the Court of Appeal case of Margaret Wairimu Maguagu v Karurua Investment Limited & 4 Others [2019] eKLR where it emphasised the impact of due diligence under Section 26(c) of the [Limitation of Actions Act](#).
83. Counsel also relied on the case of Dhanesvar v Mehta v Manilal M. Shah [1965] 1 EA 321 and Christian Juma Wabwire vs Attorney General [2019] eKLR on the importance of limitation.
84. Counsel submitted that there was nothing wrong with the 1st Defendant applying for a Grant of Probate and being issued with the grant alone; that there are different principles that are applicable to a testate estate and an intestate estate and that under Section 60 of the [Law of Succession Act](#) and as per the court's decision in Re Estate of Margaret Wairimu Gichuhi [deceased] [2017] eKLR, probate may be granted to the executors simultaneously or at different times.
85. It was submitted by counsel that grant of probate takes effect after the date of death. Counsel relied on the Court of Appeal's determination in Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another [1987] eKLR and the case of Re Estate of Oloo Omolo Lumasai [2020] eKLR.

Analysis and Determination

86. Upon consideration of the pleadings, testimony and submissions filed in this suit, the following issues arise for the court's determination:
 - a. Whether this court has jurisdiction to hear and determine this suit.
 - b. Whether this suit is res judicata.
 - c. Whether this suit is statute-barred.
 - d. Whether the 1st Defendant lawfully sold the suit property to the 2nd Defendant.
87. This suit has been filed by the current administrators and beneficiaries of the Estate of the deceased, Sadrudin Shamsudin Ismail Nurani. The suit concerns the charging of the suit property in 1994, prior to the deceased's death, and the subsequent sale and transfer of the suit property by the 1st Defendant, a previous executor of the estate, to the 2nd Defendant in 1998.
88. The Plaintiffs' case is that the suit property was fraudulently sold by the 1st Defendant to the 2nd Defendant. They assert that the 1st and 3rd Defendants breached their fiduciary duty to the estate; that this court should find that the transfer of the suit property registered on 14th April 1998 was a nullity and that the discharge of charge registered on 22nd April 1998 was also unlawful, null and void ab initio.
89. The Defendants have contended that the charging of the suit property by the 3rd Defendant and the subsequent transfer by the 1st Defendant to the 2nd Defendant was lawful and legal. The 3rd Defendant asserts that the deceased obtained a facility of KShs. 30,000,000 as a shareholder of Dale Investments Ltd against the suit property as well as another property located in Nyali Mombasa.
90. According to the Defendants, upon his demise, the facility fell in arrears and the 1st Defendant engaged the 2nd Defendant with a view of him paying off the deceased's debt to the bank upon his death.
91. The Defendants assert that the suit property was lawfully discharged and sold by the 1st Defendant, who had full authority under the will, to the 2nd Defendant and that the Bank prepared and registered a discharge of charge and released the title documents to the 2nd Defendant.



92. The Defendants have raised preliminary objections. According to the Defendants, this court has no jurisdiction to hear and determine this dispute because it is a succession matter; that the suit is time barred and that this suit is res judicata.

Whether the ELC has jurisdiction to determine this suit.

93. Jurisdiction is everything. Without it, a court has no power to make one more step. This was the position taken in the locus classicus case of Owners of the Motor Vehicle M.V. Lillians v Caltex Oil (Kenya) Limited [1989] KLR1.
94. The Defendants have asserted that this court lacks the jurisdiction to determine this dispute because it is a succession matter that ought to be determined by the High Court.
95. The jurisdiction of the Environment and Land Court is prescribed under Article 162(2)(b) of *the Constitution*, which states that this Court shall have jurisdiction over disputes relating to the environment, the use and occupation of, and title to land. In addition, Section 13 of the *Environment and Land Court Act* expounds on the jurisdiction of this Court as follows:
- “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.”

96. Courts have held that in certain case, there is concurrent jurisdiction between the Environment and Land Court and the High Court in succession matters. This is with respect to disputes that touch on land. In *Salome Wambui Njau (suing as Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v Caroline Wangui Kiguru*, ELC [2013] eKLR, it was held as follows:

“In matters of succession disputes touching on land, Environment and Land Court Pursuant to Article 162(2) of *the Constitution* and the High Court as the Succession Court under Section 47 of the *Law of Succession Act* would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which court is best suited to hear and determine the dispute.”



