



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Guchu (Suing as an Administrator Of the Estate of Stephen Guchu Churu) v Kamande & 3 others (Environment and Land Appeal 20B of 2020) [2022] KEELC 3965 (KLR) (4 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3965 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 20B OF 2020**

**BM EBOSO, J**

**JULY 4, 2022**

**BETWEEN**

**RUTH WANJIRU GUCHU (SUING AS AN ADMINISTRATOR OF THE ESTATE OF STEPHEN GUCHU CHURU) ..... APPELLANT**

**AND**

**TERESIA WANJIKU KAMANDE ..... 1<sup>ST</sup> RESPONDENT**

**STANLEY MUNYAMBU KINYANJUI ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR RUIRU ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(Being an Appeal against the Judgement and Decree of Hon. C.A OTIENO-OMONDI (SPM) delivered in Ruiru Senior Principal Magistrate Court on 29/4/2020 in Ruiru SPMC MCLE No.22 of 2019 - formerly Thika ELC No. 77 of 2019)*

**JUDGMENT**

**Background**

1. This appeal arose from the Judgment of hon CA Otieno Omondi, Senior Principal Magistrate, in Ruiru Senior Principal Magistrate Court Environment and Land Case Number 22 of 2019 [formerly Thika Chief Magistrate Court Environment and Land Case Number 77 of 2019]. The appellant, Ruth Wanjiru Guchu, sued the respondents in the said suit through a plaint dated 18/4/2019. The plaint was subsequently amended on 19/6/2019.
2. The appellant's case was that, she was the widow of the late Stephen Guchu Churu [the deceased] and administratrix of his estate. She initiated the suit on behalf of the estate of the deceased. The deceased was at all material times the registered proprietor of land parcel number Ruiru/Ruiru East



Block 2/5309 which she alleged was a matrimonial property [the suit property]. She contended that the 1st and 3rd respondents had fraudulently caused the suit property to be registered in the name of the 1st respondent. She itemized various particulars of fraud on part of the 1st and 3rd respondents. As against the 2nd respondent, she faulted him for procuring registration of a caution against the parcel register relating to the suit property.

3. She urged the trial court to grant her, among other reliefs, an order declaring that the registration of the suit property in the name of the 1st respondent was unprocedural, illegal, fraudulent, null and void. Further, she urged the court to vacate the impugned caution.
4. The 1st respondent filed a statement of defence dated 30/8/2019 in which she contended that she purchased the suit property from the deceased in the year 2010. It was her case that the deceased gave her possession of the suit property and subsequently transferred the suit property into her name during his life time. She denied fraud in the registration of the suit property in her name. She added that the appellant had filed two preceding suits at the Thika Chief Magistrate Court relating to the suit property, namely; Thika CMC Civil Case No 142 of 2010 and Thika CMC Civil Case No 206 of 2010. It was her case that in Thika CMC Civil Case No 206 of 2010, the appellant sued the deceased and herself [1st respondent] and sought an order restraining the deceased against completing the sale of the suit property to her. It was her case that the suit giving rise to this appeal was an abuse of the process of the court.
5. The 2nd respondent filed a statement of defence dated 23/7/2019. His case was that he purchased a portion of the suit property measuring 40 feet x 60 feet from the 1st respondent through a sale agreement dated November 16, 2010. He thereafter erected a four bedroom maisonnette on the said plot and he had been living on the plot since 2012. It was his case that he lodged a caution on the suit property to protect his interest in the land.
6. The 3rd and 4th respondents filed a joint statement of defence dated 6/6/2019. Their case was that the registration of the suit property in the name of the 1st respondent was done by the 3rd respondent procedurally and legally, based on the documents presented to the 3rd respondent.
7. Trial proceeded before hon C A Otieno-Omondi who eventually rendered a Judgment dated 29/4/2020. She found that the appellant had failed to prove fraud in the registration of the suit property in the name of the 1st respondent. She further found that the appellant was not entitled to any of the reliefs sought in the amended plaint. She dismissed the appellant's suit.

### **The Appeal**

8. Aggrieved by the said Judgment, the appellant brought this appeal advancing the following ten verbatim grounds of appeal:-
  1. The learned magistrate erred in law and fact by failing to consider and or determine whether there was a valid agreement for sale of the suit land between the appellant deceased husband herein and the 1st respondent herein thereby arriving at an erroneous finding.
  2. The learned magistrate erred in law and fact in holding that the 1st respondent had proved that she bought the suit land from the appellant's deceased husband herein as the 1st respondent had not produced a sale agreement or proved that she had paid any consideration for the suit land and when the 1st respondent hadn't proved that she attended the land board for consent to transfer the land.



