



Beatrice Kuri Francis v M’Mukira & 4 others; Ecobank Limited (Interested Party) (Environment and Land Appeal 81 of 2019) [2022] KEELC 3550 (KLR) (18 May 2022) (Judgment)

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**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 81 OF 2019**

CK NZILI, J

MAY 18, 2022

BETWEEN

BEATRICE KURI FRANCIS APPELLANT

AND

SUSAN GATIRIA M’MUKIRA 1ST RESPONDENT

CATHERINE MAKANDI MUTWIRI 2ND RESPONDENT

DAVID MUTUMA M’IRINGO 3RD RESPONDENT

EDITH KAIRUTHI 4TH RESPONDENT

DOREEN MUKUBA 5TH RESPONDENT

AND

ECOBANK LIMITED INTERESTED PARTY

JUDGMENT

A. Pleadings

1. The applicant at the primary suit was sued by the respondents for breach of trust by fraudulently transferring or causing to be transfer to herself L.R No. Ntima/Igoki/5569 formerly registered in the name of their late husband/father respectively, the late M’Iringo M’Nchau hereinafter the “family land” and subsequently offering the said family land as a security with the interested party herein, for a loan of Kshs.4,000,000 despite knowing or being aware on 17.4.2004, the deceased had shared out the family land amongst the respondents and the appellants.
2. The respondents prayed for cancellation for the title deed in favour of the appellant and registration of the same under the joint names of themselves and the appellant and for an order compelling the



appellant to offer an alternative security to the interested party so as to discharge the family land from liability by the interested party.

3. The appellant's response filed an amended defence and counterclaim dated 28.9.2018 denying that the suit land was ever family land or that there existed any trust which she may have breached as alleged or at all.
4. Further she denied the alleged fraudulent transfer. Additionally the appellant averred that the respondents had been given another parcel of land by the deceased in Tutua-Ruiri area which they allegedly disposed off and recently moved into her land in 2005 which was her inheritance she denied the alleged occupation of the suit land for 50 years.
5. Regarding the loan, the appellant averred it was genuinely and openly taken as she had no obligation to disclose her financial arrangements with the respondents over the suit land.
6. Further the appellant averred that there were other parcels of land in the name of their late father apart from the suit land whose her brother lived.
7. With respect to counterclaim, the appellant averred the suit land was gifted to her as part of her inheritance by her father now deceased and charged the same to the interested party for Kshs.4million after due diligence and inspection of the property was done.
8. The appellant pleaded as the 1st respondent moved in to cohabit with her late father, the deceased made it clear that he had already gifted the family land to the appellant, which she readily accepted hence it was surprising she was now laying a claim on the suit land which she already found lawfully belonging to her after following all the requisite legal processes of transfer.
9. Further, the appellant averred that all along the respondent was seeking time from her to vacate the land, a promise which never materialized hence the continued occupation was unlawful and had caused her loss, discomfort, breach of peace and interference with her rights to property.
10. The appellant prayed for a permanent injunction, mandatory injunction, eviction and general damages for trespass.
11. In a reply to defence dated 30.8.2013, the respondents denied that the 1st respondent's children were fathered by another man apart from the deceased and that they made entry into the suit land in 2005 as alleged. Regarding ownership the respondents averred if that had been the case as alleged, the appellant would have sought to evict them long time ago from the suit land.
12. Concerning the loan the respondents averred it was surreptitiously done in spite of their long occupation, developments, possession of interests and rights over the family land.
13. Regarding L.R Kiirua/Ruiri/729 the respondents denied it was family or ancestral land since it had been bought by the deceased alone which he gave out to the appellant's brother hence the respondents had no rights over it.
14. The respondents therefore denied the alleged sole, inheritance of the family land by the appellant from the deceased, given the latter had shared it amongst the parties herein during his lifetime, and directed the family land to be the burial place for the family hence the reason the appellants late parents remains were interred therein.

B. Interested Party Entry and Amendments

15. Through an application dated 27.6.2016, the interested party as chargees to the suit property sought to be enjoined to the suit and prayed for the orders of inhibition dated 9.7.2013 to be vacated in the



alternative following the clogging of the exercise of the statutory power of sale, both the appellant and the respondents to be ordered to pay the debt then standing at Kshs.6,245,504.96/= together with interest.

16. The court on 10.9.2018 allowed the notice of motion. By an application dated 3.8.2018, the appellant sought to amend the defence and introduce a counter claim. The same was allowed on 10.9.2018 following which the case was listed for pre-trial conference on 8.10.2018.

C. Pre-trial Compliance

17. The respondents' plaint was supported by a list of witnesses dated 26.6.2013, witness statements and a list of documents namely, a green card for L.R No. Ntima/Igoki/5569; photos; certificate of death; certificate of marriage between the 1st respondent and the deceased and a demand letter dated 7.3.2013.
18. The appellant filed a paginated bundle on 28.9.2018 containing a case summary, issues for determination, list of witnesses, witness statements, list of documents including a valuation report, copy of record, certificate of death, title deed, copy of search dated 21.12.2012 and a loan statement. The interested party did not comply with the said directions.

