



Eric Tipis Lesengeni, Michael Kantet Tipis, Benard Kantet Tipis and Serah Shiloo Tipis (Suing as Personal Representative of the Estate of Rodah Tipis - Deceased) v Umoja Developers Limited (Environment and Land Case Civil Suit 1418 of 2014) [2024] KEELC 5453 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5453 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1418 OF 2014

AA OMOLLO, J

JULY 18, 2024

BETWEEN

ERIC TIPIS LESENGENI, MICHAEL KANTET TIPIS, BENARD KANTET TIPIS AND SERAH SHILOO TIPIS (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RODAH TIPIS - DECEASED) PLAINTIFF

AND

UMOJA DEVELOPERS LIMITED DEFENDANT

JUDGMENT

1. The plaintiff brought this suit vide a plaint dated 7th November, 2014 and later amended on 1st December, 2022. The Plaintiff pleaded that without any right, the Defendant and or its employees or agents have entered and taken possession of the subject premises without authority of the plaintiffs. That the said occupation amounts to trespass and has exposed the plaintiffs to loss and injury and denied them use.
2. The Plaintiff pleaded that neither them nor Roda Tipis – deceased or through authorized agents ever sold the suit property to the Defendant. In the alternative, if any such attempts were made, they aver that it was not completed.
3. It is stated by the plaintiffs that as at the date of the alleged sale agreement dated 29th May, 2006, Roda Tipis – deceased was admitted under Intensive Care Unit (ICU) at Nairobi hospital. It is their case that the Defendant forcefully took possession of the suit property by breaking through the perimeter wall shortly after the demise of Roda.



4. The Plaintiff unpleaded that the deceased never signed any transfer documents in favour of the Defendant. They assert the Defendant's claim is based on fraud, irregularities and illegalities. They pleaded the particulars as hereunder;
 - a. Forging the Deceased's signatures.
 - b. Uttering false documents to wit; forged sale agreements and transfers.
 - c. Purporting to obtain ownership of the subject property without payment of consideration and or purchase price.
 - d. Misrepresentation and deceit to wit that the Defendant had paid purchase price and or entered into a sale agreement a fact they knew to be false.
5. Despite demand and notice to sue given, the Defendant has not surrendered vacant possession. Wherefore, the plaintiff prays for judgment against the Defendant for;
 - a. General damages.
 - b. An Order evicting the Defendant and its employees, agents and/or servants from L.R No. 3734/240.
 - c. A permanent injunction restraining the Defendant, whether itself, agents and/or servants from entering, remaining open, further upon the land or in any other way dealing with L.R No. 3734/240.
 - d. Mesne profits
 - e. Costs of the suit
 - f. Interest on (a), (b) and (c) above at Court rate.
 - g. An order that the Defendant never entered into an agreement with Rodah Tipis (Deceased) and the Defendants never paid the alleged purchase price and or complied with the alleged terms and conditions stated in the purported Agreement.
6. The Defendant filed a defence and counter-claim dated 19th December, 2024. It denied the plaintiff's claim and stated instead that pursuant to a sale agreement dated 29th May, 2006, the suit property was sold to them for Kshs.18,000,000. That the Defendant paid to Rhoda Tipis – deceased the entire purchase price and granted them possessions. Further, the vendor's advocate, Harit Sheth & Co. Advocates handed to the Defendant the completion documents.
7. The Defendants pleaded that the transferred was not registered because the title to the suit property got lost in mysterious circumstances while in the possession of its directors. It is the Defendant's contention that the suit property does not constitute part of the estate of deceased.
8. In the counter-claim, the Defendant reiterated purchasing the suit property and that it does not constitute the estate of Rhoda Tipis, it listed the irregularities on the part of the plaintiff thus;
 - a. Including Land Reference Number 3734/240 as part of the estate of the deceased when the Plaintiffs knew/and/or ought to have known that Rhodah Tipis (now deceased) had already sold the same to the defendant.
 - b. Including Land Reference Number 3734/240 as part of the estate of the deceased in Succession Cause No. 2665 of 2007 and the present suit when the Plaintiffs are aware that the said property was not listed as part of the assets of the deceased in the Affidavit in support of the



petition for letters of administration intestate filed in the aforesaid Succession Cause No. 2665 of 2007.

- c. Obtaining a provisional certificate of title for Land Reference Number 3734/240 when the Plaintiffs knew and/or ought to have known that Rhoda Tipis (now deceased) had handed over the original certificate of title to the defendant upon sale of the said property to the Defendant.
9. The Defendant prayed for judgment in the counter-claim against the Plaintiff that;
- i. A declaration that the Defendant is the bonafide purchaser of Land Reference Number 3734/240 having purchased the same from Rhodah Tipis (now deceased).
 - ii. An order compelling the plaintiffs to immediately surrender provisional certificate of Title I.R 11161, Land Reference Number 3734/240 to the Defendant.
 - iii. An order cancelling the registration of the plaintiffs as administrators in transmission over Land Reference Number 3734/240 and an order vesting the said property to the Defendant.
 - iv. In the alternative to prayer (c) hereinabove an order compelling the plaintiffs to forthwith execute the relevant transfer documents of Land Reference Number 3734/240 to the Defendant and in default of execution of the relevant transfer documents the Deputy Registrar of this Honourable Court do sign in their stead.
 - v. Costs.
10. The parties adopted the evidence that was taken in High Court Succession Cause No. 2665 of 2007 together with the documents produced thereof. The plaintiffs opened the hearing with the evidence of Sera Shiloo Tipis testifying as PW 1. She stated that she is one of the administrators of the estate of Rhoda Tipis and produced the documents in their list dated 7th November, 2014 as Pex 1 – 16.
11. PW 1 also adopted her witness statement stated 7th November, 2014. She also adopted the bundle of pleadings and documents filed in the succession cause now produced as Pex 17 – 26. She said that her deceased father Justus Kandet Ole Tipis was the initial owner of L.R No. 3734/240 (hereafter referred to as the suit property). That their father willed the property to their late mother – Rhoda. According to her, Prof. Kahara used to live in a house behind their house (suit property).
12. In her evidence in the succession cause, PW 1 said that after the death of her mother, one day while walking along Lavington, she found the gate of the suit property opened and Mr. Kahara was inside. She decided to carry out investigations by undertaking a search at the Lands Office. The search revealed the suit property was still the owned by her mother and only a caveat was registered on the title in 2007 which caveat they knew nothing about.
13. PW1 said she also went to KCB and obtained bank statements of her deceased mother from January, 2006 and the statements showed there was no money deposited in the said account. The statements were annexed to the Further affidavit and produced as exhibit. She continued to say that at the time of the impugned sale, her mother was in hospital as per the letter attached to her affidavit indicating the date she was admitted and when she died.
14. She decided to visit the offices of MS Harith Sheth Advocates and requested him to shed light on the sale of the Lavington property at Kshs.18 million. That she talked to Richard Kariuki, the partner and who told her that if she tried to remove the defendant, she will meet the ensuing costs. PW1 stated that she also reported the matter to the police for investigation. Mr. Lebullelah who registered the caveat said it was not his signature. She filed the matter in ELC and while the succession case was with the High Court Family Division.