3. The learned magistrate erred in law and in fact by failing to consider that the land board consent to transfer the suit land was procured illegally, fraudulently and unprocedurally thereby arriving at an erroneous finding.
4. The learned magistrate erred in law and in fact by considering previous pleadings and or suits between the appellant and the 1st respondent the in absence of proof of delivered judgement in the aforesaid suits and or pleadings, thereby arriving at an erroneous finding.
5. The learned magistrate erred in law and in fact by failing to consider all the triable issues raised by the appellant and made in the cause of the hearing and further in both written and oral submissions made before her.
6. The learned magistrate erred in law and in fact by failing to pay attention to all the defences raised by the respondents herein and further in failing to disallow the prayers sought for by the appellant.
7. The learned magistrate erred in law and in fact by failing to consider that the suit property herein was part and parcel of the plaintiff's matrimonial property and thus arriving at an erroneous finding.
8. The learned magistrate erred in law and in fact by failing to consider that the suit property herein was fraudulently, unprocedurally and illegally transferred to the 1st respondent and thus arriving at an erroneous finding.
9. The learned magistrate erred in law and in fact in giving a judgement against the law and weight of evidence tendered by the appellant in totality thus arriving at an erroneous finding.
10. The learned magistrate erred in law and in fact by failing to consider whether she had requisite pecuniary jurisdiction to determine the suit before her.

### **Appellant's Submissions**

9. The appeal was canvassed through written submissions dated 5/5/2021, filed through the firm of Nganga Kimani B & Associates. Submitting on ground numbers 1 and 2, counsel for the appellant cited section 3(3) of the [Law of Contract Act](#) and argued that the 1st respondent had failed to demonstrate that there was a valid formal sale agreement between her and the deceased. Counsel contended that a determination on the question as to whether there was a valid sale agreement between the 1st respondent and the deceased was crucial to the determination of the dispute.
10. On ground number 3, counsel submitted that no valid consent could be procured in the absence of a valid sale agreement. Counsel added that even if there was a valid sale agreement, the same was rendered null and void upon expiry of six months from the date when it was entered into, hence no valid consent could be procured in 2014.
11. Counsel for the appellant faulted the trial magistrate for considering pleadings in the preceding suits, contending that pleadings in the preceding suits did not constitute evidence capable of guiding the court. Counsel argued that the trial court made an error by inferring a sale agreement from pleadings in the preceding suits.
12. On ground numbers 5 and 6, counsel submitted that the trial magistrate failed to consider all the triable issues raised by the appellant and failed to pay attention to the defence raised by the respondents.



- Counsel added that the subsequent sale agreement between the 1st and 2nd respondents was null and void because the 1st respondent had no capacity to sell part of the suit property to the 2nd respondent. Counsel further submitted that the transaction between the 1st and 2nd respondents had been rendered void due to their failure to obtain a consent of the land control board.
13. On ground number 7, counsel submitted that the appellant had demonstrated that she was a wife to the deceased and that the suit property was their matrimonial home. Citing section 6 of the *Matrimonial Property Act* of 2013 and section 28 of the *Land Registration Act* of 2012, counsel submitted that matrimonial interest was an overriding interest which the trial court ought to have protected.
  14. On ground numbers 8 and 9, counsel submitted that the trial magistrate had made findings that were against the weight of evidence tendered by the appellant. On ground number 10, counsel submitted that the trial magistrate erred in failing to determine whether the trial court had the requisite pecuniary jurisdiction to entertain the suit.