D. Testimony

19. PW 1 the respondent adopted her witness statement dated 26.2.2013 and told the court she had sued her step daughter for fraudulently transferring the family land while her late husband was sick. She confirmed that there was a time the appellant visited her late father and she left them alone in the house but he never told her he had allegedly transferred the suit land to her she only heard from people that a loan had been taken using the land but was never consulted though they used to live together in the said compound which had her developments thereon and a farm.
20. The 1st respondent produced a green card and charge as P. exh (1), photos, P. Exh (2), death certificate P. Exh (3), Marriage certificate as P. Exh (4) and a demand letter as P. Exh (6). She denied the contents of the defence as regards the alleged gift, land in Tutua – Ruiru allegedly sold by her and confirmed that she had always lived on the suit land. Further, PW 1 admitted that they had quarreled with the deceased in 2005 after she learned the shamba had been allegedly given out to the appellant without her knowledge or consent.
21. Regarding marriage, PW 1 testified that they had been married initially under Meru customary law since 1962, until September 2005 when they solemnized the same in church.
22. In cross examination PW 1 admitted an earlier marriage relationship with one M³Mukiria before getting married to the deceased and formally solemnizing it on 24.9.2005. Further PW1 stated she was unaware about the land control board committee but never reported or lodged any complaint with the police concerning the transfer. She acknowledged that the appellant was the daughter of the deceased's former wife and that the deceased should have informed her about the transfer. She further admitted that the documents held by the appellant indicated the land was given as a gift and that one Silas was their best man during the church wedding.
23. PW 1 acknowledged her previous marriage with M³Mukiria was blessed with two children whereas her marriage with the deceased had five children. She admitted discussing the land issue with the best man.
24. In re-examination PW 1 stated she was living together with the deceased but he never asked her to accompany him to the land control board meeting to transfer land to the appellant but pointed out she only found out about what had happened in 2013. Asked by the court the 1st respondent confirmed



- that the deceased had another land at Ruiri occupied by the appellant's brother DW 2 and that her co-wife had died before her husband passed on.
25. PW 2 adopted her witness statement dated 24.6.2013 and stated that her late father was sickly and they only found out about the alleged file transfer in 2013, from one Karagania following which they visited to the interested party offices who confirmed that a loan had been taken by the appellant who used to live in Nairobi, after allegedly transferring the land on 20.9.2005 without a spousal consent. PW 2 stated that the appellant was living on the family land unlike the respondents and that they had not been aware of the aforesaid developments.
 26. PW 2 also told the court that her late father had another parcel of land occupied by their step brother in Ruiri which was approximately 4 ½ acres though her mother used to do farming therein until she was alleged chased away by DW 2.
 27. PW 2 said she could not know what the appellant did with the 4 million shillings but clarified that they were supposed to share the land equally. As regards a succession cause over her late father's estate, PW 2 said she was not aware of any.
 28. Regarding the valuation report, PW 2 denied knowledge of any such visit or enquiry by the interested party to the family land prior to extending the loan facility against the property.
 29. PW 2 insisted she was a rightful beneficiary of the estate and that their late father would not have given out the land exclusively to the appellant without giving them a share.
 30. PW 3 adopted her witness statements dated 26.6.2013 largely associating herself with PW 2.
 31. DW 1 adopted her written statement dated 28.9.2018 as her evidence in chief confirming the respondent was her step mother. She told the court her own mother passed on in 1994, that her late father transferred the suit land to her after a land control board consent was issued on 29.3.2005 approving the transfer. Eventually, DW 1 testified her transfer forms were duly signed by her late father, herself, Charles Mokuia Advocates and the land registrar at the time when her late father was in good health.
 32. She produced the copy of title and green card as a D. Exh 3. DW1 said she took out a loan against her property on 28.3.2013 which was free of any encumbrances as per the search certificate dated 21.12.2012 she produced it as D. Exh 4, where after the bank did a survey and visited the land.
 33. She stated that she was advanced a loan of Kshs. 4 million but was unable to service it after her business went down. She produced the loan account statements as D. Exh 6, land control board consent as D. Exh 8. S maintained she had no obligation to inform any one or ask any of the occupants to vacate the land since the land was hers. She maintained nobody had raised any complaints over fraud or illegality against her. She denied holding the suit land in trust for the respondents and urged her counterclaim to be allowed.
 34. In cross examination DW 1 admitted charging the suit land for a loan with the interested party, which facility she was still servicing and was slightly over Kshs.10 million at the time going by D. Exh 6 which if she defaulted could result to a forced sale and eviction of the occupants. DW 1 denied the land was ancestral or family land as alleged. As regard the order issued on 9.7.2013, DW 1 acknowledged that she was ordered to pay Kshs.4 million or offer an alternative security but she had not complied with it. She admitted she possessed no evidence that she took the loan for a business. She told the court she did not notify respondents about both the transfer and the loan, since she was under no obligation to do so.
 35. Further, DW 1 admitted that though the land was registered under her name, she had no farming or permanent developments thereon.



36. Similarly, DW 1 admitted she had not issued the respondent any notice to vacate the land. As regards spousal consent, DW 1 said she was not aware it was one of the requirements at the land control board meeting. DW 1 said she would not remember the chairman and members of the land control board meeting at the time. Similarly, DW 1 admitted she possessed no receipts for the transfer fees, receipts of payment to the advocate who prepared the transfer, his name, gender or the location of his law firm and could not remember if she appeared in person, or the persons who presented and registered the transfer documents at the lands office on her behalf though she was the one who took them to the lands office. Regarding the land allegedly bought for the respondent at Ruiru, DW 1 said she had no documents to that effect. She admitted she had no documents or witnesses statements that PW 2 and PW 3 were not her step sisters.
37. Further, DW 1 admitted she had not disclosed to the interested party that her step mother and step children were living on the suit land.
38. DW 2 adopted his witness statement dated 28.9.2018 as his evidence in chief. He told the court his late mother had only two children with their deceased father who gave him the Ruiru land when he moved out in 1992 and the suit land to the appellant. He confirmed PW 1 and her children were living in Kooje area which was $\frac{1}{4}$ an acre unlike the Ruiru land which was $3\frac{1}{2}$ acres. He could not however confirm when the 1st respondent got married to his late father. He also confirmed his late father had not told him the respondent should vacate the suit land since they had nowhere to go. Further DW 2 said DW 1 was neither occupying the suit land nor did she have any developments thereon.
39. DW 3 told the court that DW 1 was gifted the land by her late father and DW 2 was also given the land in Ruiru by the deceased, though he could not remember whether PW 1 was married in 1963 or thereby under the Ameru customary law. DW 3 told the court that at the time the deceased passed on, the respondents were not living on the suit premises.

