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Case Class:	Civil
Court:	Environment and Land Court at Kitale
Case Action:	Judgment
Judge:	Fred Ongarora Nyagaka
Citation:	Eunice Nasipondi Mwasi v Mary Moraa Mwasi & another [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Trans Nzoia
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
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Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KITALE

ELC NO. 22 OF 2020

EUNICE NASIPONDI MWASI (SUING AS THE PERSONAL REPRESENTATIVE OF THE

ESTATE OF PAUL MONG'ARE MWASI (DECEASED).....PLAINTIFF

VERSUS

MARY MORAA MWASI.....1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION.....2ND DEFENDANT

JUDGEMENT

1. In life, some situations and behaviours of some people are abhorrent and extremely painful. One such is where a mother loses her son who to her is the only one among many who is the light of her home. Again, in such circumstances, it turns out that the deceased son had a loving wife who is left a widow at an early stage in life to take care of children who have to face a life of disorientation while also fighting a strange battle soon after the death of their father. This seems to be fate of the case before me: of a mother of a deceased son, one **Paul Mong'are Mwasi**, pitted against her daughter-in-law, the Plaintiff herein, over the property acquired by the deceased and the Plaintiff respectively for a matrimonial home while the orphaned children watch. How this Court wishes one or both of the parties herein came to their senses and did the right thing!

2. The suit before this court was initiated by way of a Plaint dated **25/03/2020** and filed on **26/03/2020**. It sought the following reliefs:

(a) **A declaration that the Plaintiff is the lawful and/or legal owner of all that parcel of land known as SINYERERE/SITATUNGA BLOCK 7 CHEPKOIYO/230 and the 1st Defendant is holding the same in trust for the Plaintiff;**

(b) **A permanent injunction do issue against the Defendants, their agents, servants and whosoever claims under them or any other person exercising authority from them from selling, disposing off, further charging, alienating and/or in any other manner dealing and/or interfering with the Plaintiff's use, occupation and quiet possession of the parcel of land known as SINYERERE/SITATUNGA BLOCK 7 CHEPKOIYO/230;**

(c) **A mandatory order do issue compelling the Defendants to forthwith discharge and transfer the suit land to the names of the Plaintiff at their cost failure the Deputy Registrar do execute the requisite documents for an effective transfer in favor of the Plaintiff;**

(d) **Costs of the suit;**

(e) **Any other relief that this Honorable Court may deem fit under the circumstances.**

3. The suit was defended vehemently. The 2nd Defendant entered appearance on **19/06/2020** and filed its statement of Defence on the same day. The 1st Defendant appointed her firm of Advocates on **02/07/2020** and subsequently filed her statement of Defence on

21/07/2020.

4. After close of pleadings, hearing proceeded by way of *viva voce* evidence. But before the hearing could commence, the parties recorded a consent through which the Plaintiff withdrew the case against the 2nd Defendant in its entirety. The background to the consent was that it was common knowledge that after the 1st Defendant got herself registered as the proprietor of the parcel of land in dispute herein, she charged it to the 2nd Defendant. By the time the suit was being heard, the 1st Defendant had paid the entire loan to the 2nd Defendant except legal fees, and the said Defendant was ready to discharge the parcel of land. Thus, to the parties, there was no need to keep the 2nd Defendant in the proceedings and go on incurring costs over nothing.

THE PLAINTIFF'S CASE

5. At the hearing, the Plaintiff called **five (5)** witnesses, besides her, in a bid to establish her case. She testified as **PW1**. Her evidence was that she was the daughter-in-law to the 1st Defendant. This fact the 1st Defendant did not deny. **PW1's** further evidence was that she had been married to **Paul Mong'are Mwasi**, the 1st Defendant's son, who died on **27/08/2019**. This was **seven (7)** months before the suit was brought. She produced in evidence their Marriage Certificate as **P. Exhibit 2**, evincing that their wedding took place at St George's ACK Church. Their union was blessed with **three (3) issues**. She produced their Birth Certificates as **P. Exhibit 3 (a), (b) and (c)**.

6. She also produced as **P. Exhibit 1** the Death Certificate to evidence the demise of her husband, **Paul Mong'are Mwasi**. She testified that upon his death, **PW1** successfully obtained authority to manage and administer the estate of the deceased. This was through the issuance of a Grant of Letters of Administration issued in her favor on **19/03/2019** in **Kitale HC Succession Cause No. 15 of 2020**. The Grant was produced and marked as **P. Exhibit 4**.

7. It was **PW1's** evidence that her late husband purchased a **five (5) acre** parcel of land in **1994**. She produced an Agreement of Sale dated **13/10/1994**, as **P. Exhibit 5** to support this fact. A perusal of the sale agreement shows that the said **Paul Mong'are Mwasi** (now deceased) purchased **five (5)** acres of land from **John Kimutai Barwo**, the vendor, (also now deceased) situate in **Chepkoiyo Farm** being part of Plot No. **54** originally Plot No. **36**. In terms of the consideration, the parcel of land was to cost Kenya Shillings **Two Hundred and Twenty-Five Thousand (Kshs. 225,000/=)** only. On the date of the agreement, the deceased paid **Kshs. 180,000.00** with a balance of **Kshs. 45,000.00** to be paid on **30/11/1994**. The 1st Defendant was amongst the witnesses who attested to the deceased's signature in and the document as a whole. Her evidence was that whereas she traveled with the deceased to the 1st Defendant's home on that particular day, **PW1** did not attest to the agreement. Her explanation, which was again not disputed by the 1st Defendant was that the deceased son's car which his parents and witnesses used to go to where the agreement was to be executed was full, and culturally show would not squeeze in the same car with her father-in-law. Thus, she was left at home. She was not present during its execution.

