



Njeru & another v Njeru & another (Environment & Land Case 9 of 2023) [2024] KEELC 6652 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELC 6652 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 9 OF 2023**

MD MWANGI, J

JULY 25, 2024

BETWEEN

JOSEPH NGATIA NJERU 1ST PLAINTIFF

JOHN KIRIAKU NJERU 2ND PLAINTIFF

AND

LOISE NGINA NJERU 1ST DEFENDANT

SAKINA STAR LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs' case as pleaded in the amended plaint dated 26th October, 2023 is that their late father, Michael Njeru Kiraiku, passed on in 1969 and left behind a property known as L.R No. 1181/40 at Kapsabet which was transferred to the 1st Defendant as Administrator to hold the same in trust for them and one other sibling as they were minors then. The 1st Defendant is their biological mother.
2. The Plaintiffs aver that in 1993, when the Plaintiffs and their other sibling came of age, they as a family unanimously resolved to sell the Kapsabet property and invest the proceeds in purchasing Nairobi L.R No. 209/3531/13 (hereinafter referred to as 'the suit property'). They allegedly agreed to construct rentals on the suit property and divide the rent proceeds amongst themselves. It was further agreed, according to the Plaintiffs, that the suit property would be registered solely in the name of the 1st Defendant and the 1st Plaintiff was allegedly appointed a manager to manage the rentals and all the outgoing thereon.
3. The Plaintiffs allege that the family constructed a total of 45 residential houses through financing from the Housing Finance Company of Kenya Ltd (HFCK). The 1st Plaintiff states that the loan was partly serviced by rent proceeds from the rentals and his own small contributions totaling to Kshs. 1,362,000/-. He averred that he too occasionally made payments for the land rates.



4. The 1st Plaintiff further asserts that he went ahead to build his matrimonial house on the suit property with the knowledge and consent of the family including the 1st Defendant, to enable him undertake his duties of managing the suit property with ease. He further asserts that he and the 1st Defendant had even incorporated an entity known as Kwanjeru Agencies on 14th January, 2005 for the purpose of managing the suit property. The loan advanced by HFCK was being serviced through this entity known as Kwanjeru Agencies.
5. The Plaintiffs plead that the 1st Defendant remarried after the death of her husband (the Plaintiffs' father) and had 3 daughters from the 2nd marriage. When the said 3 daughters came of age, they demanded a share of the rent proceeds collected from the rentals on the suit property. As a result, there were disagreements and the 1st Defendant cut off the 1st Plaintiff from the proceeds without any cause or justification.
6. The 1st Plaintiff avers that in 2013 he proceeded to construct his own rentals on the suit property with the knowledge and consent of the family for purposes of his own sustenance. The rentals are 18 in number; both commercial and residential. They are occupied by the 1st Plaintiffs' tenants who enjoy a tenancy of 8 years each.
7. The 1st Plaintiff accuses his own mother, the 1st Defendant, of selling the suit property in order to frustrate him and without the knowledge or consent of any family member. Following the said sale, on 9th December, 2022, the 1st Defendant issued the 1st Plaintiff with an eviction notice and disconnected water to his house and his rentals by applying for de-enrolment of the same at the Nairobi Water & Sewerage Company Ltd.
8. The Plaintiffs plead that they have nowhere else to go and therefore stand to suffer irreparable harm if the Defendants are allowed to proceed to illegally evict the 1st Plaintiff, and demolish his dwelling house. The Plaintiffs' right to property enshrined under the Law of Succession Act, Article 40 for the Constitution as read with Section 24 of the Land Registration Act are in danger of infringement, particularly because the Defendants are out to disinherit the Plaintiffs of their late father's estate.
9. The Plaintiffs pray for judgment against the Defendants jointly and severally for: -
 - a. A declaration that the Defendants have infringed on the Plaintiffs' right to property.
 - i. A declaration that the suit property, L.R. No. 209/3531/13 is an asset of the estate of the late Michael Njeru Kiriaku under (but not limited to) the common law equitable doctrine of tracing.
 - ii. An order revoking the 2nd Defendant's title deed to the suit property L.R. No. 209/2531/13.
 - b. A permanent injunction against the Defendants by themselves, their agents, servants, successors or assigns howsoever from demolishing, selling, entering, encroaching, trespassing, working, constructing, alienating, transacting and or evicting the 1st Plaintiff from the suit property L.R. No. 209/3531/13;
 - c. (ci) The Plaintiffs be granted an equitable share of the suit property i.e. a quarter portion of the suit property each.
 - (cii) In the alternative to prayers a (ii), (b) (ci), an order of compensation at the current market value of the Plaintiffs' respective portions upon valuation.