E. The Appeal

40. The trial court after going through the evidence allowed the suit and dismissed the counter claim triggering this appeal. The appellant attacked the decree of the lower court on the basis that; it was wrong to find the respondents having locus standi institute the suit; the court shifted the burden of proof over fraud to the appellant. It varied a valid contract between the interested party without proof of fraud; the court misguided itself on what amounted to a gift *inter vivos*; it failed to appreciate the defence and counterclaim duly filed and not opposed; it dismissed, the appellant's authorities on succession and failed to appreciate that the transaction of the deceased and the appellant was a gift and not a sale.

F. Written submissions

41. The appellant relied on written submissions dated 12.4.2021. On the first ground the appellant submitted since the deceased as pleaded at paragraph 6 of the plaint passed on 13.5.2006, the interest of the estate could only be advanced by the respondents while possessed of letters of administration. In this instance it was submitted the suit was a non-starter for lack of capacity to sue. Reliance was placed on in the estate of John Gakuuya Njoroge, Machakos Succession Cause No. 256 of 2007. On the second ground of appeal, it was submitted the burden to prove the alleged fraudulent acquisition of the suit land lay with the respondents. As to the issue of mental state of the deceased at the time of the transfer, it was submitted the solemnization of marriage occurred on 24.9.2005 whereas the transfer of the suit land occurred on 29.9.2005 hence there was no proof of sickness or loss of memory within that short period of time.



42. The appellant further submitted no witnesses were called to prove any fraud or the issue of a spousal consent which the appellant submitted it was not applicable prior to the 2010 Constitution.
43. As regards the land control board consent and the transfers, the appellant submitted that no evidence was led to prove the alleged forgeries of the transfer documents and signatures of the deceased or that the same was unprocedurally done.
44. Reliance was placed on *Vijay Morjaria v Nasingh Madhusing Darbar & another* [2000] eKLR on prove of particulars of fraud.
45. Concerning the issue of the contract with the interested party, the appellant submitted it was wrong for the trial court to make orders varying the loan agreement between the appellant and the interested party, which was tantamount to condemning the bank to lose its collateral yet it had done due diligence before giving out the loan.
46. The appellant submitted the gift was effected 8 years before the suit was filed when the deceased had absolute freedom to choose to transfer the suit land to his daughter which could not be faulted in law. Reliance was placed on the estate of Gedion Manthi Nzioka Machakos Succession Cause No. 122 of 2010.
47. Regarding the defence and counter claim, it was submitted that the respondent deliberately failed to file a reply to defence and defence to the counter claim but the trial court, contrary to Order 7 Rule 11 Civil Procedure Rules failed to find the same unopposed. Lastly, it was submitted the trial court failed to consider the binding submissions filed by the appellants.
48. On the other hand, the respondent by written submissions dated 17.2.2022 urge the court to find it was not necessary to seek and obtain letters of grant of representation since the subject land was transferred before the death of the deceased husband the initial owner of the land and that under Order 2 Rule 6 (11) Civil Procedure Rules locus standi should have been raised at the first opportunity, that Articles 22, 48, 159 (2) (d) 258 of *the constitution* had enlarged locus standi as held in *John Wekesa Khaoya v A.G* [2013] eKLR, *Mumo Matemvu v Trusted Society of Human Rights Alliance and 5 others* [2013] eKLR.
49. It was submitted the respondents had a legitimate interest in the only family land and which they were in actual possession and occupation as admitted by DW 2. As regards prove of fraud it was submitted the respondents at page 98-104 of the record of appeal attained the bar to shift the evidential burden to the appellant to rebut it on how the subject property was transferred to her favour which she failed to rebut. Reliance was placed on *Ahmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR and Section 112 of the *Evidence Act* that it was incumbent upon the appellant to dislodge the notion that her registration was fraudulently done.
50. As regards the alleged variation of contract with the interested party, it was submitted the said contract was never availed before the court and in any event the framed issues at page 122 of the record of appeal did not list such an issue and by issuing an order to defray the loan the court did not vary the said contract.
51. On the issue of the gift, the respondents submitted the defence did not plead gift *intervivos* and since parties under Order 2 Rule 6 (1) Civil Procedure Rules were bound by pleadings the appellant under Section 107 of the *Evidence Act* failed to prove that the transfer was a gift *intervivos*.
52. On whether the defence and counter claim should have been considered it was submitted the same were not served upon the respondents and neither was the amended defence and counter claim stamped or signed by the appellant and no evidence of service of the same was availed together with statements or



oral evidence in support of it hence the trial court was justified in dismissing it more so when it had no accompanying verifying affidavit and in line with Order 4 Rule 1 (2) Civil Procedure Rules thus it was incompetent.

