



**Thuo v Thuo & another (Environment and Land Appeal
E016 of 2021) [2023] KEELC 17255 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17255 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E016 OF 2021**

OA ANGOTE, J

MAY 4, 2023

BETWEEN

JANE NYAMBURA THUO APPELLANT

AND

CHARLES JOSEPH MAINA THUO 1ST RESPONDENT

STEPHEN IRUNGU THUO 2ND RESPONDENT

*(Being an appeal from judgement and order of the Chief Magistrate's Court at
Milimani Commercial in Nairobi (Hon Peter Muholi) given on the 12th day of
February, 2021 in Civil Suit 4147 of 2018 consolidated with CMCC No 2605 of 2014)*

JUDGMENT

Background

1. This Appeal arises from two suits that were consolidated and determined by the Magistrates Court at Nairobi regarding the ownership of the parcel of land known as Plot No 21, Kayole, Nairobi. The Appellant, Plaintiff in Civil Suit 4147 of 2018 (formerly ELC Case No 519 of 2017), sought the following reliefs as against the 1st and 2nd Respondents (1st and 2nd Defendants):
 - i. A Permanent Injunction restraining the Defendants/Respondents, their agents, servants and/or employees and any other party in rem from selling, alienating, transferring, constructing, sub-dividing, surveying, interfering and/or in any way dealing with the Plaintiffs plot Number 21 KAYOLE.
 - ii. A declaration that the Plaintiff herein is the owner of Plot No 21 KAYOLE.
 - iii. An Order directing that all the rent for the rental premises in Plot No 21 Kayole be paid to the Plaintiff.



- iv. General Damages.
 - v. Costs of the suit.
2. The 1st Respondent was the Plaintiff in CMCC No 2605 of 2014 and vide a Plaintiff filed on the 7th May, 2014 sought as against the 2nd Respondent (Defendant therein) the following orders:
 - i. An injunction restraining the Defendant from interfering with the Plaintiffs Plot No 21 Soweto/Kayole in Nairobi and further restraining the Defendant from writing notices to the Tenants and/or demanding rent from Tenants residing in the Plaintiffs Plot No 21 Soweto/Kayole and general damages thereof.
 - ii. Costs of the suit.
 - iii. Any other relief the Court may deem fit to grant.
3. It was the Appellant's case before the trial court that she was at all material times the allottee of Plot No 21 Kayole (herein after the suit property) having been allocated the same in 1998; that the Respondents are her biological sons; that by a Power of Attorney dated 24th June, 2011, she intended to donate the Power of Attorney to the 2nd Respondent and that the same was never registered.
4. It is the Appellant's case that the special Power of Attorney dated 25th January, 2005 and purportedly donated by her to the 1st Respondent is fraudulent; that she revoked the same vide a notice of revocation of the Power of Attorney dated 13th March, 2017 and that she reported the issue of forgery to the Criminal Investigation Department.
5. According to the Appellant, vide a Ruling delivered by the Business Premises Rent Tribunal, it was ordered that the rental monies would be released to the party with a Court Order certifying that he or she is the owner of the suit property; that she is elderly and sickly and fully dependent on the rental income from the property for her upkeep and medication and that the 1st Respondent has been engaging in fraud by creating documents and claiming that they emanate from her, collecting rent and claiming ownership of the suit property.
6. It was the 1st Respondent's case vide the Plaintiff in CMCC 2605 of 2014 and Defence and Counterclaim in CMCC 4147 of 2018 that he is the lawfully registered proprietor of the suit property in which he has constructed rental rooms; that the Appellant voluntarily transferred the suit property to him which process the elders were involved in and that he is the only registered owner thereof.
7. It is the 1st Respondent's case that he is in possession of a plot card issued by the Nairobi City Council; that he collects the rent for the benefit of all the parties; that the documents were fully prepared by and with the knowledge of the Appellant and the allegations of fraud are unfounded and that the revocation of the Power of Attorney was done without his knowledge contrary to the law with the aim of defeating his title to the property.
8. It was averred by the 1st Respondent that the Appellant and 2nd Respondent by way of fraud induced the Registrar to revoke the Power of Attorney without involving all the parties and that on 1st April, 2014, the Appellant and the 2nd Respondent purported to collect rent from his tenants claiming ownership of the property.
9. In the Counterclaim, the 1st Respondent sought an injunction restraining the Appellant and the 2nd Respondent from interfering with the suit property; a declaratory order that the suit property belongs



to him and a declaration that the Appellant and 2nd Respondent have no authority to interfere with the same. The 1st Respondent also sought for damages and interest thereon and costs of the suit.