- (ciii) Reimbursement of the 1st Plaintiffs' contribution to the loan payable of Kshs.1,362,000/-.
- d) Costs of the suit and interest thereon at Court rates from the date of judgment till payment in full.
- (e) Any other relief that the Honourable Court deems fit to grant.

The 1st Defendant's Amended Defence

10. In response to the Plaintiffs' case, the 1st Defendant filed her statement of amended Defence dated 10th November, 2023. In the said statement of amended Defence, the 1st Defendant denied the Plaintiffs' claim in the amended plaint in its entirety.
11. The 1st Defendant admitted that the Plaintiffs are her sons and she has 5 other biological children making in total 7. Her husband passed on in 1969 leaving her behind as a young widow and she single-handedly brought up her family including the Plaintiffs herein. The 1st Plaintiff however, rebelled against her and did not complete his education. He further refused to undergo technical training as a mechanic. Consequently, the 1st Plaintiff has been dependent of her all of his life even as an adult. He has particularly lived in the suit property all through.
12. The 1st Defendant further states that she has always catered for all the needs of the 2nd Plaintiff all of his life and despite his refusal to complete secondary education, she employed him in her hotel at Kapsabet and later in Nairobi. To date, he is still dependent on her and she has continued to provide for his needs on a monthly basis.
13. The 1st Defendant denies the Plaintiffs' allegations that she was registered to hold the Kapsabet plot in trust for her minor children or that she bought the suit property from the proceeds of sale of the Kapsabet plot, L.R. NO. 1181/40 as alleged by the Plaintiffs or at all.
14. The 1st Defendant asserts that it is through sheer hard work and using the earnings from her hotel business in Kapsabet that she acquired the several properties listed in her statement of Defence. She supplemented her earnings with loans from Standard Chartered Bank, Kapsabet Branch to acquire the aforementioned properties.
15. In 1993, the 1st Defendant avers that she sold her property in Kapsabet, L.R. No. 1181/40 and her business and the other properties aforementioned in her amended statement of Defence. Additionally, the 1st Defendant took out a mortgage in her own name from Housing Finance Company. It is from the proceeds of sale, the mortgage from the Housing Finance Company and the income from her hotel business that she purchased the suit property with for the sum of Kshs.3.2 million. She purchased the suit property solely in her name and as the sole proprietor. She vehemently denies that the Plaintiffs or any other of her children had an interest in the suit property.
16. The 1st Defendant denies the 1st Plaintiff's allegations that he assisted in the repayment of the of the mortgage over the suit property or any other related expenses. The 1st Defendant paid the mortgage out of her own toil, blood and sweat. The 1st Plaintiff never contributed a penny towards the repayment of mortgage to the Housing Finance Company.
17. The 1st Defendant reiterates that the Plaintiffs have all their lives been dependent on her. She merely allowed the 1st Plaintiff to live in the suit property on humanitarian grounds. Despite the 1st Defendant's generosity, the 1st Plaintiff has been ungrateful and made it impossible through sheer misconduct for the 1st Defendant to enjoy peaceful and quiet possession of the suit property. The



- 1st Plaintiff attacked and physically assaulted the 1st Defendant's Caretakers and daughters on the suit property on diverse dates and unlawfully collected rent from the 1st Defendant's tenants. He further and without the consent of the 1st Defendant constructed unauthorized structures on the suit property which at one time were responsible for a fire that razed down part of the suit property. The 1st Defendant incurred huge expenses in restoring the partially burnt property.
18. The 1st Defendant denies that she allowed the 1st Plaintiff to construct his matrimonial home in the suit property. He did it, if at all without her consent.
 19. The 1st Defendant explains that the incorporation of the entity known as Kwanjeru Agencies was only to facilitate the 1st Plaintiff purchase a pick-up from DT Dobie. The 1st Defendant guaranteed the 1st Plaintiff for the purchase of the vehicle on hire purchase but ended up paying the entire purchase price as the 1st Plaintiff was unable to.
 20. The 1st Defendant asserts that the intentions of the 1st Plaintiff have been to forcibly seize control, possession and ownership of the suit property from her. The frustrations and the inability to enjoy her property forced the 1st Defendant to sell the suit property. The 1st Defendant affirms that she lawfully sold the suit property to the 2nd Defendant for a consideration of Kshs. 65,000,000/- vide a Deed of Assignment dated 29th October, 2022. She confirms that she received the full payment of the consideration subsequent to which a transfer was registered in favour of the 2nd Defendant on 11th November, 2022.
 21. The 1st Defendant terms the Plaintiffs' suit as frivolous and vexatious and an abuse of the Court process. It is the 1st Defendant's position that the Plaintiffs have no reasonable cause of action against her. The 1st Defendant asserts that she bears no parental responsibility over the 1st Plaintiff who is a 57 years old man. Her personal property is not family property and the Plaintiffs have no claim whatsoever.
 22. The 1st Defendant categorically states that she closed her water and electricity accounts after transferring the suit property to the 2nd Defendant.
 23. The 1st Defendant contends that the joinder of the 2nd Plaintiff into the suit was un-procedural as it was undertaken without proper leave and in violation of the Civil Procedure Rules. Finally, the 1st Defendant asserts that the reliefs sought by the Plaintiffs are misconceived and untenable as they are without any legal or factual foundation.