97. In delineating the jurisdictional boundaries, the court in *Beatrice Atieno Ongadi vs National Land Commission & 5 Others* [2021] eKLR opined that disputes that concern legality of succession proceedings have been found to be within the realm of the High Court and not the ELC:

“Disputes arising from the legality of Succession proceedings of the Estate of a Deceased person do not fall within the realm of this court... If upon the conclusion of the succession dispute, it is found that the Appellant and/or the other beneficiaries of the Estate of the Deceased held titles to the parcels of the land from the Estate of the Deceased but the same were fraudulently transferred from them without their consent and/or knowledge, then they would have a valid claim before this court...”

98. The persuasive determination in *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR has, with precision, found that the succession court deals with matters between administrators and beneficiaries, while the ELC has jurisdiction where the suit property has been conveyed to third parties. The ELC’s jurisdiction also arises in respect of disputes that come up after confirmation of the grant.

“...The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators (emphasize added).

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3). Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be *functus officio* so far as the property in question is concerned (emphasize added). The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court (emphasize added). The interventions by that court are limited to what I have stated above.”

99. The suit herein concerns the validity of the conveyance of the suit property to third parties and the question of whether the suit property was properly charged by the 3rd Defendant Bank. Indeed, the



suit property was not included as one of the assets of the deceased during the succession cause, and that for that reason, the suit property was fraudulently charged, discharged and sold to the 2nd Defendant.

100. The question as to the validity of the charge and discharge of the suit property by the 3rd Defendant, and the subsequent sale of the property to the 2nd Defendant by the 1st Defendant falls within the jurisdiction of this court and not the High Court.

Whether the suit is res judicata

101. The 1st Defendant has asserted that this suit is res judicata because the subject matter herein was heard and determined by the succession court in Succession Cause No. 714 of 1997 In the Estate of Sadrudin Shamshudin Esmail Nurani.

102. The doctrine of res judicata is prescribed in Section 7 of the *Civil Procedure Act*, 2010 as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

103. The court in *Invesco Assurance Company Limited & 2 Others vs Auctioneers Licensing Board & Another Kinyanjui Njuguna & Company Advocates & Another (Interested Parties)* [2020] eKLR broke down the five essential elements for a party to establish that a matter is res judicata:

“...the party raising it must satisfy the doctrine’s five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

- i. The suit or issue raised was directly and substantially in issue in the former suit.
- ii. That the former suit was between the same party or parties under whom they or any of them claim.
- iii. That those parties were litigating under the same title.
- iv. That the issue in question was heard and finally determined in the former suit.
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”

104. Similarly, the Supreme Court in *John Florence Maritime Services Limited & another vs Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR stated that for res judicata to be invoked in a civil matter the following elements must be demonstrated:

- “a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action.”



105. As already discussed above, the jurisdiction between the succession court and the ELC is distinct. The succession court resolves dispute between the personal representatives of the deceased and the beneficiaries, while the ELC determines disputes over land that involve third parties to the succession cause.
106. In addition, in this case, the 2nd and 3rd Defendants were not parties to the succession suit. It is also an undisputed fact that the suit property was not listed in the schedule of assets in the succession cause and was therefore not the subject to the Deeds of Settlements that were made between the parties in the succession cause.
107. Indeed, the issue of the 1st Defendant having dealt with the suit property fraudulently or at all never arose in the succession cause. This suit is therefore a distinct matter that has not been subject to a previous suit, and no final determination has been made on the legal and factual issues raised herein. The suit is therefore not barred by the doctrine of res judicata.