53. Lastly as regards to the authorities relied upon by the appellant, it was submitted the trial court distinguished the same which predated 2010 and applied recent and relevant suitable authorities to the issues before the court.
54. The interested party by written submissions dated 28.2.2022 took the view its situation was unique as held in *Damaris Wanjiru Nganga vs Loise Naisare Leiyan and another* (2015) eKLR that no adverse orders could be sought and or issued against such a party. It was further submitted that no level of fraud was levelled against the interested party by the respondent since it only discharged its licensed duty of lending money against security.
55. Whereas the trial court held that the interested party failed to put in documents the interested party submitted they filed a replying and supplementary affidavit attaching its evidence which position was not challenged by anybody more so since there was no substantive claim brought against it or was aimed at defeating its security over the subject suitland more so given the valuation report reflected the respondents home.
56. The interested party submitted that it supported the appeal so far as it challenged adverse orders against it since it had not been brought to suit as a substantive party by the respondents capable of having a claim, thus no adverse orders could issue against it.
57. The interested party submitted the court should find the adverse orders against it non-viable; that no adverse orders could issue against it, that it did not participate in the matter over the allegations by the respondents allow the appeal by rejecting the adverse orders made against it and substitute them with an order directing that any discharge of the subject land parcel of land from liability should be subject to the full and final settlement of the loan amount advanced therein.

G. Role of Appellate Court

58. This being a first appeal, the court has the mandate to re-hear, rehearse and re-evaluate the lower court file, come up with the independent findings and conclusions to facts and the law while alive to the fact that the trial court had the opportunity to hear the witnesses first hand and assess their demeanor.

H. Issues for Determination

59. Having carefully gone through the entire record of appeal and the lower court file, pleadings, witnesses statements, list of documents, evidence, written submissions and proceedings, the issues commending themselves for this court's determination are:-
 - (i) If the amended defence and counterclaim was properly filed and served upon respondents.
 - (ii) If the respondents had capacity to file a claim against the appellant based on customary trust.
 - (iii) If the respondents pleaded and proved any fraud and customary trust against the appellant.
 - (iv) If the appellant pleaded and proved her defence and counter claim, or defence for that matter and or was under obligation to rebut any evidence.



- (v) If the interested party duly participated and produced evidence in support of its stake before the trial court, If any adverse claims were raised against it and
- (vi) Whether any adverse orders could issue.

60. As set out in part A of this judgment, the section on pleadings in this judgment, the appellant sought and obtained leave to amend its defence and introduce a counter claim to this suit. This was not opposed by the respondents. The application dated 3.8.2018 was allowed. Prayer 2 of the said application sought that the draft defence and counter claim annexed to be duly filed after payment of the requisite fees.
61. The onus was on the appellant to prove that on 28.9.2018, the requisite fees were duly paid for the document to be deemed as validly filed. The court receipt no. 944 591 issued on 28.9.2018 was for Kshs.750/= and did not include the mandatory fees for the four principal prayers in the counter claim which would have attracted more than Kshs.750/-
62. In *Chairman Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School and another v Francis Bahati Diwani and 2 others* [2014] eKLR, the court held on omission to fully comply with a provision of the rules was an irregularity which except in clear cases may be cured.
63. In this matter, and in absence of a requisite receipt, the failure to file and serve the amended defence and counter claim was contrary to the court order.
64. The witness statement by the appellant dated 28.9.2018 referred to her prayers in the counter claim. This was contained in the paginated bundle filed on 28.9.2018. It was the same bundle which contained the appellants list of documents which were produced as D. Exhs 1-6 respectively.
65. It is therefore inconceivable that the respondents would submit that they did not know of the existence of the documents; defence and counter claim or alleged that the same were not served upon them yet they did not deny the existence or service of the rest of the documents contained in the said paginated bundle, including the case summary; issues for determination, list of witnesses, witness statements and the appellants list of documents and copies thereof.
66. In *Nicholas Kiptoo Arap Korir Salat v IEBC and others* [2003] the court held that deviations from and lapses in form and procedure which did not go to the jurisdiction or root of the dispute or which did not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to level of criminal offence attracting heavy punishment and instead the court should rise to the higher calling by going with the global route that where a procedural infraction, occasion no injustice, it should not have an invalidating effect so as to result to unfairness or hardship.
67. In *Teita Estate Ltd v John Mwather Mutua* [2012] eKLR the court held that the trial court by raising the issue of non-filing and payment of court fees suo moto during judgment writing was too late in the day and adverse to the defence interest who were denied an opportunity to explain.
68. Under Order 6A Rule 6 Civil Procedure Rules, the time to amend is deemed to be 14 days otherwise the order ceases to have effect, without prejudice to the power to extend the period.
69. In this case as was the case in *Teita* (supra), the respondents brought up the issue during the written submissions after the defence had closed her case. However the appellant did not seek leave to pay the requisite fees out of time. The effect of this is that was that the valid defence on record remained the original one dated 30.7.2013 and filed on 30.7.2013. This settles the first issue herein.