The 2nd Defendant's Statement of Defence and Counter-claim

24. In its statement of Defence and Counter-claim dated 14th July, 2023, the 2nd Defendant asserts that it is the registered proprietor of the suit property having lawfully acquired it from the 1st Defendant as an innocent purchaser for valuable consideration and without notice of any defect in the title of the 1st Defendant. The 1st Plaintiff is a trespasser and illegally in occupation of part of the suit property.
25. It is the 2nd Defendant's case that the Plaintiffs' alleged share of rent and inheritance if any, is quantifiable now that the suit property was sold and transferred to the 2nd Defendant at a disclosed amount. The Plaintiffs' suit cannot be maintained as against the 2nd Defendant who is not a family member. The case against the 2nd Defendant is therefore misconceived, frivolous, scandalous and otherwise an abuse of the Court process.
26. The 2nd Defendant counter-claims against the 1st Plaintiff for vacant possession of the suit property, a mandatory injunction directing the 1st Plaintiff to demolish all the illegal structures along the wall/frontage and on top of the residential premises on the suit property as well as a prohibitory injunction



restraining the 1st Plaintiff from entering, trespassing or operating any business in the suit property. In default by the 1st Plaintiff, the 2nd Defendant prays that it be authorized to carry out the demolitions of all illegal extensions, and temporary structures on the suit property and to evict the 1st Plaintiff from the suit property and the 1st Plaintiff to meet the costs of the eviction and demolitions.

Evidence adduced at the hearing of the case

27. The case proceeded to full hearing. Each of the Plaintiffs testified as a witness in his respective cases.
28. The 1st Plaintiff, Joseph Ngatia Njeru adopted his witness statement dated 23rd November, 2023 as his evidence in chief. He further produced the 12 documents in his bundles of documents dated 14th December, 2022 and the supplementary one dated 3rd November, 2023 as exhibits in support of his case.
29. The 1st Plaintiff essentially reiterated the facts pleaded in the amended plaint which I have analyzed earlier on. The 1st Plaintiff alleged that the Kapsabet plot was sold at Kshs. 2.7 million. He however had no documentary evidence to support his claim.
30. In cross-examination by Mr. Mutua, Advocate for the 1st Defendant, the 1st Plaintiff admitted that the requisition for stamp duty form in his supplementary bundle of documents indicated that the value submitted by parties for the Kapsabet plot was Kshs.500,000/-. The collector of stamp duty however valued it at Kshs.700,000/-.
31. The 1st Plaintiff further confirmed that he was aware that a loan was taken for purposes of the purchase of the suit property. He however could not remember how much it was. From the 1st Defendant's documents, he confirmed a sum of Kshs.1.5 million as the loan amount.
32. The 1st Plaintiff while admitting that the suit property was solely registered in the name of the 1st Defendant alleged that they (the family) had consented to that position. There was however no record of the alleged family meetings.
33. The 1st Plaintiff was aware that the suit property was sold by the 1st Defendant, his mother in the year 2022. His mother did not tell him when she was selling the suit property. She only served him with a notice to vacate the suit property through the Chief.
34. Responding to questions from Mr. Mogaka, Advocate for the 2nd Defendant, the 1st Plaintiff agreed that he had no document confirming the sale price of the Kapsabet plot as Kshs. 2.7 million. At the time of its sale, he was an adult aged 30 years.
35. The 1st Plaintiff confirmed that a sole registered proprietor of land had a right to sell the land without consulting anyone. He further confirmed that he had no approval documents allowing him to build/ erect structures on the suit property in his own name. His testimony was that the 1st Defendant had sought the approvals on his behalf.
36. All along, the suit property was in the name of the 1st Defendant, his mother from the time it was purchased up to the time it was sold to the 2nd Defendant. The 1st Plaintiff declared that he had no claim against the 2nd Defendant.
37. The 2nd Plaintiff testified as PW2 adopting his witness statement dated 3rd November, 2023 as his evidence in chief. In cross-examination by Mr. Mutua, Advocate for the 1st Defendant, he confirmed that he was aware that the suit property was sold by his mother in 2022. It had all through been in her name since it belonged to her.