Whether the suit is time barred

108. The third objection raised against the jurisdiction of this court is that this suit is time barred under the *Limitation of Actions Act*. This suit is two pronged as it concerns the charging of the suit property by the 3rd Defendant and the sale of the suit property and its subsequent discharge in favour of the 2nd Defendant. There is thus the question of the validity of the charge as well as the validity of the sale and transfer of the suit property.
109. Section 4 of the *Limitation of Actions Act* provides that claims based on contract, such as the Plaintiff's case against the charging of the suit property, must be raised within 6 years of when the cause of action accrued. On the other hand, under Section 7 of the Act, claims to recover land may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person, through whom he claims, to that person.
110. Where an action is based upon the fraud of a defendant, as has been claimed by the Plaintiffs, Section 26 of the Act provides for extension of the prescribed limitation period, and such period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.
111. As to when the cause of action herein accrued, it is not disputed that a security was secured by way of a charge dated 23rd August 1994 for a facility of Kshs. 30,000,000. This charge was registered in the name of the deceased, trading as Eldochem and was listed as Entry No. 10 on the title of the suit property on 24th August, 1994, way before the deceased died.
112. With respect to the sale of the suit property, the parties depone that the sale agreement was made in 1997, and the transfer was later registered simultaneously with a discharge of charge, grant of probate and transfer on 22nd April 1998.
113. The Plaintiffs have averred that they were never made aware of the deceased's ownership of the suit property or the creation of the charge and discharge by the 3rd Defendant. The Defendants have in response adduced an affidavit sworn by the 2nd Plaintiff dated 11th September 2003 in HCCC No. 393 of 2003 where they claim he indicated that he was aware of the sale of the suit property in 2003.
114. I have perused the affidavits that were filed in HCCC No. 393 of 2003. In that suit, the 1st Defendant herein, as the executor of the Estate the deceased sued Cyrus Jirongo for the recovery of Kshs. 45,000,000 which his company, Cyper Enterprises Limited (in receivership) owned the deceased. The 2nd Plaintiff herein was not a party in that suit.



115. As I have indicated above, the 2nd Plaintiff was not a party to the above suit. In an affidavit which he swore on 11th September, 2003 in the same suit as “the son of the deceased”, he deposed that Mr. Jirongo “confirmed that he had property in Langata and Embakasi which he was mortgaging to KCB in order to raise funds to pay out the debt of Kshs. 45,000,000,” and that he never heard from Mr. Jirongo thereafter.
116. In the said affidavit by the 2nd Plaintiff, he never mentioned the suit property herein, neither did he mention the charging of the suit property to the 3rd Defendant or the sale of the suit property to the 2nd Defendant. Rather, the affidavit concerned the dispute between the deceased’s estate and Cyrus Jirongo, who at that time owed the deceased’s estate Kshs. 45 million.
117. There is no evidence before me to show that as at that time, the 2nd Plaintiff, who was not a party to the suit, was even aware of the existence of the suit property, leave alone the suit property having been sold to the 2nd Defendant, fraudulently or at all.
118. The issue of the suit property was raised in the subsequent affidavit sworn by Mr. Jirongo sworn on 9th January, 2004, where he deposed as follows:
- “6. The estate of the deceased is one of the creditors to the said company in receivership;
 7. After the expiry of the limitation period, I entered into an agreement with the deceased’s estate;
 8. In the said agreement I transferred two pieces of property, to wit, LR No. 1160/230 (the suit property herein), and sub division No. 1677, section 1 mainland North to the 2nd Plaintiff, a company nominated by the estate of the deceased.
 9. The Plaintiffs (the 1st Defendant herein) have already sold L.R. No. 1160/230 in pursuance therefore.”
119. As can be seen, in his affidavit sworn on 9th January 2004, Cyrus Jirongo deposed that he had transferred the suit property as well as the property in Nyali Mombasa to Eldomart holdings, a company owned by the deceased, and that the suit property had already been sold. No evidence has been placed before me to show that this affidavit was brought to the attention of the Plaintiffs herein.
120. Further, I have perused the copy of the title in respect of the suit property and have not come across any entry to show that Mr. Jirongo ever owned the suit property, or that he is the one who transferred it to the 2nd Defendant.
121. In fact, the deposition by Mr. Jirongo, in a suit where the 1st Defendant herein had sued him, contradicts the 1st Defendant’s case herein that the suit property was sold by the 3rd Defendant to the 2nd Defendant to offset the deceased’s liabilities.
122. Consequently, it is the finding of the court that the Plaintiffs were not aware of the existence of the suit property and the sale of the same to the 2nd Defendant in 2003 as alleged.
123. Even if the 2nd Plaintiff was aware of the existence of the suit property in 2003, the evidence before me shows that he was made to believe that the same belonged to Jairus Jirongo, and not to the estate of his late father, and that Jirongo had caused it to be sold to the 2nd Defendant to offset his liability.