10. The matter proceeded by way of oral hearing. The Appellant, PW1, testified that she is the lawful owner of the suit plot having been given the same in 1988 by Kenyatta and Moi; that it is her late husband who constructed the houses on the suit property and that she has been receiving rent therefrom but had not received the rent for the last six years. The Appellant testified that she did not grant any authority for the transfer of the suit property to any of the Respondents and that she was never been given the sum of Kshs 50,000 as alleged.
11. On cross-examination, she stated that it was her late husband who used to collect rent but she could not remember for how long; that she could not remember when her husband built the houses; that she does not know how many houses are on the property; that she is unaware of whether rates are paid; that she has never given the 2nd Respondent the plot nor written any statement and that she has never been before the National Land Commission.
12. The Appellant adduced into evidence a copy of the allotment letter dated 18th November, 1988, the unregistered Power of Attorney to the 2nd Respondent dated 24th June, 2011, a copy of the Special Power of Attorney to the 1st Respondent dated 20th January, 2005 and a copy of an OB extract.
13. The Appellant also produced in evidence a copy of the notice of revocation of the Power of Attorney dated 13th March, 2017, a copy of a Ruling by the Business Premises Rent Tribunal, a copy of the Ruling in Civil Suit 2605 of 2014, her medical report, a letter from the National Land Commission dated 25th May, 2017 and a letter from Nairobi City County dated 3rd November, 2017 stating that she was the initial allottee of the suit property.
14. On the other hand, the 1st Respondent testified that he was allocated the property by his mother in 2004 and paid her the sum of Kshs 50,000/=; that they went to Nairobi City Council to have the plot transferred to him after registration; that they went to the legal office where the committee interviewed them after which the transfer was done; that he was issued with the ownership card which has the account number that he uses to pay rates and rents and which he used to apply for electricity and that he constructed twenty semi-permanent structures on the suit property generating monthly rent of Kshs 2000 each.
15. It was the testimony of the 1st Respondent that sometime in 2014, the 2nd Respondent went onto the property and asked the tenants to pay rent to him and that together with the Appellant, they instigated the filing of suits at the High Court and the Business Premises Rent Tribunal in a bid to take the property. It was his evidence that the Appellant has been giving contradictory evidence in the various suits, in one instance claiming that she transferred the property to the 2nd Respondent, while in another instance denying having transferred the suit property to any of them.
16. The 1st Respondent adduced into evidence the Power of Attorney dated 20th January, 2005, the plot formalization card for the property, electricity bills from Kenya Power and Co Limited, a letter from Nairobi City County affirming the 1st Respondent's ownership of the suit property, and Transfer Deed in favour of the 2nd Respondent dated 24th June, 2011, amongst others.
17. After hearing the parties and receiving their respective documents, the lower court delivered its Judgment on 12th February, 2021 by dismissing the Appellant's claim and allowing the 1st Respondent's counter claim as follows:
 - i. I do make a declaration that the 1st Defendant is the legal owner of Plot No 21, Kayole, Soweto.



- ii. The Plaintiffs suit is dismissed.
- iii. Given the circumstances of this case I will not grant any general damages.
- iv. To further create harmony and collegiality between the parties who are family I will direct that each party bears their own costs.
- v. The 1st Defendant had indicated his willingness to allow the Plaintiff who is the Mother to draw the rent from the houses on the suit property, I will implore him to do so as it is good.