38. PW2 stated that he lives in Ol-Kalou in his mother's land. He had no issue whatsoever with his mother.
39. Responding to Mr. Mogaka, Advocate for the 2nd Defendant, the 2nd Plaintiff reiterated that he lives in his mother's land. He is maintained by his own sister who sends money to a certain shop on a monthly basis. He collects his shopping from that shop.
40. PW2 affirmed once again that he had no issue with his mother, the 1st Defendant who had given birth to him and in case of any issue, he would reach out to her. He is not concerned with his mother's property. He denied the signature on his witness statement which he had earlier on adopted as his evidence in chief..
41. At re-examination, PW2 retracted his denial of the signature on his witness statement.

Evidence adduced on behalf of the Defendants

42. The 1st Defendant testified as a witness in her case and called 1 other witness.
43. The 1st Defendant adopted her witness statement dated 10th November, 2023 as her evidence in chief. She produced the 25 documents in her bundle of documents of even date as exhibits in support of her case.
44. The 1st Defendant asserted that the sale of the Kapsabet property realized as a sum of Kshs.500,000/- only. She took a loan of Kshs. 1.5 million from the Housing Finance Company of Kenya (HFCK) and sold other properties to raise the purchase price of the suit property. The 1st Plaintiff did not help in the repayment of the loan to HFCK.
45. The 1st Defendant explained that she had opened an agency with the 1st Plaintiff who is her elder son to help him buy a motor vehicle. It was not for purposes of collecting rent from the suit property as alleged by the 1st Plaintiff. She had only allowed him to live in the suit property as his son. She was not in any business partnership with him.
46. Responding to questions from Ms. Awour, Advocate for the Plaintiffs in cross-examination, the 1st Defendant confirmed that at the time of death of his husband, she had 3 children only with him. She admitted that she applied the proceeds of sale of the Kapsabet plot alongside other monies towards the purchase of the suit property. The Kapsabet property had fetched only Kshs.500,000/-.
47. She denied that she got married after her husband's death.
48. The 1st Defendant admitted that she did not tell the 1st Plaintiff that she intended to sell the suit property. She was afraid that the 1st Plaintiff would have caused him physical harm. He had prior to the sale chased her out of the suit.
49. Kwa Njeru Agencies was registered to help the 1st Plaintiff buy a pick-up vehicle. The 1st Defendant guaranteed the 1st Plaintiff for the purchase of the vehicle on hire purchase. It was bought at Kshs.834,604/- which she ended up paying.
50. The 1st Defendant had intended to give the 1st Plaintiff a sum of Kshs. 6.0 million, the same amount she had given to all her other children after selling the suit property. She had saved a similar amount for the 2nd Plaintiff. It is the amount she uses to maintain him through one of her daughter.
51. Responding to Mr. Mogaka, Advocate for the 2nd Defendant, the 1st Defendant acknowledged that the 2nd Defendant paid him the entire purchase price of the suit property being Kshs.65 million. She had no issue with any other of her children over the sale of the suit property.