15. The witness stated that the deceased sold plot in Narok and bought the tractor KAX 217 P – Tractor – 2.2 m. That the deceased was paid Kshs. 2M from sale of L.R No. 1/357 – Lenana Road. Although PW1 did not know the deceased dealings; she knew the deceased had maize, barley and wheat and she was paid for the same. She went to Harith Sheth was their family lawyer and was told the deceased did the transaction. She referred to the documents at Page 24 referenced Sale of L.R 3734/240 Nairobi to Umoja Development Ltd – Bankers cheque Kshs.1.28 million and payment of comprehensive Insurance of Kshs.52,460/= for motor vehicle KAV 268W. Page 28 – The letter for Harit Sheth Advocates. Order for Massey Sergon Tractor Model MA 290 – 2WD – 82 HP Kshs.2,165,000.
16. She denied that the payment of Kshs.785,000/= cheque and not a banker’s cheque as indicated in the acknowledgment form and also denied the alleged payment of Kshs.2,155,000/= to be paid to SMB EA Ltd to be proceeds from the sale of the suit property. PW1 denied that there was acknowledgment of Eric Tipis collecting a cheque of Kshs.400,000/= on behalf of Rodah Tipis on 30/4/2007 and the acknowledgment by Rodah Tipis for Kshs.100,000/= proceeds being part of sale of L.R 3734/240. She added that on 26/1/2007 when her mother received Kshs.200,000/= in cash from Harit Sheth, she was in hospital. Similar position applied to the activity on page 6 of the bank statement showing a deposit of Kshs.400,000/= on 26/1/2007
17. At page 22 (a) of the advocate shows that there is a bankers cheque of Kshs.1,280,000/= and it is indicated that PW1 received the letter which allegation she denies receipt. On 18/4/2007 Kshs.303,420/= the same amount that Sam said had collected. The letter of 3/5/2007 is a refund upholds and it is an overpayment and it is written my name and it is not me at all. In the bank statement page 8/10 – 11/5/2007 shows Kshs.12,300/= the same amount. By the Nairobi Hospital letter of 6/11/2018 that shows that my mother was admitted;
- 30th May, 2006 – 1/7/2006
- 28th April, 2007 – 7/5/2007
- 22nd June, 2007 – 24/7/2007
- One statement of account on 14/6/2006 – cash withdrawal – self Kshs.40,002 withdrawn by self. Pw1 did not know how the deceased withdrew money and she was admitted in hospital.
18. The Plaintiff said that they lived on the suit property purchased by mortgage from Ireri in 1969 and they lived there on and off. That whenever their father leased it, they would move to another house. When her mother was sickly, she moved to the apartment in Kilimani so that it was closer to Nairobi Hospital. Pw1 stated that she has filed document to show that the sale agreement dated 29/5/2006 was forged as their mother was first admitted 30/5/2006. Further supporting affidavit of 22/3/2016 at page 17. This applies to the acknowledgment of receiving Kshs.50,000/= on 29/6/2006.
19. Then in regard to the letter of 9/6/2006 written by the “seller” yet their mother who was in Nairobi Hospital sick could not have written, signed the letter and received the money. She also denied acknowledgment of receiving Kshs.200,000/= from R. M. Kariuki of Harith Sheith Advocates is not true as she did not sign or receive the money. It is her evidence that her mother was very strict/allowed us to take anything on her behalf. The witness further denied receipt any money or Kshs.50,000/= on 30/5/2006. That Daniel Tipis was in Australia on 2/3/2007 hence not in the country he has been in Australia to date and could not have received any money on behalf of the deceased.
20. Page 27 of Richard Kariuki’s affidavit, PW1 stated that her mother did not receive a banker’s cheque on 10/11/2007 for Kshs.2,155,000/= bankers cheque Kshs.785,000/= and Kshs.60,000/= in cash totaling to Kshs 3Million. The bank statement shows that Kshs.785,000/= 11/1/2007 cheque deposit



Kshs.785,000/= cleared on 17/1/2007 was a loan cheque and not banker's cheque. PW1 avers that she has known Nathan Kahara and his wife from when they were young and were neighbours and family friends. There were 3 Rhodas; Rhoda Kahara, Rhoda Kariuki and Rhoda Tipis.

21. She does not know if the Kahara's knew of their mother's sickness but when she passed on, she told all parties/friends of her death. That Kahara told her to meet him at Serena Hotel and he paid me Kshs.10,000/=. My father wrote a Will and Harit Sheth and her mother were/are executors of Oletipis Will. When she filed the petition for letters of administration, she did not include this property.
22. During cross-exam, PW1 admitted they did not include the suit property L.R 3734/240 in the petition but it was added in the summons for confirmation. That the petition filed on 4/10/2007 and it had a list of beneficiaries and assets with KXM 061 – Pickup purchased through a trade in. PW1 affirmed she was not the one utilizing the suit property. In paragraph 5 and 6 of Replying Affidavit, the witness denied deposing that she did not know that Harit Sheth prepared for them a grant. PW1 said she is the one who informed Eric Tipis of 24/4/2018 that the suit property had been acquired by someone and she was aware it was claimed by the Kaharas.
23. In re-exam, stated that the letters dated 17/7/2006 at page 24 and the one of 14/7/2006 page 25 suggests the 2 letters paid the same amount of money and the income and sale of motor vehicle was done twice. That in the letter of 29/6/2006 Villa Care does not show the sale price for the apartment was used for the purchase of the suit property. She also denied obtaining any money for purchase of the suit property on behalf of her mother. That since they were not able to establish that their mother sold the property for Kshs.18 million, she reported the matter to the police to carry out investigations.
24. PW2 was No. 2311371 Mr. John Muinde Senior Superintendent of Police and Forensic Document Examiner based in DCI Headquarter Nairobi. He stated his qualifications to include, a Bachelor of Science degree Moi University in 1997 and Master's Degree in Leadership and Security Management from Kenyatta University – 2019. In the field of Forensic Document Examination, PW2 said he is trained at the Interpol Headquarter in Forensics – Leon; Regional Forensic Services Centre in Khartoum – Sudan and Forensic Service in Melbourne State – Australia. That he has practiced Forensic Examination for 19 years now and has conducted forensic examinations and given expert opinions in court all over the country.
25. PW2 stated that on 15/1/2015 the Forensic Examination laboratory received the following exhibits.
Questioned Documents;
A1 – Copy of questioned Agreement of Sale LR 3734/240 (OR 3734/127 of 29/5/2006 between Rhoda Tipis and Umoja Developers Ltd.
A2 – Copy of grant Agreement of Sale L.R No. 3734/240 (OR 3734/127 of 29/5/2006 between Rhoda Tipis and Umoja Developers Ltd.
A3 – Questioned and undated transfer form for title number IR 11161 between Rhoda Tipis and Umoja Developers Ltd.
A4 – Questioned Agreement of Sale of LR 3734/240 which had QR 3734/5/127 dated 29/5/2006 between Rhoda Tipis and Umoja Developers Ltd.
A5 – Copy of questioned and dated (undated) transfer form for Title No. LR 11161 between Rhoda Tipis and Umoja Developers Ltd.
A6 – Copy of questioned Agreement of Sale of land LR No. 3734/240 OR 3734/5/127 of 29/5/2006 between Rhoda Tipis and Umoja Developers Ltd.