### **1st Respondent's Submissions**

15. The first respondent filed written submissions dated 11/2/2022 through the firm of Muthoga Gaturu & Co Advocates. Counsel for the 1st respondent identified the following as the key issues falling for determination in this appeal: (i) Whether the trial magistrate properly considered the evidence on the disposition of the suit property to the 1st respondent; (ii) Whether the appellant's contention that the transfer of the suit property to the 1st respondent was illegal, fraudulent or unprocedural; (iii) Whether the suit property was part of the matrimonial property co-owned by the deceased and the appellant; and (iv) Whether the trial court had pecuniary jurisdiction and the effect thereof.
16. On whether the trial magistrate properly considered the evidence on the disposition of the suit property to the 1st respondent, counsel submitted that evidence was tendered before the trial court demonstrating that the deceased, who at all material times was the beneficial owner of the suit property, sold the suit property to his second wife [1st respondent] to raise funds which he needed at the time. Counsel added that the appellant, through Thika CMC Civil Case No 206 of 2010, acknowledged the said sale and challenged it by suing both the deceased and the 1st respondent but lost the case. Counsel added that evidence was placed before the trial court demonstrating that the deceased procured registration of the suit property into his name in 2014 and subsequently transferred it to the 1st respondent in the same year. Counsel added that the appellant had acknowledged during cross-examination that she did not include the suit property among the assets of the deceased at the time of initiating succession proceedings relating to the estate of the deceased. Counsel argued that there was no irregularity in the disposition of the suit property to the 1st respondent.
17. On whether the transfer of the suit property to the 1st respondent was illegal, fraudulent or unprocedural, counsel for the 1st respondent submitted that the trial court considered the appellant's pleadings and evidence and properly came to the conclusion that the appellant had failed to satisfy the threshold for proving fraud. Counsel added that the 1st, 3rd and 4th respondents had tendered evidence to demonstrate that the registration of the 1st respondent as proprietor of the suit property was done procedurally. Counsel added that the 1st respondent had produced a transfer duly executed by the deceased on 28/7/2014 and the requisite consent of the land control board, issued on 2/9/2014. Counsel submitted that the appellant did not lead any evidence to demonstrate that the signature of the deceased was a forgery.
18. On whether the suit property was a matrimonial property co-owned by the deceased and the appellant, counsel submitted that the appellant did not lead any evidence relating to contribution towards acquisition of the suit property. Counsel added that there was evidence that the deceased relocated the



appellant to his other property in Kahawa. Counsel added that the appellant had, through the petition in the succession cause relating to the deceased's estate, acknowledged the fact that the suit property was not part of the deceased's estate.

19. On whether the trial court had pecuniary jurisdiction to adjudicate the dispute, counsel submitted that the suit before the trial court was filed and prosecuted by the appellant and the appellant never questioned the jurisdiction of the trial court. Counsel added that the appellant never led evidence relating to the value of the suit property during trial. Counsel urged the court to reject the appellant's attempt to challenge the pecuniary jurisdiction of the trial court in this appellate court.

## **2nd Respondent's Submissions**

20. The 2nd respondent filed written submissions dated 20/5/2021. The 2nd respondent submitted that the 1st respondent explained, through evidence, the circumstances under which she got to be registered as proprietor of the suit property. The 2nd respondent added that, the appellant failed to prove illegality, fraud or irregularity in the registration of the 1st respondent as proprietor of the suit property, adding that the trial magistrate applied the law correctly in rejecting the appellant's claim. The 2nd respondent added that, as an innocent purchaser for value, the law protected him. On pecuniary jurisdictions of the trial court, the 2nd respondent faulted the appellant for instituting and prosecuting the suit in the trial court and subsequently challenging the pecuniary jurisdiction of the court at the appellate stage after losing the suit in the trial court.

## **Analysis and Determination**

21. I have considered the entire record of the trial court; the grounds of appeal; the record of appeal, including the impugned Judgment; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The appellant itemized ten (10) grounds of appeal and submitted on all of them. I will make brief sequential analysis and pronouncements on the ten grounds of appeal.
22. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well-settled. The duty of a first appellate court is to re-appraise the evidence and draw inferences of fact. [See *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR]
23. Before I turn to the grounds of appeal, it is important to note that I have perused a copy of the parcel register which the Land Registrar presented to the trial court as part of his evidence. The parcel register was opened on 31/7/1992. On the same day, the land was registered in the name of Jane Njeri Njuguna. On 1/9/2014, the land was transferred to Stephen Guchu Churu [the deceased]. On 3/10/2014, the land was transferred to Teresia Wanjiku Kamonde [the 1st respondent]. On 9/6/2017, a caution was registered against the title by Stanley Munyambu Kinyanjui [2nd respondent].
24. Secondly, evidence presented before the trial court reveals that Stephen Guchu Churu died on 8/12/2015 at Aga Khan Hospital, Nairobi On 4/5/2016, the High Court issued to the appellant a grant of letters of administration relating to the estate of the deceased.
25. Thirdly, evidence presented to the trial court further reveals that the appellant was a plaintiff in two preceding suits that were filed in relation to the suit property, prior to the filing of the suit which culminated in the impugned Judgement. The first suit was Thika Chief Magistrate Court Civil Case Number 142 of 2010 in which Jane Njeri Njuguna and Ruth Wanjiru Guchu [the appellant] sued the 1st respondent alleging that the 1st respondent was interfering with the suit property; had constructed