8. **PW1** testified further that the title was not instantaneously processed because the vendor's parcel had not been surveyed. Again, she stated that as at the time of the deceased's death, the title was yet to be issued in his favor or to his estate.

9. **PW1's** testified that the 1st Defendant was invited by her late husband and herself to reside on the property as a caretaker from **1995** up to **2005** when the deceased took over control and management of the property. Upon taking over, **PW1** and her late husband begun cultivating on the parcel of land. Her evidence was that at the time of purchase of the parcel of land, **PW1** and the deceased took possession of the property and erected a small structure and store.

10. **PW1** informed the court that sometime in **June 2019**, the deceased who was a member of the disciplined forces of Kenya had gone for a training course in relation to his job. It was at that time that they discovered that the 1st Defendant had registered the subject title in her favor as the proprietor of the same clandestinely. Her evidence was that the 1st Defendant obtained a loan from the 2nd Defendant by surrendering the said title as security. This was regardless of the fact that the deceased had constructed their matrimonial home in that parcel of land which construction commenced in **2013** and was completed in **2019**. For this presupposition she produced a photograph of the house and marked it as **P. Exhibit 8**. **PW1** testified that the issue remained unresolved since the deceased died **two (2)** months later. He was buried on the said property.

11. **PW1** proceeded to interrogate the findings of title registered in favor of the 1st Defendant. A Certificate of Official Search dated **10/07/2020** and produced as **P. Exhibit 6** revealed, to her utter dismay, that the property was registered as **SINYERERE/SITATUNGA BLOCK 7/CHEPKOIYO/230** in the 1st Defendant's name. The title deed was issued on

31/03/2010. It was her evidence that the title was obtained by fraud.

12. Later on, the **1st** Defendant called **PW1** for a meeting and informed her that she wanted the subject parcel of land divided into **two (2)** equal portions. In attendance of the said meeting, held in Mwanzo Academy in Cherangani, were **Livingston Angwenyi, Isaiah Ondimu** and **Pamella Kerubo**, the **1st** Defendant's children. It was the **1st** Defendant's desire to have proprietorship over one portion of the property once divided.

13. Following the discovery stemming from the search results, **PW1** lodged a complaint with the Assistant County Commissioner's office at Kitale East in Kaplamai Division. The parties to the dispute, namely the Plaintiff and the **1st** Defendant, were summoned on **28/02/2020** to attempt an amicable resolve. However, the same bore no fruit. **PW4** would testify later that the **1st** Defendant wanted, in the said meeting, to be given a *matatu* vehicle owned by the **PW1** and a home in Nakuru-Njoro in exchange for her claim over the property. **PW1** testified further that the **1st** Defendant promised to transfer the title back to the Plaintiff at her own cost in September **2019** but failed to do so.

14. It appears that the relationship between the Plaintiff and the **1st** Defendant was filled with acrimony, spite and scorn following the meeting. According to **PW1**, the **1st** Defendant descended on the property and planted grass, destroyed the iron sheets and the concrete to the cowshed and chased away **PW1's** workers or caretakers. She produced photographs of the damage and marked them as **P. Exhibit 9 (a), (b), (c) and (d)**. Her evidence was that she reported the matter to Kachibora Police Station but did not pursue the same for reasons of family relations.

15. **PW1** maintained that the deceased was the rightful owner of the subject parcel of land. She stated that because he was in and out of the country, he was unable to finalize the process of acquisition of title in his name and death robbed him of this action. She particularized the activities of the deceased and produced his credentials, documented activities, certificates and trainings in evidence as **P. Exhibit 10 (a) - (f)** to show his busy schedule.

16. **PW1** denied that the deceased authorized the change of ownership of the parcel of land. She challenged the existence of another sale agreement relied on by the **1st** Defendant, and produced as **D. Exhibit 3**, in that it had no appended signature of the **deceased** and **Samuel Kibet Barwo**. She further accused the **1st** Defendant of forging **PW2's** signature. She further raised suspicion with the handwritings on the document as different. She questioned the handwriting on the document purporting to authorize an Advocate to transfer the property in favor of the **1st** Defendant. She stated that had he wanted to do so, he should have informed her as his wife since they were in good terms all along. She dismissed the **1st** Defendant's allegation that Chepkoiyo Farm Company Limited Committee (since disbanded due to fraud) had any authority to sell the land. It was her evidence that the said Committee's role was restricted to registering purchasers who had bought parcels of land from owners therein. They were not authorized to sell or allocate land. She urged this Court to find the suit merited and grant the prayers sought.