70. Coming to the issue of locus stand, on the plaint dated 26.6.2013 at paragraph 6 of the plaint the respondents introduce the suit land as the only family land formerly registered in the name of deceased M'Iringo M'Nchau the husband to the 1st respondent and father to the 2nd – 6th respondents and the appellant allegedly held in trust for them as the only family land and a source of livelihood.
71. At paragraph 7 of the plaint the respondents pleaded that the appellant in September 2005, without their knowledge or consent took undue advantage of the deceased and fraudulently transferred the suit land to herself in breach of the rights of the deceased and the respondents hence took the view that the land now registered under the appellants name was held in trust for them and herself. At paragraph 13 thereof the respondents pleaded the deceased had shared out the suit land to them on 17.4.2004. The prayers sought; were cancellation the name of the appellant and reversion of the land to their joint names and that of the appellant and an order compelling the appellant to offer alternative security to the interested party so as to discharge L.R No. Ntima/Igoki/5569.
72. In Alfred Njau & others v City Council of Nairobi [1982-88] 1KLR, the court defined a cause of action as the fact or combination of facts which give rise to a right to sue whereas locus standi was defined as the right to appear or be heard in court or other proceedings and that to say that a person has no locus standi means he cannot be heard even on whether he has a right or not he has a case worth listening to.
73. The respondents' case was that by virtue of being the wife and children of the deceased respectively and by extension the appellant being the daughter of the deceased, there existed a fiduciary relationship that gave them a right of the land which was initially registered under the deceased name. In other words, the respondents were advancing rights to the land by the deceased which were allegedly fraudulently breached by the appellant without considering their pre-existing beneficial interests.
74. The respondents approached this court claiming land rights belonging to the deceased hence were acting on behalf of the estate of the deceased as beneficiaries thereof without a grant and colligenda, colligenda bona or letters of administration ad litem. They could not sue for a choice of action which belonged to the deceased initially prior to and subsequent to his death without being clothed with capacity to do so. In cross examination the respondents admitted that there were nor pending probate proceedings, yet they were alleging some other property was also in the name of the deceased.
75. This was more disturbing when the respondents main prayer was the title deed be cancelled and instead to be registered in their joint names and that of the appellant yet ideally, if the property had been fraudulently transferred from the name of the deceased to the appellant's it should then revert to the name of the deceased so that it could be shared by all the beneficiaries to the estate including DW 2.
76. In my considered view, without the capacity to maintain, prosecute and sustain these proceedings for and on behalf of the estate, the respondents could not possibly advance their claim as pleaded and presented. The suit was a nullity and could not stand without letters of administration.
77. It is trite law that a party, even if entitled to administration cannot file proceedings on behalf of an estate before letters of administration are granted. In Rajesh Pranjivan Chadasama vs Sailesh Pranjivan Chudasama (2019) eKLR the Court of Appeal held that a litigant is clothed with locus stand upon obtaining a limited grant or full letters of administration in cases of intestate succession.
78. At paragraph 13 of the plaint the respondent pleaded that the deceased had shared out his property in 2004 during his life time among his beneficiaries and hence the reason the respondent were seeking to impeach the title held by the appellant as fraudulently obtained and contrary to the wishes of the deceased.



79. Going by the reasoning in *Macfoy vs United Africa Ltd (1961) 3 ALL ER 1169* at page 1172, I echo the words of Lord Denning that if an act was void then it was in law a nullity and not a mere irregularity. That it was not only bad but incurably bad. Counsel for the respondents have however submitted that and invites the court to find that the parameters of locus stand had been widened by Articles 159, 258 and 260 of *the Constitution*. Unfortunately as regards the *Law of Succession Act* cap 160 a party acting for and on behalf of the estate of the deceased must come clothed with the requisite papers so as to have capacity to advance the interests of the estate of the deceased. To interpret the law otherwise and widen the parameters would lead to absurdity and unimaginable adverse results to the estate of deceased where every Tom, Dick and Jerry would be able to intermeddle with the estate of the deceased to the detriment of the beneficiaries to the estate.

PARA 80.

In *Virginia Edith Wambui Otieno vs Joseph Ochieng Ougo and another C.A 31 of 1998* the Court of Appeal held an administrator was not entitled to bring an action before he had taken out letters of administration and if he did so, such a suit would be incompetent from the date of inception. See also *Roman Karl Hint 3 v Mwang'ombe Mwakima [1984] eKLR*, *Said Mabruk Abel v Margaret Mumbua Muli [2022] eKLR*, *Veronica Gathoni Mwangi & another v Samuel Kagwi Ngure & another [2020] eKLR*.

81. In *Isaya Masira Momanyi vs Daniel Omwoyo & another (2017) eKLR* the court held that the estate of a deceased person can only be represented in any legal proceedings by a person who was duly authorized to do so on behalf of the estate. Such a person has to be issued with letters of administration to represent the estate of the deceased.
82. Without letters of administration, though the 1st respondent was the wife of the deceased, she could not possibly advance his interests. The respondents tried as much as possible to agitate for and on behalf of the deceased including on whether or not he had the capacity to transfer the land to the appellant, on his mental and health status and whether or not he had shared out the land among the appellant and the respondents. All these demonstrate the respondents were agitating for the deceased's interest prior to his death and subsequently after his death as beneficiaries of those rights.
83. Regarding fraud, it is trite law that any allegations of fraud must be pleaded and strictly proved. In *Kuria Kiarie and 2 others v Sammy Magera [2018] eKLR* the Court of Appeal held allegations of fraud must be set out, the conduct as held in *Virjay vs Darbar supra* must be distinctly alleged and distinctly proved and that fraud could not be inferred at all from the facts.
84. In this suit the respondents had the burden to prove that the land control board consent, the transfer process and the registration were fraudulently done. There was no evidence produced by the respondent that the documents alleged to have been signed by the deceased to transfer the land were never signed by him, that was a formal complaint lodged with the police land registry and land control board to carry out investigations relating to the transaction and in which a report was made to the effect that the said transfers and land control forms and the signatures appearing thereon did not belong to the deceased. There was no medical report availed before court to show that the deceased at the time he was alleged to have transferred the land, was sickly and or mentally unstable or was suffering from some terminal disease as alleged or at all and or could not possibly transfer the land.
85. It was the respondent who were alleging the appellant used tricks, misrepresentation and or fraudulently caused the transfers when the deceased was sick and or frail. In *Kinyanjui Kamau v George Kamau [2015] eKLR*, the court held the burden of proof was on him who was alleging fraud which was higher than required in ordinary suits since it was a serious charge bordering on criminality.