52. The 1st Defendant clarified that she had not authorized the 1st Plaintiff to build any house/structure on the suit property. She had neither sought any approval from the City authorities on his behalf for purposes of such structures on the suit property.
53. DW2 was one Grace Nyawira, a daughter of the 1st Defendant and a sister to the Plaintiffs. She adopted her witness statement dated 10th November, 2023 as her evidence in chief. She confirmed that the 2nd Plaintiff is maintained by the 1st Defendant, his mother. She alleged that he 2nd Plaintiff was mentally unstable.
54. DW2 denied that there were any family meetings as alleged by the 1st Plaintiff concerning the suit property. She testified that the 1st Plaintiff had beaten her up at one time when she had been sent by her mother to the suit property.
55. On its part, the 2nd Defendant Company called 1 witness, Mr. Sharif Abdullahi Omar who is one of its directors. The witness adopted his witness statement dated 14^h July, 2023 and his two affidavits as his evidence in chief. He further produced as exhibits, the documents, listed on the 2nd Defendant's list and bundle of documents.
56. The witness testified that the 2nd Defendant company had a title to the suit property. It had purchased it from the 1st Defendant at the sum of Kshs. 65 million and which it had paid in full.
57. Responding to questions from Ms. Awour, Advocate for the Plaintiffs, the witness confirmed that they had inspected the suit property before purchasing it. There were tenants in the suit property. The 1st Defendant's son too lived in the suit property. They were not aware of any claim by the 1st Plaintiff over the suit property. The 1st Plaintiff did not ask them any questions when they visited the suit property prior to purchasing it. They conducted a search which confirmed the 1st Defendant as the sole registered owner. They had purchased it after conducting due diligence.
58. In re-examination, the witness for the 2nd Defendant stated that he had been assured by the 1st Defendant that everyone in the suit property would vacate once she gave them notice. The tenants indeed vacated after the notice by the 1st Defendant leaving only the 1st Defendant in the suit property. The 2nd Defendant had already secured approval for redeveloping the suit property from the Nairobi City County Government.

Court's Directions

59. The court directed parties to file written submissions at the conclusion of the hearing. All the parties complied and the court has had the advantage of reading and considering the said submissions which now form part of its record.

Issues for Determination.

60. Having considered the pleadings filed in this case, the evidence adduced before the Court and the submissions by the parties, I am of the considered view that the issues for determination in this case are as follows: -
 - a. Whether the Plaintiffs have established a proprietary interest over the suit property.
 - b. Whether the Plaintiffs have laid basis for the revocation of the 2nd Defendant's title over the suit property.
 - c. Whether the Plaintiffs are entitled to a quarter share of the suit property each or any portion thereof.



- d. In the alternative to (c) above, whether the Plaintiffs are entitled to any monetary compensation.
- e. Whether the 1st Plaintiff is entitled to reimbursement of a sum of Kshs.1,362,000/-.
- f. Whether the 2nd Defendant is entitled to an order of vacant possession of the suit property and the other orders in its counter-claim against the 1st Plaintiff.
- g. What orders should issue in respect to the costs of the suit and counter-claim.

Analysis and Determination.

a. Whether the Plaintiffs have established a proprietary interest over the suit property

61. This case is principally between sons (Plaintiffs) and a mother (1st Defendant); the Plaintiffs and the 1st Defendant respectively. The 2nd Plaintiff was joined into this suit vide the amended plaint dated 26th October, 2023. I will handle the 1st issue for determination alongside the 3rd and 4th issues i.e. whether the Plaintiffs are entitled to a quarter share of the suit property each or any portion thereof and in the alternative to (c) above, whether the Plaintiffs are entitled to any monetary compensation.
62. Interestingly, and during cross-examination, the 2nd Plaintiff who testified as the 2nd Plaintiffs' witness (PW2), literally renounced his witness statement and stated that he had no issue or case with his mother (the 1st Defendant). He testified that he lives in Ol-Kalou in his mother's shamba and is maintained by his sister who sends money for his sustenance to a shop where he collects his unga and other necessities from.
63. PW2 under cross-examination by Mr. Mogaka, Advocate for the 2nd Defendant reiterated that he had no issue with his mother who gave birth to him. In case of any issue he could always talk to her. His mother's property does not concern him. He even renounced the signature on his witness statement though in re-examination by Ms. Awuor, Advocate for the Plaintiffs, he confirmed/acknowledged the witness statement and the signature thereon.
64. The Court's assessment of the 2nd Plaintiff is that he was unaware of the issues before the Court and may, as submitted by the 1st Defendant, have been dragged into the suit by the 1st Plaintiff to add fuel to the 1st Plaintiff's case and give it a semblance of a family dispute.
65. The Court's finding is that the 2nd Plaintiff, from his testimony before the Court, did not establish any case against the Defendants.
66. It is not in dispute that the suit property was all along, since 1993 registered in the name of the 1st Defendant as the sole proprietor. Both Plaintiffs acknowledge that fact. The 1st Plaintiff however in his pleadings and evidence insinuates that the 1st Defendant was holding the suit property in trust for him and the other siblings (the biological children of his late father only).
67. Under Section 26 of the *Land Registration Act*, Courts are enjoined to treat a certificate of title issued by the Registrar as prima facie evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner of the land. The title is only subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. The title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person (named as proprietor) is proved to be a party or if the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme.



