



**Kenya Industrial Estates Limited v Ngamba (Suing for and on Behalf of the Estate of Justine Samini Ngamba - Deceased) & another (Civil Appeal 353 of 2023) [2024] KEHC 15252 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15252 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 353 OF 2023  
JK NG'ARNG'AR, J  
DECEMBER 4, 2024**

**BETWEEN**

**KENYA INDUSTRIAL ESTATES LIMITED ..... APPELLANT**

**AND**

**ESTHER JUSTINE NGAMBA (SUING FOR AND ON BEHALF OF THE ESTATE OF JUSTINE SAMINI NGAMBA - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**FATUMA OSMAN ABDI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Judgment of Hon. Ritah Amwayi (PM) delivered on 22nd November 2023 in Kaloleni Resident Magistrate's Court Civil Suit No. E192 of 2023, Esther Justine Ngamba (Suing for and on behalf of the Estate of Justine Samini Ngamba - Deceased) v Kenya Industrial Estates Limited & Fatuma Osman Abdi)*

**JUDGMENT**

1. The background of the appeal is vide the plaint dated 5<sup>th</sup> September 2022 where the 1<sup>st</sup> Respondent averred that the late Justin Samini Ngamba passed away on 30<sup>th</sup> June 2007 and that prior to his untimely demise, the deceased's estate comprised of property LR No. Mbwaka/Maereni/282 with which neither the deceased guaranteed any loan nor the deceased's two surviving widows consented to charging or at all. That the 1<sup>st</sup> Respondent received a 45-days Redemption Notice and Notification of Sale by M/s Cash Crop Auctioneers dated 28<sup>th</sup> June 2022 and that the said notices allegedly addressed to Mr. Justin Samini Ngamba for an intended sale of the property LR No. Mbwaka/Maereni/282 which was scheduled by public auction on 8<sup>th</sup> September 2022. That the notice further indicated that the property had been charged in favour of M/s Kenya Industrial Estates Limited wherein the 2<sup>nd</sup> Respondent was the borrower whereas the deceased was the guarantor and a sum of Kshs. 1,698,323 remained outstanding and payable to the Appellant. That this was a clear indication of not only fraud and forgery



- between the Appellant and the 2<sup>nd</sup> Respondent but also intermeddling with the deceased's estate since whereas the loan in issue was taken sometimes in 2015, it was 8 years after the deceased had passed on.
2. The Appellant in their statement of defence dated 4<sup>th</sup> August 2023 beside denying the averment in the Plaintiff stated that it advanced a financial accommodation of Kshs. 1,000,000 to the 2<sup>nd</sup> Respondent which was secured by a legal charge over property title number Mbwaka/Maereni/282 registered in the name of the deceased who was also the guarantor of the loan advanced to the 2<sup>nd</sup> Respondent, which loan remains unsettled and owing to the Appellant. That the Appellant adhered to all the legal and statutory procedures required in perfection of its security interest over the suit property and when the loan amount fell due it strictly adhered to the statutory provisions of issuing the requisite notices in exercising its statutory power of sale. That the Appellant obtained all the requisite consent including the spousal consent from the chargor's spouse and Land Control Board's consent in perfecting its security interest by registering a charge over the suit property.
  3. The 1<sup>st</sup> Respondent prayed for damages against the Appellant and the 2<sup>nd</sup> Respondent jointly and severally for an order directing the Appellant and the 2<sup>nd</sup> Respondent to hand back to the deceased's estate the original title to property title number Mbwaka/Maereni/282, a declaratory order that the Appellant's right of sale has not and cannot accrue/crystallize over property title number Mbwaka/Maereni/282 in view of the fraud and forgeries in not only obtaining/stealing but also guaranteeing the loan and charging the deceased's property title number Mbwaka/Maereni/282, a permanent injunction restraining the Defendants, their agents or persons acting under their directions from further charging, advertising for sale, selling by way of public auction or private treaty, or in any way dealing with property title number Mbwaka/Maereni/282, an order directing the Land Registrar Kilifi, to immediately rectify the register by lifting and/or discharging any and all encumbrances registered on property title number Mbwaka/Maereni/282 in favour of the Appellant, an order directing the Appellant and the 2<sup>nd</sup> Respondent to jointly and severally pay punitive damages for the illegalities highlighted, costs and interest of the suit.
  4. This suit was heard in the trial court and judgment delivered on 22<sup>nd</sup> November 2023 where the court found that the 1<sup>st</sup> Respondent's suit against the Appellant and the 2<sup>nd</sup> Respondent had been proved on a balance of probabilities. The suit was therefore allowed as prayed in the plaint dated 5<sup>th</sup> September 2022 with costs.
  5. Being dissatisfied, the Appellant appealed against the judgment of the trial court through the Memorandum of Appeal dated 4<sup>th</sup> December 2023 on grounds that the learned trial magistrate erred in facts and in law: by determining extraneous matters beyond her jurisdiction and without any evidence making a finding that the Appellant was intermeddling with the estate of the deceased and ought to be punished, which offence is contrary to Section 45 (2) of the *Law of Succession Act* which is within the purview of a succession court dealing with a succession cause; by rewarding an illegality and proceeding to punish the Appellant by awarding enormous exemplary damages in the sum of Kshs. 500,000 against the Appellant without evidence and based on the wrong principles of law yet the 1<sup>st</sup> Respondent had not met the threshold for granting such damages; in finding that the 1<sup>st</sup> Respondent proved allegations of fraud and forgery on a balance of probability when the required threshold for matters of fraud and forgery, given its seriousness, is beyond the balance of probability and on a strict proof; by proceeding to find that the 1<sup>st</sup> Respondent proved allegations of fraud and forgery despite making a contrary finding that the circumstances under which the original title belonging to the deceased ended up in the Appellant's custody were questionable since the same had been under the 1<sup>st</sup> Respondent's custody; and when she failed to heed established laws of evidence after she shifted the burden of proof of the allegations of fraud and forgery on the Appellant by holding that the Appellant had failed to prove the