124. That being so, the court agrees with the Plaintiffs that they only became aware of the fact that the suit property belonged to their late father, and had been transferred to the 2nd Defendant by the 1st and 3rd Defendants in 2014, and not earlier.

Whether the 1st Defendant lawfully sold the suit property to the 2nd Defendant

125. The Plaintiffs in this suit have challenged the sale of the suit property to the 2nd Defendant on several grounds, including that the 1st Defendant lacked the capacity to enter into a sale agreement with the 2nd Defendant; that he intermeddled with the estate of the deceased; that the suit property was deliberately not listed in the asset register in the probate matter and that the transfer was registered simultaneously with a discharge of charge, grant of probate and transfer on 22nd April 1998.

126. It was further alleged by the Plaintiffs that as at the time of executing the transfer in favour of the 2nd Defendant, the property had not been validly transmitted to the 1st Defendant under the Registration of Titles Act.

127. While the 1st Defendant has conceded that he wrongfully omitted to include the suit property from the List of Assets of the deceased's estate, he asserts that he had the capacity under the will to enter into a sale agreement. He deponed that he transferred the suit property to the 2nd Defendant on 22nd April 1998 after confirmation of the grant of probate on 23rd January 1998.

128. It is not in dispute that the 1st Defendant, Galeb Gulam and Mohmoud Karim, were appointed as joint executors of the deceased's will. However, while Galeb Gulam applied to the court and sought a grant of probate, Mohmoud Karim did not. The Plaintiffs contend that the 1st Defendant could not act as a sole executor, and in doing so, he was acting beyond the mandate given to him.

129. Section 53 of the *Law of Succession Act* provides that probate may be granted to one or more of the executors named in the will. Section 60 of the Act also prescribes that where several executors are appointed, probate may be granted to them simultaneously or at different times. This means that the powers exercised by several executors under a will can be exercised by each respective executor, regardless of whether the others have sought grant of probate.

130. In considering these provisions, Musyoka J in *In re Estate Of Margaret Wairimu Gichuhi (Deceased)* [2017] eKLR stated that there is nothing in the relevant legislation that requires a co-executor to inform or consult his co-executor before applying for representation as per the will. The Plaintiffs' claim that the 1st Defendant wrongfully acted as a sole executor is therefore not backed by the law.

131. In any event, the issue of whether the 1st Defendant was lawfully granted the probate can only be raised in the succession cause and not this court. That issue is therefore moot.

132. The Plaintiffs have also claimed that the 1st Defendant intermeddled with the suit property and did not have the authority to enter into a sale agreement or to transfer the suit property in the manner that he did.

133. The power wielded by an executor of a will was articulated in the case of *Kothari vs Qureshi & Another* [1967] EA 564 where it was held that the powers of an executor is derived from the will and that a grant of probate is mere evidence of the powers of the executor. This case was quoted in *In re Estate of Lawrence Nginyo Kariuki (Deceased)* [2021] eKLR as follows:

“When a person dies leaving a will appointing an executor, the person so appointed as executor represents the estate of the deceased testator as from the date of the death of the



testator, unless the executor renounces the executorship, and if he had intermeddled in the estate he cannot renounce the executorship.

.....

It is elementary law that an executor's title dates from the death of the deceased and springs from the will not from the grant of probate.

.....

An executor may commence suit before grant of probate and he can carry on the proceedings without grant as far as is possible until he has to prove his title, when of course he must be able to establish the grant of probate because that is the proof or evidence of his title. His rights exist as from the death of the testator and the grant is only required as evidence of this."

134. The powers of an executor are provided for under Section 79 as read with Section 80 of the [Law of Succession Act](#). Under Section 79, a grant of representation vests all the property of the deceased in the executor or the administrator appointed in intestacy. Section 80(1) provides that:

" 80.