A7 – A Copy of questioned and dated transfer form for title number IR 11161 between Rhoda Tipis and Umoja Developers Ltd.

Documents bearing the known signatures of the late Rhoda Tipis marked as BI, B2 and B3.

26. He avers that they also received an exhibit Memo form from Cpl Onyango Owede of Land Fraud Investigation Unit. The request by the Investigation Officer to the Document Examiners was to ascertain whether the signatures indicated in red ink on the questioned documents A1 – A7 when compared with known signatures of the Rhoda Tipis in black in BI, B2 and B3 were made by the same hand. That after he conducted the forensic examination at DCI Forensic Laboratory on A1 – A7 compared with known signature on B1, B2, B3, he made the opinion that the signatures are not by the same hand. The scientific opinion is heard on the similarities of the signatures in terms of; - Spread of ink, shape of the pen, baseline alignment etc.
27. It was PW2's finding that the movement of the turn from the start to the end of each signature, there was a difference in the questioned signature and known signatures. From the look of the eyes the signatures do not resemble. He prepared a report dated 20/1/2015 and tendered the original report as an exhibit in court. and signed the same day. The Expert Report – Exhibit 1.
28. Under cross-exam, PW2 said the report he prepared was premised on documents brought to them by Cpl. Onyango Owede in the Exhibit Memo dated 6/1/2015. Provision of offence stated, “Co Administrator to the estate of late mother namely Rhoda Tipis who passed away on 24/7/2007 and in December, 2011 while in the course of administration of the estate she discovered that a company namely M/s Umoja Developers Ltd had placed a purchasers prohibitory duty and our family land parcel IR 11161 Nairobi claiming purchaser's interest on grounds that it had purchased the property from late Rhoda Tipis as stipulated by the questioned documents filed by.....at the Department of Land Registry (Ardhi House) Civil Suit at High Court Nairobi.
29. The request for examination of the contested documents was made and paid for by Opiyo & Omollo Advocates. The letter addressed to CID Headquarters Kiambu Road reads; “request for examination of documents;

“We act ELC 219 of 2014 and Succession 2665 of 2007. We have received documents that were alleged to be signed by Rhoda Tipis and the clients indicate that they needed the documents with signature to be examined.”
30. However, PW2 denied this letter formed the basis of his report as he examined what was brought to him. He checked the A1 – A7 and BI – B3 but he does not know where the documents came from as they were brought by the Investigating Officer to the Forensic laboratory. He had a comparison client attached to the report – holding the original report but it was not as filed in court. The witness affirmed that he did not relate his report with the one filed by AntipasNyanjwa. That he made the examination on his own as an expert from CID Headquarter as opposed to Antipus Nyanjwa who was a private Document Examiner.
31. Pw2 was referred to the letter from Sian Farm Ltd of 314/1995 which letter bore two signatures; (Rhodah Tipis) (Rhodah Tipis) and 1st Column the 2nd handwriting Rhodah Tipis. Page 39- KCB Debit Advice – one word – Rhodah – B2 – B3 pages 39 and page 40 of the Replying Affidavit of 17/2/2015. He asserted that when the signatures are by the same person means that the signatures are of the same person with same characteristics. There is natural variation due to time difference. His sources of documents “B – 2 and B – 3. In re-exam, PW2 said the arrow was to put the document



signature that was determined – B2 and B3. I examined the signatures marked in black arrow only. I found them to the same.

32. Eric Lenleseni Tipis was the third witness called in support of the Plaintiffs' case. He adopted his witness statement filed on 24th April 2018. He denied receiving any monies in respect to proceeds from sale of L.R 3734/240 (suit property). He denied his signatures appearing on the acknowledgement forms stating receipt of Kshs 100000; 400000; 200000; 300000 and 50,000 in the documents annexed in the affidavit of Mr Richard Kariuki advocate.
33. During cross-examination, PW3 admitted that in the list of assets of the deceased stated in the petition included motor vehicle KAV 268W. He was referred to annex 6 of Mr Kariuki's affidavit which was a letter dated 17th July 2006 saying Kshs 1.2 M was used to buy m/vehicle KAV 268 W. The witness was also shown the letter dated 10.1.2007 in regard to the purchase of a tractor at Kshs 2,550,000 as well as the purchase of apartment VAK Park L.R 1/357 valued at Kshs 7 million also sourced from proceeds of sale of the suit property. His answer was that he did not know all this but insisted the property did not belong to the Defendant.
34. Prof. Nathan Kahara gave evidence as DW1 on behalf of the Defendant and said he is the Chairman of Umoja Developers that bought the Lenyton House. The other director is Dr. Rhoda Wairimu Kahara. The Defendant had joined the Petition for letters of administration and filed an application for revocation of grant on 7/11/2014 supported by affidavit. He relied on the affidavit and the annexed documents and the witness statement dated 25/11/2015 and filed on 1/12/2015 as part of evidence.
35. DW1 made a few points as a background on how they got to know about the sale of the suit property thus;
 1. That he was called by Dr. Rhoda Tipis Agents that there was a property on sale near his civil office (he was a Mayor). He took his wife to see the property.
 2. He met Rhoda Tipis wife of Ole Tipis who was Minister of State in the office of the President and Oletipis was his friend. She was happy to meet them as they were friends.
 3. When Rhodah Tipis died and they went for the funeral in Narok and the family thanked him for the support they had given them.
 4. After they saw the property, she referred him to Harit Sheth Advocates who was her lawyer. DW1 appointed the firm of Wangai Nyuthe Advocates whom they had dealt with as they put up 61 apartments in Westlands.
 5. They had executed a Joint Ventures with Siginond Enterprises and a sale Company Villa Care.
 6. He allowed Siginond Enterprises to sell his 4 apartments and also utilize the funds that was value of his property which was over Kshs.50million to be used to pay for the property in Lavington.
 7. He does not want to go in the transaction as the lawyers have testified in court.
 8. He knew the deceased daughter Serah Tipis who worked at Grand Regency when he was a member of the Summit club and he had helped her severally financially. She came one time and she asked him to give her money as her mother was sick. That he gave her Kshs.100,000/ = and told my lawyers that it was gift.
 9. He also paid hospital bills for Serah Tipis when she was admitted in hospital.