17. **PW2, Paul Rono**, testified that he knew in person the Plaintiff, the deceased and the **1st** Defendant. His evidence was that the deceased approached him seeking his assistance to purchase a parcel of land. He informed him that his sister **Rosa** had sold **twenty-three (23)** acres of her parcel of land to one **John Kimutai Barwo** who wished to sell part of it. He introduced the deceased to the said John Kimutai Barwo who later sold the **five (5)** acres of the same to the deceased. He confirmed that he attested the sale agreement the deceased entered with the vendor in **1994** at the Chief's office in Kipsaria. He testified further that the deceased's father, the **1st** Defendant, the vendor's son, Samwel Kibet Barwo, the vendor and the village elders were all present. He confirmed that a sum of **Kshs. 180,000.00** was disbursed to the favor of the vendor. After that, the deceased took possession in **1994** and built a structure. His evidence was that the **1st** Defendant was however allowed to cultivate on the said parcel of land.

18. **PW2** denied having executed another agreement, the one the **1st** Defendant purported to rely on as being between herself and the vendor. He noted that the same was not attested to by the relevant parties. He dismissed it as not genuine. He testified that the Chepkoiyo Farm Company Limited committee's jurisdiction was only limited to registration of members and were not permitted to issue titles. He stated that the deceased never informed him that he intended to transfer the said title to the **1st** Defendant's favor.

19. Finally, **PW2** confirmed that the John Kimutai Barwo donated Power of Attorney to him to be in charge of his land measuring **23** acres situate in Chepkoiyo Farm. The Power of Attorney authorized him to participate in the survey of the land. He produced the same in evidence and was marked **P. Exhibit 11**. He confirmed that the same bore the Court stamp but was not registered.

20. **PW3, Dinah Tuiya Barwo**, an elderly woman of advanced age who stated that she was born in **1943**, who adopted her written

witness statement, testified that she was the widow of the late **John Kimutai Barwo**. She testified that she took out a Grant of Letters of Administration of her later husband's estate together with her co-wife. She produced the same in evidence as **P. Exhibit 13**. She testified that she saw the agreement dated **13/10/1994** between her late husband and the Plaintiff's deceased husband. The area Chief attested it. She particularized that **PW1's** husband purchased **five (5)** acres from her share or portion of their **twenty-three (23)** acre plot in Chepkoiyo Farm before he died for a sum of **Kshs. 225,000.00**. The sum of **Kshs. 180,000.00** was disbursed at the point of execution while the balance was paid later. She confirmed that **PW2** was indeed a donee to the Power of Attorney issued by her late husband in his lifetime. She was aware that the Committee was fraudulently issuing titles from their parcel without their approval. Her evidence was that she did not know the **1st** Defendant as the owner of the **five (5)** acres bought from their farm but the deceased.

21. PW4, Fredrick Ochieng Okoth, the Assistant County Commissioner attached to Kaplamai Division Trans Nzoia County testified that he handled a dispute between the Plaintiff and the **1st** Defendant on **28/02/2020**. The **1st** Defendant was accompanied by her children. He testified that the Plaintiff complained that the **1st** Defendant maliciously damaged her property. He stated that both parties came to his office with separate sale agreements both purporting to be legitimate purchasers of the same parcel of land. While the **1st** Defendant claimed to be the registered proprietor, she failed to furnish a copy of the title. In attempting to resolve the issue, **PW4** retrieved from their records in the Area Chief's Office a copy of the sale agreement dated **13/10/1994** which was similar to the one the Plaintiff relied on. The agreement was witnessed by the area chief. He testified that he could not recall seeing another agreement on the same parcel from their records. On perusing the **1st** Defendant's relied on agreement, he found that it lacked signatures. He thus could not authenticate its veracity and admit it as evidence. It was not witnessed by the area chief and the signatures appended on it were different from those on the agreement dated **13/10/1994**.

22. During the negotiations, the **1st** Defendant admitted that the parcel of land belonged to the Plaintiff's deceased's husband. His evidence was that she stated then that was disgruntled because she accused the Plaintiff of neglecting her needs following the deceased's death yet the deceased took care of **1st** Defendant financially when he was alive. She posited that since she took care of the Plaintiff and the deceased's child, she ought to have a share in the estate of the deceased.

23. PW4 testified that in a bid to resolve the dispute he entered into separate caucuses with the Plaintiff and the **1st** Defendant. He testified that in his session with her, the **1st** Defendant agreed to relinquish the title to the Plaintiff on condition that she was given a *matatu* and one residential home in Nakuru-Njoro. When he disclosed the same in their private caucus, the Plaintiff partially accepted the offer stating that she be allowed to retain the properties until her children complete their education. She thus, in that meantime, offered to give the **1st** Defendant a Peugeot in Nakuru. Regrettably, the negotiations collapsed as the **1st** Defendant declined the offer following consultations with her children. A copy of the written decision by **PW4** was collected by the Plaintiff alone. The **proceedings** of **28/02/2020** were produced and marked **P. Exhibit 7**. He stated that in his decision, he wrote that the **1st** Defendant conceded that the rightful owners of the property were the Plaintiff and her deceased husband. He further wrote that he could not ascertain who the true owner of the land was.