86. The respondents failed to call the land registrar to support their case and or tender evidence to show whether there were an irregularity an unprocedural misteps over how the land control board consent, the transfer and registration in favour of the appellant yet the deceased was said to be sickly terminally ill and or mentally unstable.
87. A certificate of title is a prima facie evidence that the person named is the absolute and indefeasible owner as per Section 26 of the [Land Registration Act](#). See Eviline Karigu (suing as administratrix of estate of Late Muirungi M'Chuka alias Miriunga M'Gichuga vs M'Chabari Kinoro (2022) eKLR. There was nothing brought before the court that the 1st respondent as the widow of the deceased complained to the land registrar or the land control board that her land was taken away in a questionable manner and contrary to her spousal consent and/or possessory rights. The respodnents did not make a police report for the appellant to be investigated if at all they doubted the legality and authenticity of the land control board forms, consents and transfer forms.
88. The respondents were advancing a claim for and on behalf of the deceased. This is clear in the plaint where the 1st respondent advances the deceased interest as well as her interests as his wife. She cannot in my view purport to advance such a claim together with PW 2, PW 3 and PW 4 and fail to make a complaint and at the same time allege there was fraud.
89. In Bahola Mkalindi v Michael Seth Kaseme and 2 others [2012] eKLR, the court held that the estate of the deceased refer to property the deceased was legally competent to freely dispose of during his lifetime and in respect of which his interest has not been terminated by his death.
90. The respondents have taken the view that the evidential burden shifted to the appellant to prove that she obtained the title deed lawfully. In Reginah Nyambura Waitathu v Tarcisio Kagunda Waitathu [2016] eKLR and Joseph Karisa Mutsonga v Joseph Nyati [1984] eKLR the court held, the burden of proof rested with the plaintiff and at no time did it shift to the defendants who was under no obligation to prove how he had acquired his title deed. In this matter, the burden was on the respondents to prove that the legal documents that were used by the appellant were irregular, unprocedural and unlawful.
91. As regards to customary trust the principles and factors to prove and satisfy the law relating to customary trust have been settled by the Supreme Court of Kenya in Isaack M'Inanga Kiebia vs Isaya Theuri M'Lintari and another 2014 eKLR namely; that the land in question was before registration family clan or group land; the claimant belongs to that family, clan or group, the relationship with such family, clan or group is proximate; the claimant could have been entitled to be registered as an owner or there beneficiary of the land but for some intervening circumstances and lastly, that the claim was directed against the proprietor of the land who is a family member.
92. The 1st respondent produced before the trial court a marriage certificate no. 537892 showing she got married to the deceased on 24.9.2005 at St. Josephs Cathedral Meru under the African Christian Marriage and Divorce Act Cap 151 Laws of Kenya now repealed by the [Marriage Act 2014](#); a death certificate showing that the deceased passed on 13.5.2006, copy of record for L.R Nkuene/Uruku/5569, showing the register to have been opened on 3.4.2003 as a subdivision of Parcel No. 433.
93. Entry no. 3 of the copy of records indicated that the appellant was registered as the absolute owner on 29.9.2005, following transfer by the deceased as a gift. There was entry on 28.3.2013 in which some rights under Section 87 were registered and eventually at entry no. 1, a charge was registered in favour of the interested party for Kshs.4 million.



94. The respondents also produced a demand letter dated 7.6.2013 in which they for the first time, raised the issue of customary trust fraud, misrepresentation and illegalities in the transfer registration and subsequent taking up of the loan by the appellant to the detriment of the family.
95. The history of the subdivision of the suit land from Parcel No. 4313 was not given by the respondent. They did not lead any evidence showing that the appellant used false pretences, tricks, took undue advantage of the deceased, colluded with land registry officials and effected the transfer and registration, contrary to the wishes of the deceased if at all it was family land before the transfer. It was upon the respondent to lead evidence on such allegations and even produce investigative reports and complaints to the police or land fraud unit that the signatures, minutes and or documents used to transfer the suit land were not made by the deceased he was not in a position to do so due to either lack of capacity, ill health or use of trickery by the appellant so as to defeat the concept of family land see *Vijay Morjaria (supra) Arithi Highway developers v West End Butchery Limited & 6 others* [2015] eKLR.
96. The respondents did not specify what action they took soon after learning of the changes to establish the veracity and legality of the transfer and registration in favour of the appellant. So as to link the concept of family land with fraud.
97. The appellants defence was that the land was an absolute gift *inter vivos* with no conditions or overriding interests.
98. It is trite law that the respondents had no power or right to compel the deceased to grant them land during his lifetime as held in *Mbui Mukangu vs Gerald Mutwiri Mbui* (2004) eKLR.
99. The respondents' evidence and submissions were that, ordinarily a customary trust is created for land to go to the wife and children thereof. The respondents did not dispute that the deceased had a first wife the mother of the appellant and DW 2. They did not also dispute that the appellant was entitled to a share of the suit land equally with them, hence the allegations that gift *inter vivos* was subject to their overriding interests in the nature of customary interests. DW 2 testified that the deceased had other parcels of land under his name and which formed part of his estate. It is curious to note that the respondents only sought to share out the suit land and not the rest of the estate of the deceased. This is the more reason that there was need to seek and obtain letters of administration so that the respondents would have capacity to advance these interests which revolved around the deceased's estate and ideally, would fall under the Probate Court.
100. In the estate of the late Gideon Manthi Nzioka (deceased) *supra* Nyamweya J, as she then was held that a gift *inter vivos* is made through a deed or instrument and or a registered transfer and must be complete to be valid and binding.
101. As indicated elsewhere in this judgment there was no evidence tendered that the deceased lacked capacity or competence to transfer the land to the appellant. The land to the appellant by way of a gift. The gift was perfected by the transfer. There was no evidence tendered that before the deceased passed on, he had complained or objected to the gift at the time it was given, perfected and the transfer effected. There is no evidence that he expressed any fear over any tricks by the appellant over the land.
102. In law any gifts take effect immediately upon perfection and are in absolute terms. The gift herein was consummated through the acceptance by the beneficiary. Whether or not the respondents were involved, consulted and should have been consulted by the deceased, the burden of prove, that was bestowed upon the respondents to discharge to the required standard in line with Sections 107 and 109 of the *Evidence Act* Cap 80. The burden was upon the respondents to show that they asserted their rights on the land by way of seeking letters of administration to take care of the estate if at all they