10. They had all the original title documents and his wife kept it and when they went to the house, his wife misplaced it. They must have been stolen.
11. The widow of the deceased gave him possession of the land and that is where they have lived for the last 11 years and have improved the house.
12. He paid the full purchase price and the deceased used the purchase money to buy apartment and tractors.
13. He was told that the original title deed was with an advocate called Chaudhry.
14. Serah Oletipis allegation that he entered the premises unlawfully is not true.
36. In cross-exam by Mr Juma advocate for the Plaintiff, DW1 stated that he was Mayor of the Nairobi City. He denied grabbing anyone's land as deposed by Serah in the Replying Affidavit of 17/2/2015. That he was privately prosecuted by his opponents and he won the case. The witness reiterated that the property was sold pursuant to the agreement of sale dated 29/5/2006 and he left the two (2) lawyers mine and for Mrs. Ole Tipis to handle the transaction.
37. He signed the agreement on behalf of Umoja Developers although he could not recall when he signed the agreement. That he signed on each page of the agreement and he can confirm that the agreement was sealed. The witness stated that Umoja Developers Ltd only had two (2) directors; himself and his wife and they passed resolution that they buy the suit land. That this case is not about Umoja Developers but whether Umoja Developers bought the land from Rhodah Tipis. DW1 asserted that in all the dates provided herein, he dealt with Rhodah Tipis and there were people who came as agents and they told him there was property being sold near his civil home.
38. When he went to see the property, he found the seller, Rhodah Tipis. He said in this court that he knew Hon. Ole Tipis himself but knew Rhodah Tipis from far. According to him, his lawyers and their lawyers confirmed they paid everything to the seller. That he paid Kshs.19 million. DW1 was referred special conditions (A) which stated that Completion shall take place on or before 15th September, 2006. It was his averment that what arises is whether money was paid and they discussed and agreed as per the lawyers. He was also shown the letter dated 11/4/2007 annexed to the affidavit of Anthony Wachira Advocate which read in part; "It shows the documents are sent strictly on understanding to obtain and forward to them the interest amount payable under the agreement – to be completed from 16th September, 2006 up to the date of clearance of the cheque sent with the letter."
39. He was also cross-examined on paragraph C of the special conditions which allowed the Defendant to claim refund of the money and said he had not claimed for refund. That the agreement was drawn by Harit Sheth Advocates and he received all the money purchase price of the land. That the Vendor moved out of the suit property in 2007 to an apartment they bought using the purchase price and he obtained possession. It is his testimony that he complied with Clause D of the special condition.
40. The witness reiterated that they were handed over the house after they paid the purchase price in full. The lawyers have come to the court and testified to confirm. When they went for the funeral of Mrs. Rhodah Ole Tipis, the family threatened him. That they would not have done so if he regularly entered the house. Harit Sheth signed an affidavit to corroborate that he paid for the house/property. They also paid the land rates/county council rates and it was after the payment of the purchase price that they lost the title deed.
41. DW1 contended that since they did not have the title deed and the plaintiffs paid the rates that does not make them owners. That the Plaintiffs have also not produced receipts for paying the rates and they are



- willing to refund the same. He filed the caveat when the title deed document was lost on 12/1/2007 and after he discovered that some people were selling their property. He also reported to the police but the police asked them if they knew of the people who sold the land but he does not have the O.B. That he filed the caveat to demonstrate that he had interest in the suit property and Rhodah Tipis knew the money was from the Westlands' property.
42. When they took the title deed from the lawyers, it took them time to raise funds for stamp duty. All this time they did not know the title deed was missing until they found out much later when it was reported to him that there were people who wanted to buy the property. His lawyer went to see Mr Chauthry advocate who said he returned the title document to the client but he did not disclose the name of the client. Prof Nathan was aware Rhodah Tipis was the registered owner. However, he did not know that during the transaction Rhodah Tipis was sick.
 43. In response to the dates of illness given in the letter from Nairobi Hospital, DW1 insisted that he met Mrs. Rhodah Tipis and they dealt with more than one lawyer. That when Rhodah left the house she called him. It was his averment that the joint venture agreement was between him, Umoja Developers, Westlands Pride and the Director Signond Enterprises. The value of his property was kshs.50m comprised in four (4) apartments and he allowed them to sell and part of the money was used to settle the purchase price for the suit property. Umoja Developers Ltd belonged to him and his wife while Signond Enterprises was owned by his brother.
 44. In re-exam, PW1 stated that he paid the full purchase price for the suit property and the advocates for the seller was there and confirmed payment of the full purchase price. He affirmed that the widow handed over the possession of the house. On the completion of the sale, the vendor did not take him to court for non-payment of the purchase price on time. It is his evidence that he was given completion documents and he reside in the said house.
 45. DW2 was RICHARD MUNDIA KARIUKI, an advocate of High Court of Kenya and a lecturer at University of Nairobi. He signed the 3rd supporting affidavit on 7/11/2024 and adopted its content together with his statement filed on 1/12/2015 as his evidence in chief. It is his evidence that he acted as advocate for the late Rhodah Tipis in the sale of her property in Lavington and the firm received the purchase price. That the transaction was completed and the purchaser took the possession of the suit property. It was sold Kshs.18million and It had been transferred before she died. It is not part of the estate of the deceased.
 46. In cross-exam, DW2 said he was instructed by Rhodah Tipis and he has attached the Sale Agreement of the suit property. She was their client and her late husband too. That the Sale Agreement was drawn by their firm; the deceased signed the agreement and the instructions were verbal. Dw2 stated that he knows the fees was paid from the purchase price but he could not recall as it is a long time and it ought to be according to the Remuneration Order. The Agreement shows that the deceased Rhodah signed the Agreement in his office. The full purchase price was Kshs.18,000,000 paid in bits but finally we received the full amount. It must have been paid in form of cheques.
 47. Dw2 was recalled and he reiterated that he represented the family in that transaction and their law firm represented the deceased's family for obtaining a grant before they left for another law firm. That the family member would come to his office and instruct him. The witness said they released the title to the Defendant's advocate. The terms of Sale Agreement were as per the Sale Agreement produced and the sale was with regard to L.R 3734/240. That the original agreement for sale of 29th of May, 2006 was assessed with the revenue stamp and it stated the completion date as 15th September, 2006.