circumstances under which it advanced the loan facilities to the 1<sup>st</sup> Respondent's deceased husband when in fact the financial facilities were advanced to the 2<sup>nd</sup> Respondent.

6. The learned trial magistrate further erred in fact and in law: when she ignored the rules of evidence and arrived at a decision not in consonance with the available evidence when she based her finding of fraud and forgery on a charge document that had not been produced in evidence by any of the parties during hearing after she arbitrarily closed the Defendant's case without hearing; when she inferred that fraud and forgery had been jointly perpetrated by the Appellant and the 2<sup>nd</sup> Respondent without any evidence of collusion; by bringing the trial to an end without determination on merit and determining the real issues in controversy despite its complexity, due to procedural error and serious misconduct, to wit (a) issuing final arbitrary orders closing the Defendant's case on its own motion on 3<sup>rd</sup> October 2023, without determining a pending application dated 19<sup>th</sup> September 2023, rendering the same nugatory, (b) declining to recuse herself upon application despite the obvious bias and prejudicial conduct on her part, (c) completely failing to uphold and promote established judicial processes and legal procedure when she issued orders to the effect that directions could be issued after hearing of the main suit deeming all prospects of a fair trial; by obstructing the course of justice and the conduct of a fair trial by her actions and therefore any consequent judgment was unfair, invalid and prejudicial to the Appellant; by rendering judgment without hearing both parties on merit through failure to consider the Appellant's pleadings and evidence; and by issuing orders that were contrary to law and legal procedures which were unfair, unjust and in clear violation of the Appellant's right to fair hearing that ultimately led to the delivery of a one-sided and erroneous judgment based on inferred facts without evidence.
7. The Appellant prayed for orders that the appeal be allowed, that the judgment delivered on 22<sup>nd</sup> November 2023 and the decree thereto in Kaloleni Senior Resident Magistrate's Court Civil Case No. E192 of 2023 be set aside and substituted with the judgment of this court, that in the alternative, the judgment delivered on 22<sup>nd</sup> November 2023 and the decree thereto be set aside and the matter set for fresh trial before any other magistrate other than the Honourable Ritah Amwayi, that the Appellant be awarded costs of this appeal, and that this court be pleased to make such further orders as it may deem just in the circumstances.
8. In opposition to the Memorandum of Appeal dated 4<sup>th</sup> December 2023, the 1<sup>st</sup> Respondent filed Grounds of Opposition that the appeal is fatally defective, frivolous and is at its best a waste of the precious judicial time, that the Appellant never challenged the trial court orders and/or rulings of 3<sup>rd</sup> October 2023 and that of 7<sup>th</sup> November 2023 which cannot be the basis of this appeal, and that the Appellant's assertion that the court rendered judgment without hearing both parties is self-defeating since the records are clear that the Appellant was granted an opportunity to present their witnesses on three occasions (notably on 8<sup>th</sup> August 2023, 27<sup>th</sup> September 2023 and 3<sup>rd</sup> October 2023) all which opportunities the Appellant squandered.
9. The Respondent further stated in the Grounds of Opposition that the suggestion that the trial court acted without jurisdiction (in concluding that the Defendant intermeddled with the deceased's estate) was never raised before the trial court and is appearing for the first time and that it was an obiter dicta by the trial court arising from the court's analysis of facts and evidence which cannot form the basis of the appeal, and that no evidence has been placed before the court to demonstrate that the trial court in arriving at its findings misdirected itself on the facts of the law and that the Defendants having been afforded an opportunity to ventilate their case but failed to call a witness, the trial court was within the law to uphold the Plaintiff's evidence which remains unchallenged. The Respondent prayed that the Memorandum of Appeal be dismissed with costs.



10. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 15<sup>th</sup> July 2024 stated that the standard of proof in allegations of fraud and forgery were higher than ordinary civil case as was held in *Donald Omuyaku Okinami v Luanda Revival Worship Centre* (2021) eKLR where the court cited with approval the case of *Kinyanjui Kamau v George Kamau* (2015) eKLR and *Mary Wanjiru Kibugu & 6 Others v Regency Co-operative Savings and Credit Society Limited* (2021) eKLR which cited the case of *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 Others* (2013) eKLR. That the list of documents dated 5<sup>th</sup> September 2022 and produced by the 1<sup>st</sup> Respondent do not sustain the allegation of fraud and forgery as pleaded by the 1<sup>st</sup> Respondent in the particulars of fraud and forgery. That the 1<sup>st</sup> Respondent has specifically pleaded under the head particulars of fraud and forgery that the signatures of the deceased and his widow in the loan agreement, instrument of charge and spousal consent are forgeries. However, they have failed to tender any evidence on record to sustain the allegation.
11. The Appellant argued that the trial court in their judgment made reference to an alleged letter of offer dated 8<sup>th</sup> May 2014 and loan agreement dated 17<sup>th</sup> June 2014. That it relied on the documents in its determination when the said documents were never produced as evidence in the trial court by either the Appellant or the 1<sup>st</sup> Respondent. That the trial court proceeded to infer that fraud and forgery had been jointly perpetrated by the Appellant and the 2<sup>nd</sup> Respondent when it was uncertain of the events that led to the charging of the securities and perfection. That there was no evidence that the Appellant's agents signed the loan documents or that it was aware that an illegality was being perpetuated having been furnished with all the documentation for securities perfection by the 2<sup>nd</sup> Respondent. That the finding of the trial court on that aspect was an admission that the 1<sup>st</sup> Respondent had failed to prove their case to the required standard.
12. The Appellant contended that Section 107 of the *Evidence Act* demands that a party who approaches court and is desirous that the court should give judgment as to any legal right or liability dependent of the existence of facts which he asserts must prove that those facts exist. That at the trial court, the 1<sup>st</sup> Respondent's case proceeded in the presence of the Appellant who had the opportunity to cross examine the witness and put to question the credibility of the said witness but the trial court arbitrarily closed the Appellant's case unheard. The Appellant relied on the holding in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* (2014) eKLR and that Section 108 of the *Evidence Act* further provides that an incident of burden of proof lies on the person who would fail if no evidence at all were given on either side. That the 1<sup>st</sup> Respondent alleged fraud and forgery on the part of the Appellant and therefore the evidentiary burden lay at her feet. That however, the trial court deviated from the laws of evidence and shifted the burden of proof to the Appellant who had been denied a right to be heard. That furthermore, the trial court based its finding on fraud and forgery on loan application forms and a charge that had not been produced in evidence by any of the parties as they did not form part of the 1<sup>st</sup> Respondent's list and bundle of documents.
13. On the award of exemplary damages to the tune of Kshs. 500,000, the court ought to have been guided by the holding in *Brookes v Barnard & Others* (1964) AC 1129 and *Grinyamwaya v Nairobi City Commission* (1985) eKLR. That the award of exemplary damages is qualified when it is in consonance with Section 45 of the *Law of Succession Act* which prescribes punishment for intermeddling. That the 1<sup>st</sup> Respondent has not proved any injury suffered to warrant the award of exemplary damages. The Appellant cited the case of *Caltex Oil (Kenya) Limited v Rono Limited* (2016) KLR. The Appellant therefore prayed that the appeal be allowed.
14. The Appellant submitted that during hearing of the Respondent's case at the trial court, there arose issues of fraud and forgery that had to be definitely established for fair and just determination if



investigations were conducted by the Directorate of Criminal Investigations. That the Appellant filed an application dated 19<sup>th</sup> September 2023 seeking orders for stay of proceedings pending investigation but when the matter came up on 27<sup>th</sup> September 2023 the court ordered parties to proceed with hearing of the main suit and stated that the court would issue directions with respect to the Appellant's application after hearing of the main suit. That the trial court further issued orders that defence hearing would proceed on 3<sup>rd</sup> October 2023 and that on the said date the trial court closed the Appellant's case on its own motion without giving it an opportunity to be heard contrary to Articles 25 (c), 27, 47, and 48 of the Constitution.