18. The Appellant, dissatisfied with the aforesaid decision filed this Appeal vide the Memorandum of Appeal dated 11th March, 2021 and set out the following grounds;

- i. The Honourable Magistrate erred in law and in fact in dismissing the Appellants suit against the Respondent.
- ii. The Honourable Magistrate erred in law and in fact in declaring the 1st Respondent as the legal owner of Plot No 21 Kayole, Soweto.
- iii. The Honourable Magistrate erred in law and fact in entertaining and allowing the 1st Respondents' incurably defective counter-claim.
- iv. The Honourable Magistrate erred in law and in fact in entertaining and allowing the 1st Respondents defective counter-claim without giving reasons for the decision.
- v. The Honourable Magistrate erred in law and in fact in determining a dispute on ownership of land knowing very well that he had no jurisdiction over the matter.
- vi. The Honourable Magistrate erred in law and in fact in determining a dispute on ownership of land yet he has not been appointed by the Chief Justice and gazetted to hear land disputes.
- vii. The Honourable Magistrate erred in law and in fact in failing to consider that there was a contradiction by the 1st Respondent as to whether he was given the property as a gift or whether he purchased it.
- viii. The Honourable Magistrate erred in law and in fact in failing to notice the contradiction in the 1st Respondents case that the Appellant gave him power of attorney to transfer the land and at the same time the Appellant appeared before a land committee to do a transfer.
- ix. The Honourable Magistrate erred in law and in fact in assuming that the Appellant appeared before the Registrar/Committee to sanction the transfer yet there was no evidence to prove this.
- x. The Honourable Magistrate erred in law and in fact in believing the 1st Respondents word of mouth that together with the Appellant they appeared before a Committee where the transfer was done without giving reasons for disbelieving the Appellant who denied these facts.



- xi. The Honourable Magistrate erred in law and in fact in not finding that the Power of Attorney was ambiguous.
- xii. The Honourable Magistrate erred in law and fact in disregarding the issue of the Appellants illiteracy.
- xiii. The Honourable Magistrate erred in law and fact in disregarding the issue of the Appellants illiteracy.
- xiv. The Honourable Magistrate erred in law and in fact in finding that the Appellant validly made the Power of Attorney yet there was no evidence that the Appellant understood the contents of the instrument.
- xv. The Honourable Magistrate erred in law and fact in finding as valid the Special Power of Attorney which was drawn and witnessed by the same advocate.
- xvi. The Honourable Magistrate erred in law and in fact by contradicting himself by holding on one hand that the 1st Respondent acted in good faith and remitted rent to the Appellant for the first 6 years as per the donated powers but on the other hand goes ahead to find that the 1st Respondent was the actual owner of the property.
- xvii. The Honourable Magistrate erred in law and in fact in downplaying evidence that the Appellant had been receiving rent from 2005 to 2014.
- xviii. The Honourable Magistrate erred in law and fact in finding that evidence on record hints at manipulation of the Appellant but goes ahead to affirm the fraudulent transactions on the suit property.
- xix. The Honourable Magistrate erred in law and fact in disregarding the finding of the National Land Commission recommending the reversal of the fraudulent transactions on the suit property and directing the Nairobi City County Government to issue the Appellant with ownership documents.
- xx. The Honourable Magistrate erred in law and in fact in failing to see fraud demonstrated by the surrounding circumstances of the case including multiple conflicting documents of ownership from Nairobi City County.
- xxi. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate the applicable principles of law therefore arriving at an erroneous finding.

Submissions

- 19. The Appellant, through his counsel, submitted that the trial court did not have jurisdiction to entertain the matter as the Magistrate was not appointed to handle land matters pursuant to Section 26(3) of the *Environment and Land Court Act*; that the National Land Commission had made a finding that the Power of Attorney had been procured fraudulently and ordered the Nairobi City County to reverse the fraudulent transaction and that if the Respondents were aggrieved by the aforesaid decision, they should have filed a Judicial Review Motion and not a Counterclaim.
- 20. It was submitted that the Counterclaim is defective not having been accompanied by an Affidavit pursuant to Order 4 Rule 1(2) of the Civil Procedure Rules. Counsel cited the case of Priska Onyango



Ojuang and Another vs Henry Ojwang Nyabende [2018] eKLR and Galerius Investments Limited vs County Government of Mombasa & Another [2020] eKLR in which it was held that a Verifying Affidavit is a mandatory requirement, the lack of which renders the suit fatal.