24. PW4 stated that he inadvertently did not capture the issue of inconsistencies in the agreements, the copies of the agreements placed before him and the retrieval of their records finding a copy of the agreement relied on by the Plaintiff. That he didn't record everything that was discussed. His evidence was that the omissions were not calculated to favor any party. He testified that in attendance of the meeting were the area chief and an officer of the National Lands Control Board, one **Julius Rutto**.

25. PW5, Robert Milimo Wepukhulu, testified as Secretary to Chekoiyo Farm Company Limited committee. He testified that subdivisions commenced on the farm in **1999**. His evidence was that at the time, the **1st** Defendant approached the Committee seeking to be registered as a trustee of the parcel of land for the deceased. When the Committee asked her to submit the agreement to that effect, she stated that she left it at home. His further evidence was that since she was known to the Committee and explained that the deceased was out of the country, the committee incorporated her name in the area list in trust for the deceased. But this was after the **1st** Defendant called through her line the deceased who verbally approved the transaction. **PW5** stated that the Chairman is the one who spoke to the deceased on phone in their presence. She processed a title deed in **2005**. His evidence was that she undertook to transfer the title to the name of her deceased son. **PW5** is the one who executed all necessary documentation to necessitate the transfer. He testified that it was deplorable that the **1st** Defendant refused to transfer the title to the deceased's name as she had earlier promised. He agreed with the authenticity of the agreement relied on by the Plaintiff and dismissed the **1st** Defendant's agreement as fraudulent.

26. PW6, James Inganji, testified that he purchased a parcel of land on plot number **229** in Chepkoiyo Farm from **John Kimutai Barwo** in **1994**. **PW6** met the deceased in **December 2002**. The deceased was his neighbour. He testified that he interacted with the

deceased and the 1st Defendant in **2003** because of a boundary dispute between his parcel of land and that of the deceased. At that time, the 1st Defendant was taking care of the property. The dispute was resolved amicably. He stated that the deceased began construction of his matrimonial home in **2013**. His testimony was that he was informed that there was a dispute as to the ownership of the parcel of land. He identified the deceased as the owner but could not ascertain from documentation.

THE DEFENDANT'S CASE

27. DW1, the 1st Defendant, stated that sometime in **1994** the deceased informed her that he had identified a parcel of land he wanted to purchase to relieve her from poverty. She added that PW2 helped the deceased identify the parcel of land he intended to purchase. But worth noting is that this testimony differed materially from the contents of the written by DW1 herself signed and filed on **21/07/2020** which she adopted in evidence-in-chief. In it she stated that *it was her who identified the parcel of land and informed her son (now deceased) about it and since she did not have enough money, her late son, Paul Mong'are Mwasi, helped to pay for four (4) acres leaving a balance of Kshs. 45,000/= which she paid on 02/03/1995. He then wrote a letter to a lawyer that the land be transferred as a gift to her.*

28. DW1 confirmed in her oral testimony that her deceased son was the Plaintiff's husband. Further, she gave evidence that the Plaintiff remained at home when she and other went to execute the agreement with John Kimutai Barwo at the chief's place in Kipsaria on **13/10/1994**. She produced the agreement which, to her they entered into, and marked it as **D. Exhibit 1**. She testified that on the material date, her husband, and PW2 and the vendor were present. Notably other people whose names appear on the document were absent.

29. Her evidence was that they first went and saw the parcel of land after which they proceeded to the chief's office where the deceased paid the sum of **Kshs. 180,000.00** equivalent for the purchase of **four (4)** acres of the parcel of land. He gifted her the land. She testified that everyone who was at the chief's office appended their signatures on the agreement. Notably, not on **D. Exhibit 1**. She testified that it was **P. Exhibit 5** which she identified (in Court) that was executed by the parties at that juncture.

30. The 1st Defendant gave evidence that she successfully registered herself as the proprietor of the parcel of land which became, namely, **SINYERERE/SITATUNGA BLOCK 7 CHEPKOIYO/230**, measuring approximately **2.0240 Ha (five (5) acres)**. According to her initial testimony, there was one agreement drawn. She then changed her evidence to say that there were two agreements drawn: the one presented by the Plaintiff as **P. Exhibit 5** and the one she produced as **D. Exhibit 1**. The two were of different dates, one for **02/03/1995** when DW1 purported to have paid **Kshs. 45,000.00** for the remaining **one (1)** acre, at the chief's office. Curiously, the said agreement also bore the date **31/03/1995**. Her evidence was that this agreement was drawn by one chief Nyaroo. Worth of note was that it was neither signed by the deceased nor by PW2 or the chief who witnessed the first one. Her testimony was that when the agreement was made (later) she was accompanied by **William Mwasi** and the vendor. The said agreement indicated that she had paid the **Kshs. 180,000.00**. However, it was her testimony that it was the deceased that paid. When she was cross-examined, she admitted that the agreement marked as **D. Exhibit 1** was not signed on the date it purported to have been made. She admitted further in cross-examination that the agreement - **D. Exhibit 1** - was backdated to read **13/10/1994**. DW1, relying on the agreement marked as **D. Exhibit 1** which was impugned, testified that she paid **Kshs. 45,000/=** to complete the purchase of the land.