68. I need to state that all registered land, unless the contrary is expressed in the register, are, under Section 28 of the [Land Registration Act](#), subject to the overriding interests listed under: -
- a. spousal rights over matrimonial property;
 - b. trusts including customary trusts;
 - c. rights of way, rights of water and profits subsisting at the time of first registration under this Act;
 - d. natural rights of light, air, water and support;
 - e. rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
 - f. leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
 - g. charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
 - h. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
 - i. electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
 - j. any other rights provided under any written law.
69. The Plaintiffs while acknowledging that the 1st Defendant was the registered proprietor of the suit property, allege that the suit property was an asset of the estate of the late Michael Njeru Kiraiku under (but not limited to) the common law doctrine of tracing. They seek a declaration to that effect.
70. It is a settled principle of the law of evidence that he who alleges bears the burden of proof. The Principle is embodied in the provisions of Sections 107 and 109 of the [Evidence Act](#), Cap 80 of the Laws of Kenya, which I reproduce here below:-
- “ 107 Whoever desires any Court to give judgment as to any legal right or liability
– dependent on facts which he asserts must prove that those facts exists.”
109. “The burden of proof as to any particular fact lies on the person who wishes
 the Court to believe in its existence, unless it is provided by any law that proof
 of the facts shall lie on any particular person.”
71. The burden of proof that the suit property was an asset of the estate of the late Michael Njeru Kiraiku ‘under the common law doctrine of tracing’ was squarely on the Plaintiffs.
72. What I understand the Plaintiffs to be saying in their case is that the proceeds of sale of the property known as L.R. No. 1181/40 at Kapsabet which was owned by their late father and subsequently registered in the name of the 1st Defendant (their mother) to hold in trust for them were used to solely purchase the suit property thereby transmitting the legal claim of the estate of their late father over L.R. No. 1181/40 to the suit property. This explains the Plaintiffs’ prayer for an equitable share of the suit property being a quarter portion of the suit property each.



73. Cognizant of the fact that the suit property has already been sold to a 3rd party, the Plaintiffs in the amended plaint made the Alternative prayer for compensation at the current market value of their respective portions upon valuation. Their case is that their 'equitable right' in the property known as L.R. No. 1181/40 at Kapsabet is traceable to the suit property.
74. I will briefly discuss the decision of one House of Lords in the case of *Foskett – vs – McKeown* {2000} UKHL 29, which is the leading case on the English Law of trusts concerning tracing and availability of proprietary relief arising from a breach of trust.
75. The brief facts of the case are that in breach of trust, Mr. Murphy took 20,440 Sterling Pounds from a company he controlled. Over 200 investors including Mr. Foskett had invested in the company for purposes of buying land in Portugal. The land had been bought but not developed as promised. Mr. Murphy had used the trust money to pay off the 4th and 5th instalments on his life insurance policy. He had paid the first two or more premiums with his own money.
76. When Mr. Murphy committed suicide, his children were paid 1,000,000/- Sterling Pounds under the insurance policy. Mr. Foskett and the other investors (the claimants) sued the Defendants (the children of Mr. Murphy), claiming 40% share in the policy monies. They argued that they had a proprietary interest in the insurance monies because the policy had been bought using a portion of misapplied trust funds.
77. The Defendants in response argued that only some equitable lien was available, and the beneficiaries should only receive the amount taken.
78. Whereas the Court of Appeal held that the claimants could only get some equitable lien over the proceeds of the policy to secure the repayment of the 4th and 5th premiums, the House of Lords held that they could claim a proprietary right over the insurance policy proceeds.
79. In the leading judgment by Lord Millet, the House of Lords stated as follows: -
- “This is a textbook example of tracing through mixed substitutions. At the beginning of the story the Plaintiffs were beneficially entitled under an express trust to a sum standing in the name of Mr. Murphy in a bank account. From there the money moved into and out of various bank accounts where in breach of trust it was inextricably mixed by Mr. Murphy with his own money. After each transaction was completed the Plaintiffs' money formed an indistinguishable part of the balance standing to Mr. Murphy's credit in his bank account. The amount of that balance represented a debt due from the bank to Mr. Murphy, that is to say a chose in action. At the penultimate stage the Plaintiffs' money was represented by an indistinguishable part of a different chose in action, viz. the debt prospectively and contingently due from an insurance company to its policyholders, being the trustees of a settlement made by Mr. Murphy for the benefit of his children. At the present and final stage it forms an indistinguishable part of the balance standing to the credit of the respondent trustees in their bank account.”
80. Lord Millet in his judgment distinguished between tracing and following. He stated that;
- “...The process of ascertaining what happened to the Plaintiffs' money involves both tracing and following. These are both exercises in locating assets which are or may be taken to represent an asset belonging to the Plaintiffs and to which they assert ownership. The processes of following and tracing are, however, distinct. Following is the process of



following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old.”