- a house on it; and was cutting down trees on the land. They sought a permanent injunction restraining the 1st respondent against dealing with the suit property.
26. The second preceding suit was Thika Chief Magistrate Court Civil Case Number 206 of 2010 in which Ruth Wanjiru Guchu [the appellant] and Michael Mungai Guchu sued Stephen Guchu Churu [the deceased] and Teresia Wanjiku Kamande [the 1st respondent]. They alleged that the deceased and the 1st respondent had, in the year 2009, entered into a secret sale/ purchase of the suit property and the deceased had failed to disclose to the appellant the purchase price relating to the suit property. They sought a permanent order restraining the deceased against selling the suit property to the 1st respondent. They also sought an order removing the 1st respondent from the suit property. The suit was subsequently dismissed.
  27. It does emerge from the amended plaint in the suit giving rise to this appeal that three years after the deceased died, the appellant initiated the suit culminating in the impugned Judgment, purportedly on behalf of the estate of the late Stephen Guchu Churu [the deceased – whom she had previously sued in one of the preceding suits] She alleged that registration of the suit property in the name of the 1st respondent in 2014 was procured through fraud by the 1st and 3rd respondents. The trial court did not agree with her, hence this appeal.
  28. The first ground of appeal is that the trial court erred in law and in fact in failing to consider and determine whether there was a valid agreement for sale of the suit property between the 1st respondent and the deceased. The second ground of appeal is that the trial court erred in law and fact in holding that the 1st respondent had proved that she bought the suit property from the deceased. The two grounds of appeal were collapsed into one and canvassed simultaneously. I will similarly dispose them simultaneously. I have looked at the appellant's amended plaint and the 1st respondent's defence. Validity of the sale of the suit property to the 1st respondent by the deceased was not one of the key issues that were pleaded in the pleadings before the trial court. The appellant had in her pleadings in a preceding suit, Thika CMC Civil Case No 206 of 2010, averred that the deceased had secretly sold the suit property to the 1st respondent. The key issue before the trial court was whether the registration of the 1st respondent as proprietor of the suit property was procured fraudulently by the 1st and 3rd respondents. The appellant did not challenge the validity of the sale agreement in the pleadings in the suit giving rise to this appeal. She had earlier challenged the sale of the suit property to the 1st respondent in the preceding suit, Thika CMC Civil Case Number 206 of 2010. Indeed, the trial court did not make any finding on the illegality of the sale agreement between the deceased and the 1st respondent. This, in my view, was proper because validity of the sale agreement was not pleaded in the suit giving rise to the impugned Judgment. It was an issue in a different suit filed by the appellant. Consequently, I find no merit in the two grounds of appeal.
  29. The third ground of appeal is that the trial court erred in law and fact in failing to consider that the consent of the land control board was procured illegally, fraudulently, and unprocedurally. The Land Registrar testified as DW1. Among the documents he produced was a letter of consent dated 2/9/2014, issued by the Ruiru Land Control Board. No evidence was tendered to suggest that the letter of consent was not issued by the relevant Land Control Board. Similarly, no evidence was tendered or led by the appellant to establish fraud or irregularity in the procurement of the consent. The application for consent bore the deceased's signature. The appellant faulted the consent on the ground that it was procured more than six months after the alleged sale of the suit property to the 1st respondent by the deceased. The consent was procured by the deceased. In my view, in the absence of evidence demonstrating that the deceased did not procure the consent, there is no proper basis for faulting the consent. There is therefore no proper basis for faulting the trial court for failing to find that the consent was procured illegally, fraudulently and unprocedurally.