31. DW1 testified that following the purchase, the deceased instructed his advocate vide a letter to prepare the valid documentation to have the suit registered in her name. She produced in evidence an **undated letter** authorizing transfer of the property from the deceased to the 1st Defendant. According to her, the letter was written by the deceased. It was produced as **D. Exhibit 3**. She thereafter applied to the Land Control Board. She produced the application and the Land Control Board consent as **D. Exhibit 4 (a)** and **(b)**. It also bore the sum of **Kshs. 40,000/=** as the purchase price of the parcel of land. It did not bear the signature of the Land Registrar. The Chepkoiyo Farm Company Limited committee approved her transfer. She produced the transfer document dated **29/03/2010** as **D. Exhibit 5**. She obtained a Title registering the property in her name on **31/03/2010**. It was produced and marked **D. Exhibit 2**. She produced the Green Card as **D. Exhibit 6**, to show that the title was registered in her name and that she had taken a loan with the 2nd Defendant. She testified that the loan had since been fully paid save for advocate's fees. She denied the Plaintiff's claim.

32. DW1 testified that she took possession of the land soon after the purchase. She planted maize. Her evidence was that in **2014**, she authorized the deceased to construct a house on the parcel of land as his rural home. She informed the court that she continued to stay on the land peacefully until **2020** when the Plaintiff obtained an eviction order to have her removed from it.

33. DW1 confessed that she offered the Plaintiff **three (3)** acres of the subject portion of land but PW1 refused. She said that at the Assistant County Commissioner's office, she offered the Plaintiff a portion of the property. She confirmed that the deceased spoke to the Farm Committee chairperson when she requested to have the parcel of land transferred in her name. She informed the court that she owned another parcel of land measuring approximately **two (2)** acres in Biribiriet where she constructed a house and a school called Mwanzo Academy. She insisted that she did not obtain the title through fraud as alleged. She urged this court to dismiss the suit in its entirety with costs.

SUBMISSIONS

34. Following the close of parties' respective cases, the Plaintiff and 1st Defendant elected to address the court on the issues by filing closing written submissions. The Plaintiff filed hers on **28/02/2022** while the 1st Defendant filed her submissions on **20/04/2022**.

35. According to the Plaintiff, by virtue of the land being registered in the 1st Defendant's name, there existed a constructive trust between the 1st Defendant and the deceased. She testified and submitted that the 1st Defendant fraudulently obtained the title with the intention of unjustly enriching herself yet she owned another parcel of land in Biribiriet. She added that from the Plaintiff's witness accounts, the title was registered through misrepresentation by the 1st Defendant. She accused the 1st Defendant of fraudulently altering the agreement of sale by making another fake one and further malevolently registering her name through the Farm Committee. She propositioned that because the title was obtained by means of fraud, this Court had power to cancel it. In the upshot, she urged this court to grant the prayers sought with costs.

36. The 1st Defendant maintained that she was the lawful registered proprietor of all that parcel of land namely **SINYERERE/SITATUNGA BLOCK 7 CHEPKOIYO/230** measuring **five (5)** acres. Her testimony was that she obtained the same lawfully and followed due process. She added that any allegation of fraud ought to have been dealt with by the deceased when he was alive when the property was purchased. She relied on **Sections 24 and 26** of the **Land Registration Act** for this assertion. The 1st Defendant submitted that the Plaintiff failed to establish that the property was acquired through misrepresentation. To this end, the 1st Defendant submitted that the Plaintiff failed to prove her case on a balance of probabilities. This in her conclusion, suffered the fate of the case to stand as dismissed with costs to her.

ANALYSIS AND DISPOSITION

37. I have carefully analyzed the pleadings, oral evidence and the documents relied on by the parties. I have also considered the submissions filed by both the Plaintiff and the 1st Defendant. In analyzing the issues in dispute, I will address the dispute under the following heads:

(a) Whether the 1st Defendant obtained the Title by way of fraud"

38. The Plaintiff maintained that the 1st Defendant obtained the title to the parcel of land namely **SINYERERE/SITATUNGA BLOCK 7 CHEPKOIYO/230** measuring **five (5)** acres by way of fraud. She stated that the 1st Defendant relied on unauthenticated documents. She challenged **D. Exhibit 1** as bearing no signatures of the relevant parties thereto and that the one of PW2 as forged. PW2 testified that he never signed such a document. It thus confirms that the signature purported to be his on the document was a forgery. PW1 also questioned the authenticity of **D. Exhibit 3**. She further posited that the purported transfer document executed by Chepkoiyo Farm Company Limited and the 1st Defendant was fraudulent as they had no powers to transfer ownership. Their mandate was limited to registration of new members. The 1st Defendant denied these assertions. She maintained that she lawfully registered as the proprietor of the subject parcel of land and remained the legitimate owner.

39. To answer this question, it is critical to first emphasize that the general view in law is that the proprietor whose name is inscribed on a title document is presumably, or *prima facie*, the lawful proprietor of the said parcel of land on the face of it. **Section 24 (a)** of the **Land Registration Act** maintains that **"the registration of a person as the proprietor of land shall vest in the person the absolute ownership of that land together with all rights and privileges belonging or appurtenant to."** Under **Section 26 (1)** of the same Act, the Certificate of Title issued by the Registrar remains *prima facie* evidence that the proprietor named is the absolute and indefeasible owner. However, that is so far as it goes because there is a proviso thereto under **Sub section (a)** which provides that the same shall be negated if it is proved that the acquisition was obtained by means of fraud or misrepresentation.