21. It was submitted that there is a plethora of evidence confirming that both the Sale Agreement and the Power of Attorney were fraudulent ploys by the 1st Respondent as evinced by the facts that the Sale Agreement dated 20th December, 2004 had a clause referring to a Special Power of Attorney dated 20th January, 2005 a year later and that the Power of Attorney had ambiguous provisions and was drawn and commissioned by the same Advocate who represents the Appellant herein when it should have been witnessed by another commissioner of oaths.
22. Counsel submitted that the Appellant is illiterate and there is no evidence showing that she was aware of the documents she was signing; that the National Land Commission commenced investigations and found that the Power of Attorney was fraudulently acquired and recommended for the revocation of the transfer in favour of the 1st Respondent and reinstatement of ownership of the land to the Appellant and that the Magistrate erred in finding that it is the 1st Respondent who developed the plot and is hence its owner as this was disputed.
23. The Appellant's counsel submitted that there was no evidence of any transfer forms, land control board consents and stamp duty payments, and that the letters from the county government are contradictory.
24. The 1st Respondent's counsel submitted that the firm of Nchogu, Omwanza and Nyasimi is not properly on record and has no locus to prosecute the Appeal as they did not comply with the mandatory requirements of Order 9 Rule 9 of the Civil Procedure Rules that governs taking over conduct of a suit post judgement. Reliance in this respect was placed on the cases of David Mbogo vs Alfred C Asikoye and 3 Others [2004]eKLR and Ismael Norani vs Shakila Band Akram [2009]eKLR.
25. It was submitted that the question of whether the Trial Magistrate has the requisite jurisdiction was not raised at the pre-trial stage and that the onus is on the Appellant to prove that the Magistrate did not have jurisdiction which she has failed to do as the purported gazette notice was not produced in these proceedings and does not form part of the record.
26. It was submitted that the file was allocated to the Magistrate as he had the necessary pecuniary jurisdiction to handle the matter subject to this Court's direction in transferring the matter to a Magistrate with the relevant pecuniary jurisdiction; that the question of the 1st Respondent's Counterclaim was not raised by the Appellant before the Trial court; that the original suit No CMCC No 4147 of 2018 had a Verifying Affidavit and that nevertheless, Courts have held that the failure to file a Verifying Affidavit with a Counterclaim is not fatal. Reliance in this respect was placed on the case of Leo Investments Limited vs Terry Wanjiku Kariuki[2009]eKLR.
27. It was submitted that the 1st Respondent adduced evidence showing that he is the lawful owner of the suit property having purchased the same from the Appellant at a consideration of Kshs 50,000; that the Appellant executed a special Power of Attorney which was duly registered; that the Appellant appeared before the Nairobi City Council to effect the transfer of the property and all the relevant documents in that regard are in the custody of the Appellant and that the 1st Respondent demonstrated that he had been paying bills and ground rents.
28. It was submitted that the Appellant did not prove her assertions that the Power of Attorney was fraudulent to the required standard of proof; that as held by the Court in Vijay Morharia vs Nansign Madhusing Darbard & Another[2002]eKLR, fraud must be specifically pleaded and proven and that as was held by the Court in Central Bank of Kenya vs Trust Bank Limited & 4 Others[1996]eKLR, the burden of proof in fraud cases is heavier than in an ordinary civil case.



Analysis & Determination

29. The court has considered the Memorandum of Appeal and the parties' submissions. Whereas the Appellant has set out 21 grounds of Appeal, the issues for determination can be summarized as follows:
- i. Whether the Appeal is competent.
 - ii. Whether the Magistrate had jurisdiction to entertain the suit?
 - iii. Whether the Magistrate erred in dismissing the Appellants suit and upholding the 1st Respondent's Counterclaim?
30. As the first Appellate Court, this Court is alive to the fact that in determining whether or not the Trial court was justified in reaching its decision, it is obligated and indeed under a duty to re-evaluate the evidence and the materials that were placed before the Trial court and may, on re-evaluation, reach its own conclusion and findings.
31. This principle was aptly enunciated in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 where the court of Appeal stated as follows:
- “This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect.”
32. More recently, the Court of Appeal in *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR, re-affirmed this position by stating as follows:
- “This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below andthe principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”
33. As to the circumstances under which this Court can interfere with the decision of the subordinate Court, the Court of Appeal in *Khalid Salim Abdulsheikh v Swaleh Omar Said* [2019] eKLR expressed itself as follows:
- “We nevertheless appreciate that an appellate Court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings.”
34. The 1st Respondent has impugned the validity of the present Appeal. According to the 1st Respondent, the Appeal as filed is fatally defective and constitutes a nullity because the firm representing the Appellant, Nchogu Omwanza & Nyasimi Kibuchi Advocates herein is not the same firm that represented the Appellant at the Trial court.



35. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —

- a. upon an application with notice to all the parties; or
- b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”

36. The present proceeding is an appeal from the Magistrates Court. The question that lends itself is whether this is one of the matters contemplated by Order 9 Rule 9 aforesaid. In the case of *Stanley Mugambi v Anthony Mugambi* [2005] eKLR, the Court dealing with a similar question persuasively stated thus;

“The issue for determination is whether commencing an appeal by an advocate other than the one who conducted the case in the lower court falls within the provisions of Order III Rule 9A. In my considered view, I do not think so. My reading of the provisions of Rule 9A is to the effect that such change or intention is restricted to a suit that is either going on or one that has been concluded. The rule does not apply to appeals. If the intention of the drafters was to include appeals under this rule it would have been so stated. To my mind, Rule 9A envisages a situation where after judgment has been entered, a new advocate desires to come on record for purposes of applying for stay of execution or to proceed with execution proceedings in that suit. If any other meaning were to be assigned to the rule, the High Court and the Court of Appeal would be inundated with time consuming applications by advocates wishing to file appeals on behalf of litigants who were represented by different advocates in the lower court. I would agree with Mr. C. Kariuki for the appellant/respondent that the aim of Rule 9A was only intended to prevent parties from throwing out an advocate after judgment with the aim of denying the advocate the fruits of their costs...”

37. The Court is persuaded and agrees with the position that once a judgment is entered, an appeal against the Judgment cannot be said to be a continuation of the lower Court proceedings, but a commencement of new proceedings in another court. As such, parties are at liberty to retain or engage new counsel without the requirement for a notice of change or leave from the previous advocate. This objection therefore fails.

38. It has been submitted by the Appellant that the trial court did not have jurisdiction to entertain the matter. According to the Appellant, this being a land matter, only a Magistrate duly gazetted to handle land matters pursuant to section 26 (3) of the *Environment and Land Court Act* can entertain the same and that when they raised the issue vide the application of 5th March, 2021, the Respondents never responded.

39. In response, the 1st Respondent stated that this Court, when transferring the matter to the Magistrate’s Court, directed that the matter be heard by any magistrate with the requisite pecuniary jurisdiction owing to the subject value of the property and the Trial Magistrate, a Senior Resident Magistrate, had the requisite jurisdiction in that regard and that nonetheless, the issue of jurisdiction was not raised at the pre-trial stage and was not proven.

40. The Court has considered the trial court’s decision and notes that this was not an issue for determination before the Court. The Appellant is essentially raising it for the first time before this



Court. Is this acceptable? The Court of Appeal in *Attorney General & 2 Others v Okiya Omtata Okioti & 14 Others* [2020] eKLR had the opportunity to consider this question and stated thus;

“On whether the High Court could have had jurisdiction at the time the suit was instituted on the grounds that the Co-operative Tribunal had not been constituted, my view is that jurisdiction either exists or does not exist ab initio and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction. And as regards the consent order of 1.3.00, it is trite law that jurisdiction cannot be conferred by the consent of the parties. Much less can it be assumed on the grounds that parties have acquiesced in actions which resume the existence of such jurisdiction. And jurisdiction is such an important matter that it can be raised at any stage of the proceedings and even on appeal.”

...Similarly, in *Kenya Commercial Bank v Osebe* [1982] KLR 296, it was held that although an appeal must be confined to the points of law raised and determined by the trial court, there were two exceptions to that rule, namely, where the trial court commits an illegality or acts without jurisdiction.”