48. That the Agreement took longer than necessary and the Plaintiffs did not covenant to the extension but by conduct extended time. DW2 asserted that he collected the money on her behalf of the deceased and her children. He averred that Mrs. Rhodah Tipis sent her children and asked him to verbally to pay the monies to her. He also stated that he had the Agency Agreement where Mrs. Rodah Tipis ID card was not indicated and he amended it by hand. He insisted that the court that the amendments were made when they were presented before him but nothing in the document confirms.
49. The witness said the payment does not show the cheque number but 3% of Kshs.18 million sale price is Kshs.540,000/= which was paid for them. "RMK 2" as shown in annex bundle of document of 22/3/2016. They banked the cheque in Victoria Bank but they did not keep copies and there is no copy of the cheque produced forwarding the cheque. That they received a letter forwarding a cheque.
50. He has annexed acknowledged Kshs.100,000/= from Harit Sheth Advocates/Client Account in the firm's account. That they saw the account clerk to the bank to collect the amount but he did not annex such document as they were not relevant. Asked about Eric Tipis receiving Kshs.400,000/= and it is signed for. He avers they dealt with them as family and were not as strangers at arm's length. That they were accountable for the money received and paid off.
51. The booklet page 22 shows payment of 50% paid kshs.250,000/= did not have the record of confirmation of payment neither any acknowledgement from Cheroti/Etole Advocates. He added that on 9/6/2006 Eric Tipis collected Kshs.300,000/= and it is the same day we paid Cheloti and Etole. We stamped it on the back. The witness also referred to the "RMK5" (Page 5) which gave Reference Sale of L.R 3734/20 Nairobi. They were instructed by Mrs. Rhoda Tipis to pay Kshs.1,050,000/= and the original. If there are documents sent to him, he had originals but the others are copies on white paper.
52. DW 2 said gave the title documents to the purchaser's advocate and the agent came with Rhoda Tipis. He did not have written instructions. He only dealt with this transaction and she bought the apartments in the 2nd file. Although he does not have any written documents to authorize him to deal with sale of land reference 3734/240, he maintained they were properly instructed. They released it to the purchaser's advocate and I showed the letter forwarding this.
53. In re-examination, DW 2 reiterated that in the agreement for sale he acted for Rhodah Tipis and she signed the agreement. That means she instructed me. From 4/4/2003 to date we have not heard any proceedings against the law firm or anyone who has claimed nonpayment of this amount to date. He disbursed the payments to the family members as instructed by the deceased. DW 2 asserted that the entire purchase price was fully paid to their law firm though it took long. There is no claim of how we distributed the money.
54. Mr. Antony Wachira gave testimony as DW 3 and introduced himself as an Advocate of High Court of Kenya and the partner in charge of Conveyancing Department at Wangai Nyuthe & Co. Advocates. He swore an affidavit of 26/5/2016 where he annexed the copies of cheques that he managed to trace from his file on payment of the purchase price. The chequesgive a total of Kshs.17,500,000/= and that he did not manage to trace the cheque for the sum of kshs.500,000/=.
55. DW 3 confirmed that they paid a total sum of Kshs.18 million despite the cheque amount of Kshs.500,000/= cannot be traced.
56. During the hearing counsel for the estate of Ole Tipis cross-examined him on how cheque issued by different entities came to be; among them Westlands Pride Ltd as well as Villa Care Limited with respect to payment of the purchase price. in answer to Paragraph 5, I attached Joint Venture Agreements as "AW 10" & "AW 11" of his affidavit where he has Agreement between Nathan Kahara Vs Siginond Enterprises Ltd and relates to construction of apartments of L.R 5147 which was a joint venture.



57. The agreement signed between Nathan Kahara and Siginold Enterprises Ltd and Westlands Pride Limited relating to the same property L.R 5147 Waiyaki. In the said agreement (annexed as AW 11) at paragraph 10 it authorized the sale of the 4 units of the joint venture and the use for the funds were to purchase a dwelling house. Westlands pride which endorsed the drafter as sum not exceeding Kshs.15 million for purposes of purchasing the house.
58. From the annexed cheques to the affidavit, the 1st cheque of 23/5/2006 “AW – 9” the cheque is for 3.6 million sorting after for the apartments. “AW 6” cheque of 5/9/2006 of 2,750,000/= . “AW 7” cheque of 30/10/2006 of 2,750,000/= . “AW 5” cheque of 23/11/2006 of 1,000,000/= were drawn by Westlands Limited. “AW 3” cheque of 13/4/2007 of 900,000/= issued by Villa Care Management Ltd. This is how the relationship between the parties to inform the source of funds.
59. There were other cheques that came from our office. Exhibit “AW 8” Kshs.1,000,000/= - “AW 8”. Exhibit AW Kshs.4,000,000/= “AW 2” all cheques were issued in the name of Harit Sheth Advocates – representing the vendor on the transaction. DW 3 affirmed receipt of the full documents to wit;
- i. Title deed
 - ii. Rates clearance certificate
 - iii. Receipts
 - iv. Bills with respect to rates
60. Thereafter on 12/4/2007 he received transfer a of property document duly signed by the deceased. That their client was granted possession awaiting registration of the property. The witness stated he did not manage the transfer from the vendor/deceased to the new owner because his client advised them to hold registration in abeyance to allow him mobilize funds to pay for stamp duty. That they kept the transfer and original title in their custody until August, 2009 when their clients director Mr. Nathan Kahara requested him to release the same to him.
61. Later, DW 1 called on 5/5/2010 there were people/persons on the property claiming to have bought the property. It is then he learnt his clients lost the title and it landed in the hands of fraudsters. He asked for the advocates for the purported purchasers and he got the name of Chaudrey & Company Advocates. DW 3 said he personally went to the offices of Chaudrey Advocates with this file and met Mr. Chaudrey and I upon perusing the documents he had including the original title that was in his possession. He advised him that there was fraud about to take place and he should not release the title.
62. Mr Wachira continued on 11/7/2014 he received a letter from Maucho & Co. Advocates acting for the estate of the deceased reporting the Defendant received the property L.R 3734/240. On 22/7/2014 he did go to the said firm and annexed evidence thereto that our client was a bonafide purchaser in lawful occupation of the property. He also called Mr. Kariuki of Harit Sheth Advocates who through their letter of 27/8/2014 also advised the firm of Maucho & Co. Advocates that indeed they acted for the Seller and full purchase price was paid. DW 3 also relied on his further affidavit of 26/5/2018 and his earlier affidavit/statement.
63. In cross-examination, DW 3 stated he had dealt with Harit Sheth Advocates in several transactions and in 2006/2007 this is the only matter we handled with Harit Sheth Advocates. The transaction relates to the agreement of 2006 after payment and clearance of cheques that they paid on 23/4/2006 - 29/5/2006 when the agreement was drafted.
64. He said they did a search and obtained a copy of the title and he inspected both. before they started the process. He did not meet the deceased at any point and only dealt with his client and forwarded the