40. The definition of fraud is not captured in the **Land Registration Act**. But according to *Black's Law Dictionary*, fifth edition, p. 594 defines fraud as “an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right”. During the Hearing of the Sub-Committee on Aviation of the Committee on Commerce, Science and Transportation United States Senate, 99th Congress, First Session, held on March 19, 1985, fraud was defined as “fraud consists of some deceitful practices or willful devise, resorted to with intent to deprive another of his right, or in some manner to do him an injury” (p. 52 of Report). In its 11th Edition by Brian A. Garner, *Black's Law Dictionary*, Thompson Reuters, St. Paul MN, 2019, defines fraud at p. 802 as “a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

41. In *Gichanga Kibutha v Caroline Nduku [2018] eKLR*, the Court cited **Bullen & Leake & Jacob's Precedents of Pleadings 13th Edition** at page 427 with the approval of *Wellingford v Mutual Society* (1880) 5 App. Cas. 685 at 697, 701, 709, *Garden Neptune v Occident* [1989] 1 Lloyd's Rep. 305, 308, *Lawrence v Lord Norreys* (1880) 15 App. Cas. 210 at 221 and *Davy v Garret* (1878) 7 ch. D. 473 at 489 and discussed fraud as follows:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause for the loss complained off. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved. (I). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.”

42. A careful analysis of the evidence adduced in the instant suit shows that the 1st Defendant's actions leading to her being registered as proprietor of land parcel No. **SINYERERE/SITATUNGA BLOCK 7/KAPKOIYO/230** fit the above definitions four and square. The Plaintiff pleaded fraud and particularized the same in paragraph 11 of the Plaintiff. She then called five (6) witnesses besides herself to testify on her behalf. It is not disputed that the 1st Defendant obtained a title deed in her name on **31/03/2010**. The authenticity of the Green Card and the title document produced in evidence were not challenged. The issue is whether the 1st Defendant obtained the title to the suit land unlawfully hence underpinning the allegations of fraud.

43. A look at the documents relied on by the 1st Defendant casts doubt as to how she obtained the title successfully *ab initio*. **D. Exhibit 1** which the 1st Defendant relied on was bereft of signatures of some of the parties mentioned in the document. It is this document she relied to contend that she entered into an agreement with the vendor. A further scrutiny of the document revealed other discrepancies. It is stated in the agreement that the 1st Defendant advanced a sum of **Kshs. 180,000.00** initially. However, in her evidence she stated that it was the deceased and not her who disbursed the funds. Furthermore, **PW2** testified that he never executed **D. Exhibit 1**. It is a mystery then as to how his purported signature was appended next to his name. The conclusion to be drawn is that the signature appended thereon must have been forged and only the person who sought to rely on the document must have been party to the forgery.

44. During cross-examination, the 1st Defendant attempted to justify the agreement marked as **D. Exhibit 1** as having been in furtherance of **P. Exhibit 5**. But to my mind, **DW1** was a liar, liar and liar: a pathological liar. She was a wholly unreliable witness for several reasons some of which I will give in summary here. She testified that in **1994**, her late son called her to inform her that he had found a parcel of land to buy for her to get her out of poverty. No documentary evidence or indeed any other was produced to prove that fact. She lied on oath on **29/06/2020**, by way of Affidavit, that the agreement **D. Exhibit 1** was made on **13/10/1994** and that she paid the seller **Kshs. 45,000/=** on **2/03/1994**. She testified as much in examination in chief on **19/01/2022**. But in cross-examination **DW1** admitted that the said (second) agreement was written on the date of purported payment made on **2/03/1995**.

45. Needless to say, regarding **DW1's** untruths that **P. Exhibit 5** (the agreement signed between the deceased and the vendor (also later deceased) clearly shows that the land was being purchased by her son for himself. Again, **D. Exhibit 1** shows that it was signed before the area chief one A. O. Asuri on **31/03/1995**. This is a different date than that stated by **DW1** as **02/03/1995**. **DW1** even renounced the name of the Area Chief but stuck to the one she believes wrote the agreement, one Mr. Nyaroo. However, why would **DW1** leave out such crucial witnesses in her evidence" Why also would vital witnesses not sign the agreement - **D. Exhibit 1** - if indeed the same was genuine" It behooved **DW1** to prove that **D. Exhibit 1** was a continuation of **P. Exhibit 5** by avoiding certain contradictions prevalent when the two agreements were examined side by side. In any event, in examination-in-chief **DW1** testified (lied on oath) that **D. Exhibit 1** was made the same date when land was first purchased. But on cross-examination she changed her story to admit that it was made many months later, in **March, 1995**. She was hard-pressed to explain why **D. Exhibit 1** purported to

reflect the same date as the initial agreement which was signed by herself, husband, her late son, also by **PW 2**, the vendor and even the Area Chief. She even denied on oath the obvious - the destruction of the Plaintiff's property - which was reported to the Police. She then lied also that it was her who permitted the late Paul to build on the suit land yet he was the one who had bought the land, according to both documentary and oral testimony given in Court.