- still held firm belief they were the genuine beneficiaries. By 2013, there had been unexplained delay of taking up that route.
103. A trust can never be implied by the court unless there was interest to create it. The respondents averred that there was a meeting on 17.4.2004 in which the deceased shared out his land to the parties herein. Unfortunately, no minutes were produced to that effect or perhaps an independent witness brought to testify over the alleged meeting. See *Njenga Chogera v Maria Wanjira Kimani and 2 others* [2005] eKLR.
 104. Further, during examination in chief PW 1 said that she had quarreled with the deceased after he had given out the shamba without her knowledge. It appears, therefore 1st respondents knew of the transfer in 2005 but did nothing to either stop it or reclaim the land during the lifetime of the deceased and soon thereafter if at all she knew the land was family land. She also confirmed the deceased was literate. The law is that a party seeking customary trust must also prove that he or she would have been the registered owner were it not because of some intervening circumstances. The onus was on the respondents to plead and prove the intervening circumstances. It is also trite law that a party alleging customary trust must prove that it was the intent of the parties or family members that the parcel would be registered in trust for other family members. The respondents had the onus to prove and discharge the burden that the deceased in transferring the land to the appellant, intended the latter to hold it in trust for not only his wife the 1st respondent, but also the rest of his family, the respondents included. That intention had to be proved through evidence and since it is never the duty of the court to infer trust, the respondent sand particularly the 1st respondent as the wife to the deceased, had to prove before the court why the deceased would bypass her and transfer the land to the appellant who in any event was the child of the 1st wife.
 105. In *Peter Gitonga v Francis Maingi M'Ikiara* [2007] eKLR the court held that the circumstances surrounding the registration must be looked at to determine the purpose of the registration to determine whether a trust was envisaged.
 106. In *Mbui Mukangu supra*, the court held that a customary trust is a concept of intergenerational equity, where land is held by one generation for the benefit of succeeding generations. In this suit, the 1st respondent has admitted there was a quarrel after she learned of the transfer. Between 2005 and 2013 when this suit was filed, there is no evidence that the respondents tried to assert their rights and or sought to demand for the suit land to revert to the estate of the deceased before he passed or so soon after he passed on.
 107. In *Peter Ndungu Njenga v Sophia Waiti Ndungu* [2000] eKLR, the court held that a presumption of trust is not to be arrived easily save to give effect to the intention of the parties which must be clearly determined before a trust is inferred.
 108. Similarly in *Njenga Chogera supra* the court while citing with approval *Muthuita vs Muthuita* [1982 – 1988] 1KLR 42 held that customary trust is proved by leading evidence. This was the same position in *Jutelabi v African Adventure Ltd & another v Christopher Michael Lockley* [2017] eKLR that the onus lies on a party alleging trust to prove it through evidence.
 109. The respondents did not call any independent witness to prove that the land was family land in nature and was intended for their use and ownership in the absence of the deceased.
 110. This is particularly so given the evidence tendered by the appellant and her witnesses that the land belonged to the 2nd house and that the respondents had been given land elsewhere where they were living but allegedly sold it and moved to the suit land which ideally belonged to the 1st house and in which the deceased had bequeathed to the appellant just like her brother DW 2 the land at Ruiru.



111. Similarly, the respondents failed to lead any evidence on any intervening circumstances that led them not to be registered as co-owners of the suit land or what transpired during the intervening period of close to eight years between 2005 and 2013. See *Midimo Okelo Ogutu v John Osewe Onyango* (sued as the personal representative of the estate of Onyango Omo (deceased) [2022] eKLR.
112. My finding therefore is that the respondents failed to prove that the suit land was family land before registration and was held by the appellant in trust for them.
113. As regards the defence, the appellant relied on her defence dated 30.7.2013. In the reply to defence dated 30.8.2013 the appellant admitted the existence of L.R No. Kiirua/Ruiru/729 situated in Ruiru Nchoroiboro bought by the deceased but which he had given to Paul Kaumbuthu the brother to the appellant and who testified as DW 2.
114. This admission leads credence to the fact that it was normal for the deceased to gift his land to the children of his first house during his life time. The respondents pleaded that they had no right to that Ruiru land and that theirs was the suit land. Specifically at paragraph 7 of the defence, the appellant pleaded that the respondents had been given a parcel of land in Tutua-Ruiru which they had allegedly disposed off and moved into the suit land which was the appellant's inheritance.
115. Further the appellant pleaded that the respondents only moved into the suit land in 2005. DW 1 testified and produced all the relevant documents showing how she acquired the suit land. None of her documents were subjected to any forensic investigation by the respondents and if found to be forged, illegal and or obtained irregularly or unprocedurally. The appellant testified that her late father was in good health when he transferred the suit land to her. She explained how her father had bought land for the 1st respondent at Tutua and the source of the suit land as a purchase and not ancestral land.
116. In my view, the appellant gave a reasonable explanation by producing documents showing the root of her title to the land. Under Section 26 of the *Land Registration Act*, a certificate to title can only be challenged through fraud, misrepresentation and lastly where it has been acquired illegally, unprocedurally and through a corrupt scheme.
117. In this suit, it was upon the respondents to impeach the appellant's defence testimony and demonstrate the manner she unprocedurally, illegally, through misrepresentation and or by corrupt scheme, acquired her title. It wasn't enough to cross examine on fraud, illegalities and unprocedural documents without tangible evidence to the contrary.
118. The onus was not on the appellant to prove her innocence but the respondent's to impeach the title on account of fraud and misrepresentation. See *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR. See *Urmila W/o Mahendra Shah vs Barclays Bank International Ltd and another* [1979] eKLR, *Central Bank of Kenya Ltd v Trust Bank Ltd & 4 others* [1996] eKLR.
119. In *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representative of the estate of Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* [2020] eKLR the Court of Appeal held that a party relying on fraud must not particularize it but also lay basis by way of credible evidence upon which a court would make a finding that there was fraud in the transactions leading to the transfer and registration of the suit land.
120. In that suit the court noted that in the absence of criminal legal or proceedings against the registered owners over the transfer and registration and given there was no complaint raised by the deceased transferor during his lifetime, fraud which is a quasi-criminal charge had not been proved to the required standard below reasonable doubt but above the balance of probabilities.