41. It is trite the question of jurisdiction can be raised at any stage of the proceedings. It matters not that the question was never raised at trial. This is one of the two exceptions where an appellate court can deal with a point of law that was never raised at trial, the other exception being where the trial court commits an illegality. The question of jurisdiction is therefore properly taken.
42. The Appellant has stated that the trial magistrate had no jurisdiction to handle the matter pursuant to Section 26(3) of the *Environment and Land Court Act*. The said section provides that the Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country and magistrates so gazzetted shall have jurisdiction to entertain, among others, matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.
43. This section was the subject of discussion in the case of *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & Another* [2020] eKLR, where the Court persuasively stated thus;

“The upshot of the provisions at Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates' Courts Act*, 2015 is that magistrates who are duly gazetted and have the requisite pecuniary jurisdiction have jurisdiction and power to handle cases involving occupation of and title to land. Claims in the nature of adverse possession involve title to land since the claimant ultimately seeks an order that he be registered as the proprietor of the land...In view of the foregoing discourse, there are ample reasons based on the express provisions of Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates' Courts Act*, 2015, the principles of interpretation of *the constitution* as well as the principles of *the constitution* such as devolution, access to services and access to justice for all persons, to find as I hereby do, that so long as presided over by a magistrate who is duly gazetted under Section 26 (3) of the *Environment and Land Court Act*, 2011 and who has the requisite pecuniary jurisdiction, magistrates' courts have jurisdiction and power to handle cases involving claims of adverse possession.”



44. Indeed, it is apparent that only a magistrate who has been duly gazetted as aforesaid can handle land matters. So, was the trial magistrate gazetted? Whereas the Appellant asserts that he was not, no evidence has been adduced in this respect contrary to the principle of law that he who alleges must prove. Nonetheless, the Court takes judicial notice of the fact that the trial magistrate was indeed gazetted to handle land matters vide Gazette Notice No. 11930 of 8th December, 2017. This objection fails.
45. The other issue that the Appellant raised as a point of law is whether the 1st Respondent's Counterclaim was valid. The Appellant asserts that the trial court erred in entertaining the 1st Respondent's incurably defective Counterclaim. To begin with, this issue was not canvassed before the Court and as such, the Magistrate cannot be blamed for not having considered it.
46. Second, unlike the question on jurisdiction, this Court is not convinced that this is a matter that can be raised on appeal at the first instance. In the circumstances, the court finds that the question of the validity of the Counterclaim should have been raised before the trial court as the Court with discretion to decide whether or not to strike out the suit. In the circumstances, it is too late in the day to ask this Court to take a draconian action and strike out the Counterclaim. This objection fails.
47. The suit before the Trial court involved the proprietorship of the suit property which both the Appellant and the 1st Respondent lay claim to. Each party was therefore obligated to prove their case on the required standard of proof being on a balance of probabilities. This principle is succinctly captured in Sections 107, 109 and 112 of the *Evidence Act*. Section 107 provides as follows:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
48. Sections 109 and 112 of the same Act states as follows:
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- “112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
49. The Appellant's case before the trial court was that she is the lawful owner of the suit property; that she has never parted with possession thereof in any manner and that the Sale Agreement and the Special Power of Attorney produced by the 1st Respondent are void and fraudulent.
50. On the aspect of void, it is the Appellant's case that the Sale Agreement and the Power of Attorney contravened Section 4 of the *Oaths and Statutory Declarations Act*. The said section provides as follows:
- “(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the



registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.”

51. In dealing with a similar objection on the validity of a sale agreement where the company secretary had acted for both parties in the agreement by drawing, executing it on behalf of the company and commissioning it, the Court in *Cove Investments Limited v Johana Kiprotich Rono & 2 others* [2021] eKLR expressed itself thus;

“ Suffice it to state that the preamble to the Act makes it clear that the said statute was enacted to “to provide for the appointment of commissioners for oaths, and to make provision in regard to the administering of oaths and the taking of statutory declarations”. A sale agreement is not a document on oath and the advocate drawing it or attesting its execution does so simply as an advocate and not a commissioner for oaths. Clearly, the objection is bereft of legal foundation.”

52. Looking at both the Sale Agreement and the Special Power of Attorney, it is clear that the Advocate was merely witnessing their execution and was not administering an oath and as such, there was no contravention of Section 4 of the *Oaths and Statutory Declarations Act*.

53. As to the contention on fraud, the same is defined by the Black’s Law Dictionary as:

“ Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another.”