- (1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such."

135. In interpreting this section, the court in *In re Estate of Lawrence Nginyo Kariuki (Deceased)* [2021] eKLR was of the view that a grant of probate validates all acts of the executor(s) in respect of the estate of the deceased done prior to the issuance of the grant of probate. This position aligns with Halsbury's Laws of England 4th Edition, under paragraph 730 on the powers of an executor:

"Acts done before probate: An executor may generally do before probate all things which pertain to the executorial office. He may pay or release debts, get in and receive the testator's estate, assent to a legacy, and generally intermeddle with the testator's goods. He may distrain for rent, demise, grant a next presentation or release an action. He may make a conveyance or assignment or personality or of realty but although before probate he can give valid receipt of money payable upon an assignment, he cannot compel a purchaser to complete until after the probate has been obtained."

136. This position was upheld by the court in *Re Estate of Tahir Sheikh Said Ahmed (Deceased)* [2018] eKLR, where it held that the executor steps into the testator's shoes from the date of the testator's demise.

137. In the case of *In re Estate of Julius Mimano (Deceased)* [2019] eKLR the court while dealing with the issue of powers of an executor stated as follows;

"According to section 79 of the [Law of Succession Act](#), the estate of a dead person vests in the personal representatives. In this cause, the deceased died testate. He named executors in his will, who have obtained probate to the will. It is the said executors in whom the assets of the estate vested by virtue of section 79 of the act. By virtue of the said vesting the said personal representatives became entitled to exercise the powers that are set out in section 82 of the [Law of Succession Act](#), which are akin to those of an owner of the property. They can sue or be sued over the property, they can sell or enter into contracts in respect to it, among



others. The personal representatives have authority from the grant of representation they hold, whether it is one of probate or of letters of administration, to handle estate property.”

138. This court is guided by the above decisions. It is therefore manifest that the 1st Defendant, under the will, had the authority to settle the debts of the deceased with the 3rd Defendant bank and to enter into a sale agreement, with the 2nd Defendant in order to pay off such debts. The next step is to interrogate the manner in which the 1st Defendant effected the sale of the suit property to the 2nd Defendant.
139. The Plaintiffs have asserted that the sale of the suit property to the 2nd Defendant was done illegally and fraudulently. As held by the Court of Appeal in *Kinyanjui Kamau v George Kamau* [2015] eKLR, any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged. The Court of Appeal further held that fraud must be proved to a standard higher than on a balance of probability. The court stated as follows:
- “It is trite law that any allegations of fraud must be pleaded and strictly proved. (See *Ndolo v Ndolo* [2008] 2 KLR (G & F) 742 wherein the court stated that: -“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”
140. The Plaintiffs have asserted that the 1st Defendant deliberately neglected to list the suit property on the List of Assets in the probate matter and that he fraudulently sold the suit property to the 2nd Defendant.
141. Section 83 of the *Law of Succession Act* imposes a statutory duty on the 1st Defendant herein as the personal representative of the subject estate to get in all the free property of the deceased, including debts owing to them, and to render accounts. The duties of personal executors, which include executors or administrators of a deceased’s estate are set out in Section 83 of the *Law of Succession Act*:
- a. to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;
 - b. to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
 - c. to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
 - d. to ascertain and pay, out of the estate of the deceased, all his debts;
 - e. within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
 - f. subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
 - g. within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than



continuing trusts, and to produce to the court a full and accurate account of the completed administration.

- h. to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- i. to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”

142. Musyoka J. in *In re Estate of Julius Mimano (Deceased)* [2019] eKLR emphasised the importance of personal representatives rendering accurate accounts. He stated as follows:

“The first instance is in the first six months of the administration. It is at this stage that they ought to account as to whether they spent any funds from the estate for the purpose of disposing the remains of the deceased and, if so, how much. State whether they got in or gathered or collected or brought together all the assets that make up the estate. The getting in of the estate is critical, it should precede settlement of debts and liabilities and distribution of the assets. Indeed, these duties can only be discharged if there are assets sufficient to settle debts leaving a surplus for distribution. It would also be from the assets collected that the estate would have a pool of resources for administration expenses. Section 83(e) commands the personal representatives to produce in court a full and accurate inventory of the assets and liabilities, no doubt generated from the exercise of getting in the assets and ascertaining the debts of the estate. There is also an obligation to render an account of all their dealings with the assets and liabilities up to the point of the account. The second occasion for rendering accounts is at the completion of administration. The duty is stated in section 83(g) of the Act. The object of the second and final account is to give opportunity to the personal representative to demonstrate that they have complied with the duty in section 83(f) of distribution of the estate to the beneficiaries.”