121. In that case, like in the instant case, there was no evidence called from the land office to verify their allegations of fraud as custodian of land record and who would have been in a better position to explain the concerns raised by the respondents.
122. Just like in the instant case, the registered owner had produced the green card and entries made therein.
123. If at all the respondents doubted the genuineness of the appellant's documents none objected to their production or called witnesses including the land registrar or land control board members and the advocates who witnessed the transfer to deny that the said documents were not signed, stamped, authored, presented and or registered with them.
124. My finding is that the appellant's defence and documentary evidence produced was consistent with her defence that the deceased validly and genuinely transferred the suit land to her as a gift during his lifetime and that he had no intention whatsoever to create a customary trust in favour of the respondents.
125. Turning to the issue of the interested party by an application dated 27.6.2016 the interested party sought to be enjoined as a party to this proceedings alleging the inhibition orders issued on 9.7.2013 were clogging its right to statutory power of sale and needed to be vacated and in the alternative the appellant to be ordered to pay.
126. The court by an order dated 15.8.2013 directly an order for the appellant to pay Kshs.4 million in the alternative offer another security to the interested party in order to discharge the suit land from liability pending the hearing and determination of the suit.
127. The respondents opposed the application and averred that had the interested party done due diligence they would have established their occupation before charging the property.
128. Once the order was made the interested party never participated or gave any evidence before the trial court, save by the filing of written submissions after the close of the defence case dated 18.3.2019. The interested party submitted that they were entitled to recover the loan due plus interest, through the exercise of a statutory power of sale and or in the alternative for an order directing the payment of the total loan amount due by both the respondent and the appellant prior to the discharge of the suit land.
129. It is trite law submissions however powerful may not amount to pleadings and evidence see Daniel Toroitich Arap Moi vs Stephen Murithi & another (2014) eKLR. Contrary to the submissions made by the interested party herein, there is no evidence before this court that the interested party ever complied with the order of pretrial conference and filed any responses in support of its claim other than the supporting and further affidavit to the application dated 26.6.2013. It is also not clear if the interested party after the order made on 15.8.2013, ever formally came on record in this suit and disclosed its stake before the trial court. Be that as it may by a ruling of this court delivered on 8.12.2021, the court allowed the interested party to come on board given the implications of the decree issued by the trial court. The interested party failed to file any pleadings and accompanied with witness statements and documents especially where the suit property charged to it was under the threat of impeachment on account of fraud and for lack of due diligence on its side. Even if the affidavit alluded to above and the documents attached thereto, were to be taken as evidence remained mere unsubstantiated statements for lack of witness(es) to produce them before the trial court. See Alice Chemutai Too v Nicholson Kipkurui Korir and 2 others [2015] eKLR.
130. As regards the submissions that adverse orders made by the trial court against the interested party should be vacated, again there is no cross- appeal made by the interested party before this court. See Supreme Court of Kenya in Gideon Konchela v Julius Sunkuli & 2 others [2018] eKLR.



131. Therefore, as regards ground no. III of the appeal, the validity of contract between the appellant and the interested party was never an issue before the trial court. None of the parties before the trial court pleaded and/or tendered evidence on that issue.
132. In *Frera Engineering Co. Ltd v Morris Mureithi Mutembei* [2020] eKLR, the court held that there is a philosophy and logical reason behind our appellate system that unless in exceptional circumstances and proper adherence to the prescribed procedure, an appellate court will only consider issues that were canvassed before and decided by the trial court.
133. This court will not become the trial court in disguise and make a decision without the input of the court of the first instance as held in *Frera Engineering Co. Ltd* suit (supra). This court therefore rejects the said ground of appeal and by extension the invitation by the interested party to seize a jurisprudential moment and come to assist a party who invited itself to the proceedings before the trial court, failed to participate and plead its interest or stake in the suit and protect it.
134. In the premises and due to the foregoing, I reach the irresistible conclusion that the appeal herein has merits. The same is allowed with costs to the appellant. The lower court decree is hereby set aside and substituted with an order dismissing the suit therein with costs to the appellant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 18TH DAY OF MAY, 2022

In presence of:

Miss Gatheru for Mbaabu for 1st – 4th respondents

Mutuma and Koskei for appellants

Ruriga for interested party

HON. C.K. NZILI

ELC JUDGE