54. It is trite law that fraud must not only be pleaded and particularized but strictly proven. This position was affirmed by the Court of Appeal in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR where the Court stated as follows:

“ It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”



55. As regards the standard of proof, the Court of Appeal in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR expressed itself as follows; -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008] 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

56. The Appellant particularized the elements of fraud against the 1st Respondent as creating a document and claiming that the same emanated from the Appellant and claiming ownership of the suit plot. On his part, the 1st Respondent vide his Counterclaim stated that the representations by the Appellant and the 2nd Respondent to the Registrar of Titles to the effect that the Power of Attorney was fraudulent and causing revocation of the Power of Attorney was unlawful.
57. The Court has considered the evidence. Both the Sale Agreement and the Special Power of Attorney have been executed by way of a thumbprint. Indeed, it is apparent that the Appellant is not literate and all the documents by her have been executed by way of a thumbprint. In light of the 1st Respondent’s assertions that the Appellant duly executed the said documents, are her denials by themselves sufficient evidence of fraud?
58. The Court thinks not. No expert evidence has been adduced showing that the thumbprint that was affixed on the Sale Agreement and the Power of Attorney do not belong to the Appellant. Similarly, without concrete evidence that the Appellant did not execute the two documents, the issue of the Special Power of Attorney being executed and registered a year after the Sale Agreement cannot in itself evince fraud.
59. It has also been submitted that the Appellant reported the fraud by the 1st Respondent to the CID and was issued with an O.B extract. There is however no evidence to show that investigations were concluded and the 1st Respondent found culpable. Equally, during cross-examination, the Appellant denied ever making any reports to the CID.
60. The Appellant also adduced in evidence a letter from the National Land Commission indicating that it made a finding that the Power of Attorney was fraudulent and asked the Nairobi City County to reverse any transactions with respect to the property and issue the Appellant with new ownership documents.
61. To begin with, it is unclear under what authority the Commission was investigating the title and in what manner it reached the conclusion that the Power of Attorney was fraudulent. Nonetheless, the Ministry of Lands did proceed to revoke the Special Power of Attorney prompting the 1st Respondent to institute JR proceedings against the same being *Republic vs Jane Nyambura Thuo Registrar of Titles Ministry of Lands, Nairobi Ex-parte Charles Joseph Maina Thuo* [2021] eKLR.
62. It is noted that vide its decision of 16th December, 2021, the Court in JR 48 of 2019 quashed the notice of revocation of Power of Attorney and reinstated the same. No appeal was ever lodged against the said decision.



63. Lastly, the Appellant submitted that the 1st Respondent's conflicting evidence with respect to whether he purchased the property or was gifted the same evinces fraud. The 1st Respondent's case, as I understand it, is that he was allocated the property by the Appellant subject to compensation, for which he paid her Kshs 50,000 and was granted the Power of Attorney to facilitate future transfer and registration of the suit property.
64. It was a term of the Sale Agreement that the vendor authorizes Nairobi City Council to transfer the plot to the 1st Respondent and that a Power of Attorney to be signed to facilitate future transfer and registration of the plot.
65. Looking at the evidence, and balancing the competing claims by the parties, it appears to this court that the 1st Respondent's version is more probable than the Appellant's. As correctly observed by the trial court, the Appellant's evidence with respect to the ownership of the suit property and transactions in respect thereof has been full of contradictions as evinced by the pleadings exhibited herein.
66. On one hand, she states that she transferred the suit property to the 2nd Respondent while on the other hand, she denies transferring the property to any of the Respondents. The Appellant is also unaware of the current status of the property, or who has been paying the rates for the property.
67. On the other hand, the 1st Respondent has apart from demonstrating the transfer of the suit property to himself, adduced a plot formalization card and a letter from the City Council of Nairobi indicating that he is the proprietor of the suit property. The letter by the Nairobi County of 3rd November, 2017 merely states that the Appellant was the original allottee of the property which has never been in dispute.
68. The Court is convinced that it is the 1st Respondent who has established ownership of the suit property on a balance of probabilities. Consequently, this court finds no reason to interfere with the findings of the trial court.
69. The Court finds that the Appeal is devoid of merit and is for dismissing. The Appeal is hereby dismissed. As the parties herein are family members, each shall bear her/his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 4TH DAY OF MAY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Odhiambo for Appellant

Mr. Omwenga for 1st Respondent

Court Assistant - June