- payments of purchase price (as is the time in conveyancing matter once the deposit is released and paid one put the caveat). The completion date was 15/9/2006 but and they completed payment in April, 2007. DW 3 answered that his client was engaged in the construction business and he called them to wait for him to mobilize funds for payment of stamp duty.
65. The purchase price was Kshs.18 million and the cheques produced are kshs.17,500,000/=. That they paid a cheque of 500,000/= which he could not trace. He referred to the affidavit of Richard Mundia Kariuki of 17/3/2016; at paragraph 11 which states that Mr. Kariuki confirmed receipt of full purchase price of the property when he released the documents for the completion of the transactions.
 66. As per the agreement of 12th June, 2006 “AW 11”, the project had already started. The Joint Ventures commenced in 2005 and they started by selling off plan apartments while the construction started in 2005 but the developments were not complete. That he would be breaching client/advocates confidentiality to bring those agreements/transactions where they are not involved. He affirmed visiting the law firm of Chudrey Advocates and the title deed he saw was the same one he had given the client which got lost. He was not with the Defendant at Chudrey Advocates law firm and his client did not confirm the title deed was lost until thus dispute arose. They had received the title deed from Harit Sheth after they paid the purchase price in full.
 67. The document examiner engaged by the Defendant Mr Antipas Nyanjwa was the fourth witness. He stated that he was instructed by the firm of Wangai Nyuthe & Co Advocates to examine the sale agreement dated 29th May 2006 and transfer of land form dated 2007. Dw4 said he was able to get relevant documents to compare with the disputed signatures. He prepared a report which he produced and concluded that the sale agreement was not a forgery.
 68. In cross-exam, Dw4 said he has indicated the documents which were given to him in his report. He affirmed that the letter of instruction dated 3rd August 2016 did not refer to the disputed and known documents but he clarified that paragraph had listed the disputed documents. He did not remember if he had recanted a report printed due to misinterpretation. In re-exam, the witness stated that he has indicated the documents with contested signatures. This marked the close of the Defendant’s case.

Submissions:

69. The parties filed their respective submissions. The plaintiff raised six (6) issues which they submitted on and the two main ones are;
 - a. Whether Rhoda Tipis entered into sale agreement dated 29th May, 2006 and the undated transfer as to be valid and legal.
 - b. Whether the Defendant’s claim is based on fraud.
70. It is their argument that there was never a sale. They relied on the letter dated 6th November, 2018 from Nairobi Hospital which confirmed that at the material time, (29th May, 2006) the deceased was ailing and sickly admitted under ICU. That it is impossible for a person who needed urgent medical attention to have negotiated and signed the sale agreement.
71. They analyzed the evidence of Richard Karuiki who gave evidence on behalf of the Defendant. That the said witness stated that “he did not have instructions nor did he have any documents authorizing him to deal with the sale of L.R 3734/240”. That this admission coupled with evidence from the hospital and the forensic report all confirm the deceased did not sign the sale agreement.
72. The plaintiffs submitted that the agreement was part of the web of fraud executed by the Defendant. They itemized examples such as the allegation of Daniel Sankale Tipis receiving Kshs.200,000 when



copies of his passport confirm that he was in Australia at the time the money was alleged to have been paid. According to the plaintiffs, all the documents presented by the Defendant are based on fraud & deceit.

73. On a without prejudice basis, the plaintiffs submit that the Defendant did not comply with the terms of the impugned sale agreement. For instance, the completion was provided to take place on 15th September, 2006. However, DW1 admitted that they did not pay by the said date. That there was no addendum signed which extended time.
74. The plaintiff argued that there was no evidence of payment made by the Defendant as proceeds of sale of the subject property. They averred that the copies of cheques produced in evidence were from other legal entities other than the Defendant i.e from Villa Care Management Ltd. Further, that no evidence was presented to prove the cheques were honoured or that the Defendant paid the total sum of Kshs.18,000,000.
75. On the question of general damages, the plaintiffs submitted that they have shown the Defendant is on the suit property illegally so they are entitled to damages. They quoted Ogotu Mboya J. in *Muranga Road Motor Mart Ltd Vs. Rock Ville Junior Academy Ltd ELC 1382 of 2016* who held thus;
- “It is instructive to note that there is no mathematical formula established in calculating and assessing an award of general damages. Notwithstanding the foregoing, it is incumbent upon the Court to take cognizance of the size of the land and extent of the trespass, the location as well as the general circumstances relating to the conduct of the parties. I am minded to award general damages in the sum of Kshs.10,000,000/=.”
76. They urged the court to also grant them mesne profits and eviction orders together with costs of the suit.
77. The Defendant in its written submissions dated 11th March, 2024 began by outlining the pleadings relied upon and the evidence adduced in support of their defence and counter-claim. The Defendant submitted that the evidence led by their witnesses confirm that they purchased the suit property during the life time of Rhoda Tipis and paid the purchase price in full.
78. In response to the conflicting forensic reports, the defendant submitted on the finding in the case of Teresia Kamene Kingoo vs. Harun Edward Mwangi & Another (2013) eKLR which held that the court can decide to rely on either of the reports or decline to adopt any. They averred that the forensic report by their witness Antipas Nyanjwas was the credible one.
79. That besides the forensic report, they had provided ample evidence that they had purchased the suit property. It is their contention that the plaintiffs included the suit property in the estate of Rhoda Tipis. They cited the case of Omar Awadh Mbarak Vs. Freedom Limited Civil Appeal No. E028 of 2022 where the Court of Appeal held that;

“All titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin, that possession is nine tenths ownership; and that the slightest amounts of possession would be sufficient.”

Determination:

80. I have analysed the pleadings, the evidence and the submissions rendered. I framed these questions in determination of the dispute;
- a. Who is the legal owner of the suit property?