30. The fourth ground of appeal relates to the trial court's reliance on the appellant's pleadings in Thika CMC Civil Case No 206 of 2010. The appellant faulted the trial magistrate for relying on her [the appellant's] pleadings in the said preceding suit. The said pleadings were part of the evidence that had been produced during trial. The pleadings established that the deceased sold the suit property to the 1st respondent during his lifetime and the appellant challenged the said sale through the suit. The appellant specifically sued the deceased as the 1st defendant in the said suit. The 1st respondent was sued as a 2nd defendant in the said preceding suit. In my view, those pleadings, together with the decree in the said suit, were relevant evidence in establishing whether or not the registration of the suit property in the name of the 1st respondent was fraudulent. It is not lost to this court that the appellant initiated the suit leading to the impugned Judgment in her capacity as the administrator of the estate of the deceased. In my view, the trial magistrate properly relied on the appellant's own pleadings as proper and relevant evidence in establishing whether there was evidence to support the allegation of fraud. The pleadings constituted relevant evidence on the alleged fraud and was properly relied on by the trial court.
31. In ground numbers 5 and 6, the appellant faulted the trial magistrate for not considering all the issues raised in the pleadings. The key issue raised in the appellant's pleadings related to the allegations of fraud, illegality and irregularity in the registration of the 1st respondent as proprietor of the suit property. I have looked at the Judgment of the trial court. The trial court adequately addressed the above issue and applied the relevant principles relating to standard of proof in relation to the allegation of fraud. I have not found a proper basis for faulting the trial magistrate in this regard.
32. In ground number 7, the appellant contended that the trial court erred by failing to consider and find that the suit property was matrimonial property. Through Thika CMC Civil Case No 206 of 2010, the appellant challenged the sale of the suit property to the 1st respondent by the deceased. The said suit was dismissed. Subsequently, the deceased caused the suit property to be transferred into his name in 2014 and thereafter transferred the suit property to the 1st respondent in the same year. The deceased did not on his part regard the suit property as matrimonial property during his lifetime. He transferred it to the 1st respondent. In her capacity as a personal representative of the deceased, the appellant had no proper basis for contending that the suit property was matrimonial property because that was never the position of the deceased during his lifetime. The appellant had, in her own capacity, lost the claim that the suit property was matrimonial property. It does appear the appellant advanced this ground of appeal in the mistaken belief that she had sued in her own capacity. Far from that, she instituted the suit on behalf of the deceased. From the preceding pleadings, the deceased never held the position that the suit property was matrimonial property. I do not, in the circumstances, find any error on part of the trial court.
33. In ground number 8, the appellant contended that the trial court erred in failing to consider and find that transfer of the suit property into the name of the 1st respondent was done fraudulently, unprocedurally and illegally. Our courts have been categorical that where fraud is alleged, the party alleging it has a duty to prove it. Our courts have held that the standard of proof in allegations of fraud is one which is higher than on a balance of probabilities but below the requirement of beyond reasonable doubt. In *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR the Court of Appeal stated:
- “.....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 of 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...”)

34. The trial court considered the above principle and came to the conclusion that the appellant had not satisfied the above threshold. I have looked at the evidence tendered by the appellant. The appellant did not tender evidence to suggest that the signature of the deceased was forged nor that any of the conveyance instruments that were presented to the Land Registrar were forged. Put differently, there was no evidence to support a finding of fraud, illegality or irregularity. There is therefore no merit in this ground of appeal.
35. In ground number 10, the appellant faulted the trial court for failing to consider whether it had the requisite pecuniary jurisdiction to determine the dispute. This ground of appeal constitutes an abuse of the process of the court. I say so because the suit in the trial court was initiated by the appellant. She prosecuted the suit to the end and invited the court to make a finding in her favour. She never raised any question in the trial court relating to the pecuniary jurisdiction of the trial court. She had the duty to apply for an order transferring the suit to a different court if she had evidence that the value of the suit property had changed. None was initiated by her. She raised this as a ground of appeal only after she lost the suit in the trial court.
36. In my view, this cannot be accepted as a bonafide ground of appeal because the appellant who was the initiator and prosecutor of the suit in the trial court never raised it during trial. Secondly, she never presented evidence to the trial court to suggest that the trial court was no longer seized of pecuniary jurisdiction to hear and determine the suit. I reject the ground of appeal on the basis of the above reasons.
37. Ground number 9 focuses on the totality of the law and the weight of evidence before the trial court. I have made a finding to the effect that the appellant failed to discharge the burden of proof in relation to the law and the necessary evidence. I think I have said enough to demonstrate that the appellant did not prove her case.

### **Disposal Orders**

38. For the above reasons, I find no merit in this appeal. The appeal is dismissed. The appellant shall bear costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 4TH DAY OF JULY 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Nganga for the Appellant

Mr Mugambi for the 1st Respondent

Court Assistant: Ms Lucy Muthoni