81. The import of this persuasive decision is that where one asset is exchanged for another, a claimant can elect whether to follow the original assets into the hands of the new owner or to trace its owner or to trace its value into the new asset in the hands of the same owner. In practice his choice is dictated by the circumstances. In the above cited case, the Plaintiffs’ did not seek to follow the money any further once it reached the bank or insurance company since its identify was lost in the hands of the recipient (which in any case obtained an unassailable title as bona fide purchaser for value without notice of the Plaintiffs’ beneficial interest). Instead the Plaintiffs chose at each stage to trace the money into its proceeds, viz the debt presently due from the bank to the account holder of the debt prospectively and contingently due from the insurance company to the policy holder. The court concluded that;
- “The transmission of a claimant’s property rights from one asset to its traceable proceeds is part of our law of property, not of the law of unjust enrichment.”
82. I must be categorical that the decision of the House of Lords is only persuasive; it is not binding on this Court. However, one of the values that this court is expected to uphold under Article 10 of *the Constitution*, in its decision is ‘equity’. Section 3 of the *Environment and Land Court Act* which is a replica of Section 1A of the *Civil Procedure Act* calls upon this court to facilitate just, expeditious, proportionate and accessible resolution of disputes. The reasoning in the decision of the House of Lords is sound to enable the court to uphold equity and to do proportionate justice to the parties in this case.
83. The 1st Plaintiff’s case is that he was one of the four beneficiaries in the estate of his late father and therefore had a one quarter stake in the property known as L.R. No. 1181/40 which was sold and the proceeds applied to purchase the suit property.
84. I have carefully considered the submissions of the 1st Defendant. At paragraph 12, the 1st Defendant submits that, “an assent was transferred to the 1st Defendant in her personal capacity and as trustee of John Kiriaku Njeru, Joseph Ngatia Njeru and Peter Nderitu Macharia. That was how the estate of the deceased, Michael Njeru Kiraiku was distributed to the beneficiaries. The 1st Defendant was made a trustee and was therefore to hold the property L.R. No. 1181/40 for herself and as trustee of John Kiriaku Njeru, Joseph Ngatia Njeru and Peter Nderitu Macharia. The 1st Defendant was not an administrator of the estate of the deceased as alleged by the Plaintiffs, but she was a trustee for John Kiriaku Njeru, Joseph Ngatia Njeru and Peter Nderitu Macharia.
85. From the evidence adduced before the Court, the sale of L.R. No. 1181/40 realized a sum of Kshs. 500,000/- only in 1993. Though the 1st Plaintiff alleged other figures, he did not provide any evidence to support the same. The 1st Defendant was clear that she sold the Kapsabet plot L.R. No. 1181/40 at Kshs. 500,000/- only and used this money alongside proceeds from the sale of her other assets and a bank loan to purchase the suit property at the sum of Kshs. 3.2 million.
86. Therefore, the proceeds from L.R. No. 1181/40 contributed to only 15.65% of the purchase price of the suit property, without developments. The 1st Plaintiff’s stake in the suit property, is traceable. It would therefore be equivalent to a quarter of the 15.65% which is 3.9 % of the whole undeveloped portion of the suit property.
87. No evidence was adduced before the Court on the undeveloped value of the suit property. All that is before the Court is the sale value of the suit property at the time of the sale to the 2nd Defendant. The suit property was sold at Kshs. 65 million. That is the only figure available to the Court.



88. Though there is no evidence that the Plaintiffs or the 1st Plaintiff for that matter contributed to the development, I will be generous and assess the 1st Plaintiff's share at 3.9% of the sale amount of Kshs.65 million which makes up a sum of Kshs. 2,535,000/-. I award the 1st Plaintiff the sum of Kshs. 2,535,000/- only against the 1st Defendant with interest at Court rates from the date of this judgment until payment in full.

b. Whether the Plaintiffs have laid basis for the revocation of the 2nd Defendant's title over the suit property.

89. It is not disputed that the suit property is already in the name of the 2nd Defendant after the sale by the 1st Defendant.