- b. Who is entitled to receive the reliefs sort in their respective claims?
81. There is no dispute that the deceased Rhoda Tipis is the registered owner of the suit property while possession is in the hands of the Defendant. The dispute revolves around the execution of the sale agreement dated 29th May, 2006 and if any monies was paid towards purchasing the suit property. At the material time, the property was registered in the name of Rhoda Tipis – deceased. The Defendant contends the property was sold to it; paid the purchase in full and was granted possession. However, after receiving the completion documents, it never registered the transfer because the original title mysteriously got lost while the Defendant was organizing for money for Special Duty.
82. Section 3(3) of the [Law of Contract Act](#) Cap 23 provides thus;
- No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
- Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the [Auctioneers Act](#) (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”
83. In this instant, the agreement was in writing and signed except it is disputed that the signature of the Vendor appearing in the impugned agreement belonged to Rhoda Tipis. Section 107 of the [Evidence Act](#) Cap 80 states that;
- “1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
84. In stating that the deceased never signed the impugned agreement, the plaintiff relies on the letter from Nairobi Hospital which stated that the deceased was admitted in hospital at the time of signing the agreement and the forensic report of John Muinde which found that the signatures in the agreement did not match the known signatures of the Rhoda Tipis-deceased. In the alternative, the Plaintiffs aver that there was no evidence of payment of the agreed purchase price and on time. They relied on the bank statements from KCB bank which according to them showed no evidence of payment of the entire purchase price.
85. In the transaction, each of the parties had their respective advocates with the Vendor represented by the firm of Harit Sheth & Co Advocates. The signature of the vendor on agreement was signed on 29th May, 2006 in the presence of R. M. Kariuki advocate. The Vendor was also initiated in every page of the agreement. The question that would arise is whether someone impersonated the vendor in light of the letter dated 6th November, 2018 from Nairobi hospital which indicated the deceased was admitted at the said hospital on the dates of 30th May, 2006 to 1st July, 2006, 26th April, 2007 to 7th May, 2007 and 23rd June, 2007 to 24th July, 2007. The deceased died on 24th July, 2007.



86. This letter on its face confirm that the period when the Deceased is said to have signed the agreement, she was hospitalized. Mr Kariuki advocate in his evidence stated that the deceased were their regular clients and so he did not deal with her as a stranger. This fact is confirmed by the evidence of the Plaintiff that Harit Sheth & their mother were the executors of their late father's will. It is the said firm who filed the petition for grant of letters of administration in the estate of Rhoda Tipis before the said representatives change counsel. Would counsel (r Richard Kariuki) lie in stating that he was instructed by the deceased in this transaction while the deceased was hospitalized?
87. The Plaintiffs did not impute any bad faith on the said law firm and there is no evidence that they lodged a complaint against them either in court or with the Law Society of Kenya in regard to the sale of the suit property. Are there holes as regards the ability of the deceased to sign the agreement? In cross-exam PW1 could not explain how their mother who was admitted in hospital attended the bank on 14th June 2006 and made a withdrawal of some Kshs 40000.
88. Mr Kariuki whose evidence was converted to DW2 also referred to agent's agreement which he admitted did not bear the ID number of the deceased and which number he inserted in hand. The agent's agreement was dated 4th April 2006 entered between the deceased and Lawrence Ngila Mosa and on the face of it, the same counsel witnessed the signatures of the parties thereto. Other than questioning the insertion of the ID number of the deceased, I did not find any other issues raised by the Plaintiffs regarding the validity of this document. This agreement's purpose expressed the intention of the registered owner of L.R 3734/240 to sell and she commissioned the agent to sell it on her behalf.
89. I pick a few pointers from this agreement; first the intention to sell was expressed approx. two months before the deceased "admission" into Nairobi hospital. Secondly, it explains the clause of payment of the deposit of Kshs 3.6million prior to the execution of the sale agreement. Thirdly, the first defence evidence stated that he learnt the house was on sale from an agent. I am alive to the case law in National Bank of Kenya vs Pipe Plastics Samkolit limited & another (2002) EA 503 that courts donot rewrite contracts between parties but enforce them. Where such a contract is disputed then external factors come into play in determining the intention of parties.
90. Further, although the Plaintiffs evidence is that the deceased was unwell and could not have signed the agreement and indeed proceeded to present forensic expert report that the signatures were not hers, there is a cheque payment of Kshs 785000 which was personally picked by the deceased from the law firm of Harit Sheth towards payment of the purchase price. The said cheque was deposited in her account as shown in the bank statements produced. PW1 attempted to distinguish this payment that it was a loan but did not provide any supporting documents of the deceased applying for a loan within the questioned period.
91. Although the statement doesnot record it as bankers cheque, the date of deposit coincides or is closer to the date when it was received by the Rhodah-deceased. This acknowledgment form was not presented to PW2 for verification of signature of the deceased. The form also mentions the monies received were proceeds from the sale of the property L.R. No 3734/240 and so if she had not signed the contested sale agreement then she would have not received the funds from her advocates.
92. The Defendant produced a forensic expert report by Antipas Nyanjwa which confirmed that the signatures on the sale agreement belonged to Rhodh-deceased. PW2 averred that Antipas Nyanjwa was a private document examiner implying that the report may be biased. I am persuaded to go by the case of Teresia Kamene Kingoo Versus Edward Mwangi & Ano (2013)Eklr which held that where a court is confronted by two conflicting expert reports, the court can chose to rely on one or reject them all.