46. Firstly, **P. Exhibit 5** was entered into by the deceased and the vendor in contrast to the **D. Exhibit 1** which revealed that the contract entered into was between the **1st** Defendant and the vendor. Secondly, the balance of the sum of **Kshs. 45,000.00** was intended to be paid on **30/11/1994** only a month later as per **P. Exhibit 5**. **PW 2** actually confirmed that it was paid to her later husband. **D. Exhibit 1** stated that the said balance was remitted on **02/03/1995**. This was four months later. There should have been some sort of consonance if the **1st** Defendant wanted this court to believe her assertions. In the first place, neither the vendor nor the **1st** Defendant's late son, nor other witnesses signed the said purported agreement. This Court cannot believe its contents. And since it formed the basis of the claim that the **1st** Defendant paid **Kshs. 45,000/=** for the purchase of the one acre that remained out of the five that were to be purchased as per **P. Exhibit 1**, the evidence by the **1st** Defendant that she is the one who paid the balance is false. Furthermore, the Court was unable to believe the **1st** Defendant's claim that she paid the **Kshs. 45,000/=** besides the further claim that she used proceeds of her farming income when there is no evidence of any such proceeds or an acknowledgement by the vendor of such amount from her and even when she misrepresented to the land control board and office of lands that the purchase of the five acres of land was **Kshs. 40,000/=** (refer to **D. Exhibit 4(a)** and **(b)**), yet it was **Kshs. 225,000/=**. The terms of the initial agreement, **P. Exhibit 5** were clear that the balance of **Kshs. 45,000/=** was payable by **30/11/1994**. Since it was not disputed by the vendor and the administrator of his estate as having been paid by then, the Court is inclined to believe that it was paid by the deceased son whom **PW3** recognized as the owner/buyer, and not by **1st** Defendant whose evidence is full of lies.

47. In any event, if the agreement **D. Exhibit 1** was genuine, why would the deceased cause **D. Exhibit 3** to be written for facilitation of the transfer and registration of the land in the **1st** Defendant's name" And granted that **D. Exhibit 3** was genuine, why did the **1st** Defendant never present it to a lawyer to draw a proper agreement as it purported to instruct" Also, if it was genuine, why was it never presented to either the Farm Committee or the lands office as part of the documents to support the transfer of the ownership from the late son to the **1st** Defendant" *Regarding the authenticity of the D. Exhibit 3, the Court had occasion to compare the signature on it purporting to be that of the deceased, Paul Mong'are Mwasi, with that which he appended in the presence of all the parties and witnesses including the 1st Defendant to the initial agreement entered into on 13/10/1994, P. Exhibit 5, both documents being in the original/primary state. The Court found a big difference or dissimilarity between them.* Even the signatures of the vendor were different. For that reason, the Court placed great doubt on the genuineness and authenticity of **D. Exhibit 3** and the truthfulness of all its contents. In any event, the said document was undated and addressed to an unnamed "lawyer (Advocate)" and was neither presented to one or even disclosed on who the said lawyer was. Again, the in cross-examination the **1st** Defendant admitted that she did not know that it was important for **D. Exhibit 1** to be taken to a lawyer as instructed. Lastly, even assuming that the said document was genuine, since it was neither acted upon nor its directions actualized, it is neither here nor there in evidence in support of the **1st** Defendant's case. Needless to say that if it were to be believed to be truthful, then it would confirm that it was the deceased who paid the balance of the purchase price of the land and not the **1st** Defendant. The reason is that the author, if taken to be the late Paul Mong'are Mwasi, stated at paragraph **1** of **D. Exhibit 3** thus, "*I have started payment and intend to finish soon.*"

48. **D. Exhibit 3** was an undated document purporting to issue instructions to an Advocate. Not only was the said document relied on undated but also was not addressed to any specific person. If these instructions were genuinely issued by the deceased, it would have been prudent that the said authorization be issued unequivocally.

49. It is further not lost sight of that all the Plaintiff's witnesses gave testimony that remained consistent, credible and corroborative. They all testified that the property was indeed purchased by the deceased. They established the veracity of the documents relied on. Conversely, the **1st** Defendant was the sole witness to her defence. Looking at the evidence of the **1st** Defendant in totality, its credit worthiness is brought to near naught since, in my view, her evidence was full of lies as stated above.

50. **PW4** testified that during the negotiated proceedings, the **1st** Defendant admitted that the property indeed belonged to the deceased. She simply held onto it as leverage for being given by the Plaintiff other properties following the death of the deceased son. In fact, she was willing to relinquish ownership subject to certain conditions precedent. This evidence was not disputed by the **1st** Defendant.

51. **PW5** in his testimony as secretary to the Chepkoiyo Farm Company Limited committee testified about the **1st** Defendant having been registered as trustee of the deceased. She disclosed to them that she was registering the property in trust for her son who

was away now deceased. She promised to transfer land to him later. However, she failed to do so even after the transfer documents were executed. She did, in her testimony, not deny these facts.