90. Section 26 of the [Land Registration Act](#) is explicit that a title of a proprietor shall not be subject to challenge except:-

- a. On ground of fraud or misrepresentation to which proprietor is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

91. It was incumbent upon the Plaintiffs to establish the grounds for revocation of the 2nd Defendant's title. None of the grounds under section 26 of the [Land Registration Act](#) has been established. The 2nd Plaintiff in his evidence acknowledged that the title to the suit property belonged to his mother.

92. It is on record too that the 1st Plaintiff in response to a question by the Advocate for the 2nd Defendant, Mr. Mogaka, clearly stated that he had no claim against the 2nd Defendant.

93. The court finds and hold that the Plaintiffs have not established the grounds for the revocation of the 2nd Defendants title. Indeed, the Court's finding from the analysis of all the material evidence presented before it is that the 2nd Defendant is a bona fide purchaser for value without notice of any defect in title. The 2nd Defendant lawfully acquired the title to the suit property.

94. Consequently, the 1st Plaintiff is a trespasser on the 2nd Defendant's property. It is noteworthy that the 1st Plaintiff did not file a statement of Defence to the 2nd Defendant's Counter-claim against him. The consequences are obvious. The Counter-claim was undefended. The Court therefore allows the 2nd Defendant's Counter-claim against the 1st Plaintiff.

c. Is the 1st Plaintiff entitled to a reimbursement of Kshs.1,362,000/- from the 1st Defendant.

95. This is a claim for special damages. It is trite law that special damages must not only be specifically pleaded but also specifically proved. The Court finds that the 1st Plaintiff has not specifically proved that he incurred and paid the amount claimed to entitle him to a reimbursement. The claim is disallowed.

d. What orders should issue in regard to the costs of the suit and counter-claim?

96. On the issue of costs, the Court takes cognizance of the relationship between the Plaintiffs and the 1st Defendant. The Court therefore in a bid to encourage reconciliation between the parties directs that each party bears its own costs.



97. However, as between the 1st Plaintiff and the 2nd Defendant and since the 2nd Defendant's counter-claim against the 1st Plaintiff has succeeded, I will award the 2nd Defendant the costs of the counter-claim against the 1st Plaintiff.

Final Orders.

98. Considering the amount of time that the 1st Plaintiff has remained in the suit property without any colour of right, the Court will only allow him 45 days only from the date of this judgement within which to vacate the suit premises and demolish all the illegal structures in the suit property constructed along the wall/frontage of the suit premises and on top of the residential premises on the roof, failing which, the 2nd Defendant is at liberty to evict the 1st Plaintiff from the suit property without any further reference to this Court.

99. Reasons wherefore:

- A. The 1st Plaintiff case is allowed only in terms of the alternative prayer for compensation awarded at a sum of Kshs. 2,535,000/- against the 1st Defendant with interest at Court rates from the date of this judgment until payment in full.
- B. The 2nd Plaintiff's case is dismissed.
- C. There shall be no orders as to costs between the Plaintiffs and the 1st Defendant.
- D. The 2nd Defendant's Counter-claim against the 1st Plaintiff is allowed in the following terms;
 - i. A mandatory injunction is hereby issued directed at the 1st Plaintiff by himself, servants, agents, assigns, workmen, and or employees to grant possession of the suit property, L.R No. 209/3531 (I.R No. 34055) Kinshasa road off Park Road, Ngara area, and to demolish all the illegal permanent extensions, temporary iron sheets/mabati structures constructed along the wall/frontage and on top of the residential premises situate on L.R No. 209/3531 (I.R No. 34055) Kinshasa road off Park Road, Ngara area, Nairobi within forty-five (45) days of this judgement.
 - ii. In default, and upon expiry of the forty-five (45) days from the date of this judgement, the 2nd Defendant is at liberty to evict the 1st Plaintiff from the suit property on L.R No. 209/3531 (I.R No. 34055) Kinshasa road off Park Road, Ngara area, Nairobi and to carry out demolitions of all the illegal permanent extensions, temporary iron sheets/mabati structures constructed along the wall/frontage and on top of the residential premises on the suit property and without any further reference to this Court.
 - iii. The costs of the demolition and eviction shall be borne by the 1st Plaintiff in case the 2nd Defendant carries out the same in accordance with clause {D(ii)}, above.
 - iv. The 2nd Defendant is granted the costs of the Counter-claim.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JULY, 2024

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Awuor for the Plaintiffs



Mr. Mutua for the 1st Defendant

Mr. Mogaka for the 2nd Defendant

Court Assistant: Yvette

M.D. MWANGI

JUDGE