143. In this case, while the 1st Defendant rendered account of the assets and liabilities of the estate, he intentionally omitted to include the suit property, a prime property measuring 10 acres located in Karen.

144. The 1st Defendant has argued that the suit property was not free property under Section 3 of the [Law of Succession Act](#) just because it was charged. The Act defines free property as the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.

145. While the 1st Defendant relied on the case of *Cecilia Igoki Nyaga v Basil Ntwiga J. Nyaga & 2 Others* [2017] eKLR, the circumstances in this case are distinct. In the former case, the transfer of the deceased property was invalidated by the failure to obtain consent from the Land Control Board, whereas in this case, the deceased undisputedly held legal title to the suit property.

146. The Court of Appeal in *Martev Guest House Limited v Njenga & 3 Others* [2022] KECA 539 (KLR) has authoritatively settled the question of whether charged property constitutes free property under the [Law of Succession Act](#). The court held that charged property falls within the definition of free



property as a deceased person's right to redeem the suit property is not extinguished by death. It stated as follows:

“By free property as defined in the [Law of Succession Act](#) was meant the property of which the deceased person was legally and competent to freely dispose of the same during his/her lifetime and in respect of which his/her interest had not been terminated by his/her death. The deceased's right of redemption did not become extinct upon the death of the deceased. It devolved to the personal representatives. It is the reason the [Law of Succession Act](#) did not donate power to the estate of a deceased person to deal with property forming that deceased person's estate, and instead donated that power to an administrator with a will or a personal representative to the intestate estate of a deceased person to deal with a deceased person's property after the death of such a deceased person.”

147. The 1st Defendant was under a legal obligation to include the suit property in the succession cause. The 1st Defendant not only failed to include the suit property in the List of Assets of the deceased but also proceeded to secretly convey the property to the 2nd Defendant, without bringing the asset and sale to the knowledge of the deceased's beneficiaries, who had an interest in the suit property. These acts constitute breach of the 1st Defendant's fiduciary duty to act in the best interest of the estate at all times.
148. Further breach of the 1st Defendant's duty is evident in his failure to undertake a valuation of the suit property, which was undoubtedly of high value. Chiefly, there is the issue of the payment of KShs. 12 million. While the 1st Defendant initially pleaded that the entire sum of KShs. 12 million was paid directly to the bank, this turned out to be false in the course of trial.
149. DW2, the 2nd Defendant's director, testified that the KShs. 12 million was in fact paid to the 1st Defendant through his advocates, and not directly to the Bank. DW3, the 3rd Defendant's legal officer, further testified that only KShs. 6 million was paid to the bank to offset the money that the deceased owed the bank.
150. What then became of the remaining KShs. 6 million paid to the 1st Defendant? It surely did not revert back to the deceased's estate. The 1st Defendant's acts in selling the suit property by private treaty, and without disclosing the said sale to the Plaintiffs was undoubtedly fraudulent.
151. The 2nd Defendant's failure to undertake basic due diligence also implicates its involvement in this fraud. This is especially considering that this was a high value property, and the conveyance of the same would require any reasonable person to diligently investigate the title. It is curious that the 2nd Defendant not only failed to undertake a valuation of the suit property, but also failed to find out if the beneficiaries of the estate of the deceased were aware of the said sale.
152. Having found that there was fraud in the transfer of the suit property to the 2nd Defendant, this court must find that the sale and transfer of the suit property to the 2nd Defendant was null and void ab initio. Consequently, rectification of the register would be the appropriate remedy under Section 93 of the [Law of Succession Act](#) as read with Section 23 of the Registration of Titles Act.
153. Section 93 of the [Law of Succession Act](#) provides that transfers by personal representatives are valid, despite subsequent revocation of representation. Courts have deduced that the purpose of this section is to protect dealings of legal representatives of the deceased. In *Musa Nyaribari Gekone & 2 Others*



vs Peter Miyienda & Another [2015] eKLR, the Court of Appeal agreed with the High Court when the Judge said that Section 93 of the [Law of Succession Act](#):

“is to protect dealings with the legal representatives of the deceased who must have as personal representatives, have assumed deceased’s authority to deal with the estate of the deceased.”