52. Looking at the demeanor of the 1st Defendant, I observed and noted on the record that she was evasive in responding to many questions put to her in cross-examination. In some instances, she refused to answer questions during cross-examination and was greatly unreliable. Her evidence was vitiated. She further admitted in cross-examination that she did not follow the right procedure when obtaining the title document, which means that clearly the manner in which she acquired the title in issue was impeachable.

53. Looking at the totality of the evidence adduced, and after a careful scrutiny of the documents relied on, I find that there is overwhelming evidence to hold that the 1st Defendant obtained the title to all that property known as **SINYERERE/SITATUNGA BLOCK 7 CHEPKOIYO/230** measuring **five (5)** acres in her favor fraudulently. This is a proper candidate for impeachment of the title as against the 1st Defendant.

(b) Whether the deceased's estate is the rightful owner of all that parcel of land namely SINYERERE/SITATUNGA BLOCK 7 CHEPKOIYO/230 measuring five (5) acres"

54. The Plaintiff's case was overwhelmingly watertight. **PW1** testified that indeed the deceased purchased the said parcel of land from the vendor who was **PW3's** deceased husband. **PW2**, who witnessed the transaction, executed the agreement entered between the deceased and the vendor. He further maintained that he never entered into a subsequent agreement over the same property. He referred to **D. Exhibit 1** affirming that he never executed the said agreement as a witness regardless of the presence of his purported signature. **PW3** confirmed that the vendor indeed sold the parcel of land to the Plaintiff's deceased husband. **PW4** confirmed that the 1st Defendant admitted that the said parcel of land was actually owned by the deceased person. The proceedings were not challenged in so far as those facts were concerned. **PW5** testified that the said parcel of land was only cleared for transfer under the pretext that **DW1** would hold the property in trust for the deceased. All along **PW6** knew the deceased as the owner of the parcel of land. All the witnesses affirmed that **D. Exhibit 1** was marred with errors and that it was not possible to uphold the fact that the 1st Defendant was the lawful proprietor of the suit land.

55. I do not need to belabor further on the facts and circumstances of this case. I find and hold that indeed all that property known as **SINYERERE/SITATUNGA BLOCK 7 CHEPKOIYO/230** measuring approximately **2.0240 Ha [five (5) acres]** belongs to the estate of the deceased **Paul Mong'are Mwasi** and the Plaintiff being the legal administrator thereof is entitled to deal with it as per the terms of the Grant of Letters of Administration issued to her by the Court. It is worth repeating that the Court did not believe the 1st Defendant's evidence that she paid for one acre of the said parcel of land so as to be entitled to the portion thereof.

56. **Section 80** of the **Land Registration Act** grants this court power to order rectification of the register by ordering the cancellation or amendment of any registration if the same was obtained by fraud or mistake. I find that this Section is applicable to this suit and is therefore invoked to lead to a correction of the existing position on the record to reflect the accurate and true account of the fact that the estate of the deceased is the lawful proprietor of the subject parcel of land.

(c) Who bears costs of the suit"

57. **Section 27** of the **Civil Procedure Act** provides that costs follow the event unless the Court for good reason feels the need to order otherwise. I would have had no reason to depart from the general norm in this matter except for the one I give hereafter. It is clear that the Plaintiff has successfully prosecuted her claim. She has expended considerable time and resources in prosecuting her case a fact that would have been avoided if the 1st Defendant had actually renounced the title to the rightful and lawful proprietor. However, this being a suit between a mother grieving the demise of her son and her daughter-in-law grieving the loss of her husband, it would be in the best interest of family reconciliation to let the matter of costs rest here. This Court did its best to implore them to reconcile and settle the matter before judgment but they did not seem to be keen to do so. I hope they shake hands after this judgment rather than treating each other with animosity as was seen in Court. Thus, each party shall therefore bear its own costs.

ORDERS AND DISPOSITION

58. Having found that the Plaintiff has proved her case to the requires standard on a balance of probabilities, I make the following orders:

- (a) A declaration be and is hereby made that the Plaintiff, as the legal representative of the estate of PAUL MONG'ARE MWASI, is the lawful and or legal owner of all that parcel of land known as SINYERERE/SITATUNGA BLOCK 7 CHEPKOIYO/230 and is entitled to be registered forthwith as such;
- (b) A permanent injunction be and is hereby issued against the 1st Defendant, her agents, servants and whosoever claims under her or any other person exercising authority from and through her from selling, disposing off, further charging, alienating and/or in any other manner dealing and/or interfering with the Plaintiff's use, occupation and quiet possession of the parcel of land known as SINYERERE/SITATUNGA BLOCK 7 CHEPKOIYO/230;
- (c) A mandatory order is hereby issued compelling the 2nd Defendant to forthwith discharge the suit land;
- (d) A mandatory order be and is hereby issued compelling the 1st Defendant to commence the process and transfer the suit land to the favor of the Plaintiff at her cost;
- (e) That should the order in (e) above not be complied within thirty (30) days from the date of this judgment, the Deputy Registrar shall execute the requisite documents to effect transfer in favor of the Plaintiff;
- (f) Each party is to bear own costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 26TH DAY OF APRIL, 2022.

HON DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE LAW COURTS



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