- In this case, the evidence I have cited is corroborated by the report of Antipas Nyanjwa that indeed the deceased signed the sale agreement dated 29th May, 2006 and that is my holding.
93. The second issue on the sale of the suit property is whether or not there was any purchase price paid and if it was paid in full. The agreement stated that a deposit of Kshs.3,600,000 was paid before execution of the agreement. The mode of payment of the balance was indicated that it was to be deposited with the Vendor's advocate in clause B of the special conditions. The completion date was put at 15th September, 2006 (clause A).
 94. Mr. Richard Mundia Kariuki who was the advocate for the vendor in the transaction said the purchase price was paid in full to their firm and the purchaser granted possession. He stated that the agreement was not completed in time but by conduct of his client, time was extended. The witness averred that he received proceeds of the sale on behalf of the deceased and her children. He asserted that the monies were paid out and expended as instructed by the deceased.
 95. The Defendant produced copies of cheques issued to Harit Sheth Advocates on various dates inter alia on 12th March, 2007 for Kshs.4 million, 13th April, 2007, for Kshs 900000 29th June, 2006 for Kshs.1.5 million and Kshs.2,750,000 dated 15th October, 2006. The copies of cheques produced total to the sum of Kshs 17,500,000. DW3 said the whole amount of Kshs 18million was paid although he could not trace the cheque payment of Kshs 500000.
 96. Further in explaining why there was no cheque issued by the defendant towards the purchase price, both DW1 and Dw3 relied on the joint venture agreement dated 29th November, 2005 and 12th June 2006. Paragraph B of the joint venture stated the Developer (Nathan Kahara) was the registered owner of LR 5/47, Waiyaki way Nairobi which he agreed to develop with Sigimo Enterprises Ltd. He was to be paid a consideration of Kshs 50 million as the parties undertook the development jointly and share profits equally. DW1 explained that him and his wife were the directors of Umoja Developers Ltd (the Defendant).
 97. He further explained his relationship with Westlands Pride and Villa Care with the latter being contracted in sale of the apartments. Copies of the joint venture agreements were produced thus explaining the sources of funds used to purchase the suit property. The companies who issued the cheques have also not come to claim the suit property.
 98. As proof of disbursements to the deceased, several documents were relied upon. Some of them have not been contradicted by production of any contrary evidence. There is a payment of a cheque for Kshs.303,410 forwarded to the deceased vide a letter dated 17th April, 2007. In the bank statement produced by the plaintiffs at page 6 of 8 confirms a cheque deposit of Kshs.303,410 which was cleared.
 99. DW 2 stated that Rhoda Tipis and her family were their clients even on other matters. That they dealt with them as family and not as strangers. One of the contentious payment is to Daniel Sankale Tipis for Kshs.200,000/= on 2nd March 2007. The Plaintiffs posit that at the time of the alleged payment, the said Daniel was out of the country. I have perused a copy of the passport of Daniel produced vide a list dated 16th January 2023 and note that the passport page bears the following stamps: exit Kenya on 17.2.2003; departed Australia on 18th February 2007; arrived Australia 23.3.2007; departed 31.7.2007; JKIA 23.8.2007.
 100. It appears that David left Australia on 18th February and returned on 23rd March 2007 (reads Melbourne Airport). We are not told where he went after leaving Australia the page indicating arrival stamp was not presented neither where he departed from to return on the 23rd March, 2007. Since the



Plaintiff intended to rely on his absence in the country on 2nd March 2007, the burden was heavy on them to discharge. The passport page produced does not lift that burden.

101. Further, there is a letter produced dated 17th June, 2006 is a letter addressed to Rodah Tipis – Deceased stating:

“RE: SALE OF L.R. NO. 3734/240

Yourself Vs. Umoja Developers

Please find enclosed banker’s cheque No. 057161 for Kshs.1,280,000/= drawn in favour of Mohamed Shaqir as per your instructions to us. Kshs. 52,460 was paid to cover max Insurance Brokers ltd.”

102. Another letter dated 14th July, 2006 also forwarded Kshs.1,280,000 to Mohamed Shaqir and Kshs.52,460 to Cover Max Insurance Brokers Ltd. There was also a letter forwarding a cheque of Kshs.300,000/= to a Mr. Daniel Callery on behalf of the deceased. A similar payment was made to SBM East Africa Ltd for the sum of Kshs.2,155,000 by Harit Sheth on behalf of the deceased. This cheque (to SBM) was received by Rhoda alongside a bankers cheque in her favour for Kshs.785,000 and cash of kshs.60,000/= on 10th January, 2007.

(Page 28 of the bundle).

103. The bank statement of the deceased produced shows a deposit for a cheque of kshs.785,000 which was cleared (page 26 of Supplementary bundle). I also noted the contents of a letter dated 13th September, 2006 drawn by the deceased and copied to Harit Sheth Advocates. In part the letter reads thus;

“ORDER FOR MASSEY FERGUSON TRACTOR...

By a copy of this letter

My advocates Harit Sheth are authorized to remit to you the said total sum of Kshs.2,165,000 upon conclusion of the sale, transaction of my Nairobi property L.R 3740/240 Nairobi in which they acting for me and which is expected to be concluded within the next one month.”

104. These letters if time on their contents exhibits that not all proceeds from the sale transaction would have passed through the bank account of the deceased. I have considered the forensic report of John Muinde S.P which states that what was presented for examination was the signatures on the impugned transfers and sale agreement with known signatures. PW 1 (Serah Shiloo) on her evidence admitted that Harit Sheth Advocates was the deceased family lawyer.
105. In view of the documents produced and in lieu of the evidence of Richard Kariuki and Antony Wachira who are the advocates who undertook the transaction on behalf of the parties, I am satisfied that the deceased received monies towards sale of the suit property. it is immaterial that some of the cheques presented were not issued by the Defendant. The sale agreement stated the balance was to be paid to the Vendor’s advocate. How the money was sourced was the obligation of the purchaser and which it accomplished.
106. Was the purchaser granted possession? There is no dispute that representative of the purchaser are in possession of the suit property. PW 1 said that while he was taking a walk in Lavington, she saw the gate open and Prof. Kahara in the property. PW 1 does not tell us what happened when that mother moved into the Kilimani Apartment near Nairobi Hospital. She did not state if there was any breakage that allowed the Defendant’s representative entry.



107. This was a family property where they lived. It must have been cherished and going by its value in 2006 at Kshs.18 million means it was an upmarket property. This court wonders whether it would been left unattended to the extent that some moves in and live in it without the knowledge of the deceased and her family. I am persuaded by the Defendants evidence that possession was given to it legally.
108. It is difficult for me to find that the signature of the deceased on the sale agreement was forged. I say so because she could not have corresponded with her advocates Harit Sheth post 29th May, 2006 talking about the sale of the suit property and how the monies were to be disbursed. If there was no sale, the plaintiff ought to have called the people paid were made to say those monies were never paid.
109. The allegation of other sources of income of the deceased from which the monies may have been received from were never supported by any evidence. PW 1 also received some of these payments on behalf of the deceased. Although she denied the signatures on the acknowledgment forms, there was no forensic expert report to corroborate her assertion. It is my considered opinion that they changed their mind upon the demise of their mother who sold the suit property.
110. Consequently, I hold that the evidence presented by the plaintiff is weak to sustain their case. I find the claim not proved and dismiss it with costs. On the other hand, I find the Defendant has proved that it bought the suit property, paid for it and was granted possession. They are entitled to full ownership and quite enjoyment.
111. In conclusion, judgement is entered for the Defendant as per the counter-claim as follows;
- i. A declaration that the Defendant is the bonafide purchaser of Land Reference Number 3734/240 having purchased the same from Rhodah Tipis (now deceased).
 - ii. An order compelling the plaintiffs to immediately surrender provisional certificate of Title I.R 11161, Land Reference Number 3734/240 to the Defendant.
 - iii. An order compelling the plaintiffs as administartors of the estate of Rhodah Tipis-deceased to execute the relevant transfer documents of Land Reference Number 3734/240 to the Defendant within Thirty (30) days of this judgement. In default the Deputy Registrar of this Honourable Court do sign the relevant documents in their stead.
 - iv. Costs.

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

A. OMOLLO

JUDGE