154. Rawal J in Re: Estate of Christopher Jude Adela [2009] eKLR, however stated that this section does not prohibit the discretion of the court to invalidate a fraudulent action by a personal representative. The Hon. Lady Justice held:

“The correct reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of section 23 of the RTA (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a Carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal actions prejudicing the interests and rights of right beneficiaries of the estate.

The reality of the situation is that provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawful issued then, Section 93 can come to the rescue of such a purchaser. In my humble view the underlying objective of the [law of Succession Act](#) is to ensure that beneficiaries of deceased persons inherit the property.”

155. The [Law of Succession Act](#) also prescribes criminal liability under Section 95(1) of the Act, which states that it is an offence of a personal representative to get in any asset forming part of the estate, misapplies any such asset, or subjects any such asset to loss or damage. Such person shall be guilty of an offence, and shall be liable to a fine not exceeding ten thousand shillings, or to imprisonment for a term not exceeding one year, or to both such fine and imprisonment.

156. This court finds that the Plaintiffs’ suit is merited. The court therefore issues the following orders:
- a. A permanent injunction be and is issued restraining the Defendants either by themselves, their advocates, agents, holders of their power of attorney or whomsoever from dealing in any way of disposing, alienating, advertising for sale, charging, assigning interests in, mortgaging, transferring or in any other way dealing and/or interfering with the claiming under their titles or names or otherwise from entering upon, remaining upon or dealing with the suit premises in any other matter howsoever all that property known as L.R. No. 1160/230 (Original Number 1160/11/20).
 - b. A declaration is hereby issued that the sale and transfer for all that property known as L.R. Number 1160/230 (Original Number 1160/11/20) by a transfer dated 14th April 1998 executed by the 1st Defendant and the 2nd Defendant was illegal, unlawful, fraudulent and nullity ab initio.
 - c. A rectification order do issue directing the Commissioner of Lands and/or the Chief Land Registrar to cancel entry number 14 registered on 22nd April 1998 transferring all that property known as L.R. Number 1160/230 (Original Number 1160 /11/20) to the 2nd Defendant.



- d. A declaration is hereby issued that the Plaintiffs as the legal administrators of the Estate of Sadrudin Shamsudin Ismail Nurani are the absolute owners of all that property known as L.R. Number 1160/230 (Original Number 1160 /11/20).
- e. A mandatory injunction is hereby issued directed at the 2nd Defendant, its assigns, subsidiaries, agents, officers of its power of attorney to deliver to the Plaintiff vacant possession of all that property known as L.R. Number 1160/230 (Original Number 1160/11/20).
- f. A mandatory injunction is hereby issued directed at the Chief Land Registrar directing him to execute such instruments and make such entries as may be necessary to ensure the giving effect of prayer number (c) hereinabove to wit transfer into the names of the Plaintiffs as the legal administrators of the estate of Sadrudin Shamsudin Ismail Nurani absolutely all that property known as L.R. Number 1160/230 (Original Number 1160/11/20).
- g. The costs of this suit to be borne by the 1st Defendant.

Dated, signed and delivered virtually in Nairobi this 13th day of June, 2024.

O. A. Angote

Judge

In the presence of;

Mr. Shah for 3rd Defendant

Mr. Shah for Koech for 1st Defendant

Mr. Kahura holding brief for Gachuhi for 2nd Defendant

Mr. Luseno for 2nd Plaintiff

Mr. Luseno for Gikari for 1st Plaintiff

Court Assistant: Tracy



ELC NO. 596 OF 2014

JUDGMENT