15. On intermeddling and the award of exemplary damages, the Appellant argued that the trial court in the judgment delivered on 2<sup>nd</sup> November 2023 awarded exemplary damages to the 1<sup>st</sup> Respondent to the tune of Kshs. 500,000. The trial court relied on the holding in the case of Grinyamwaya v Nairobi City Commission (1985) eKLR and Obongo v Municipal Council of Kisumu (1971) EA 91 which cited with authority the case of Brookes v Benard and Others (1964) AC 1129. That the trial court found the Appellant and the 2<sup>nd</sup> Respondent had intermeddled with the estate of the deceased and should be admonished and punished. However, the award of exemplary damages ought to have been in consonance with Section 45 of the Laws of Succession Act which prescribes the punishment to be vested on a party guilty of intermeddling to a fine not exceeding Kshs. 10,000 or to a term of imprisonment not exceeding one year or to both. That the 1<sup>st</sup> Respondent has not proved any injury suffered to warrant an award of exemplary damaged. The Appellant prayed that the appeal be allowed as prayed.
16. The 1<sup>st</sup> Respondent in their submissions dated 20<sup>th</sup> August 2024 argued that the undisputed facts even from the judgment of the trial court are that the late Justine Samini Ngamba passed away on 30<sup>th</sup> June 2007 and has been and is still the registered proprietor of the property title number Mbwaka/Maereni/282. That when the said property was charged by the Appellant in 2015 in favour of the 2<sup>nd</sup> Respondent herein, the late Samini Ngamba was already deceased and could not guarantee the said facility, a position which has not changed. That during the hearing before the trial court, the Appellant was afforded an opportunity (on three different occasions) to ventilate their case and to present evidence how the deceased guaranteed a loan facility but they never did and that in the absence of the evidence controverting the 1<sup>st</sup> Respondent's testimony the trial court made a decision in favour of the 1<sup>st</sup> Respondent.
17. The 1<sup>st</sup> Respondent submitted that instances of intermeddling with the deceased's property was specifically pleaded at paragraph 11 of the Plaint and that Section 45 of the Law of Succession Act provides that no person shall for any purpose except where authorized under the law dispose of the deceased's property. That in arriving at the conclusion that there was intermeddling with the deceased's property, the trial court gave account of the analysis of the facts surrounding the fraudulent transaction. The 1<sup>st</sup> Respondent further submitted on the award of Kshs. 500,000 in damages that the trial court correctly found the whole transaction was premised on an illegality. The 1<sup>st</sup> Respondent relied on the decision of Daniel Kipruto Metto v Chase Bank (Kenya) Limited (2018) eKLR where the court awarded the sum of Kshs. 300,000 in damages.
18. The 1<sup>st</sup> Respondent argued that the Plaintiff's evidence remained uncontroverted as the Appellant failed to call a witness on three occasions when they were granted the opportunity. The 1<sup>st</sup> Respondent cited authorities in Trust Bank Limited v Paramount Universal Bank Limited & 2 Others, Nairobi (Milimani) HCCS No. 1243 of 2001 and Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu (2012) eKLR. The 1<sup>st</sup> Respondent maintained that the Appellant never challenged the trial court's order and/or rulings of 3<sup>rd</sup> October 2023 and 7<sup>th</sup> November 2023. That the appeal before this court



is on merit of the judgment of the trial court and not interlocutory decisions which were never challenged. That the appeal fails in its entirety and the same should be dismissed with costs to the 1<sup>st</sup> Respondent.

19. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle vs. Associated Motor Boat Co.* (1968) EA 123 as follows: -
  - “ ... 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 allowance in this respect ...”
20. I have considered the Record of Appeal dated 8<sup>th</sup> February 2024, the 1<sup>st</sup> Respondent’s Grounds of Opposition and submissions by the parties. The issues for determination are: -
  - a. Whether the trial court had jurisdiction to hear and determine the case
  - b. Whether the Appellant was accorded fair trial
  - c. Whether allegations of fraud and forgery were proved to the required standard
  - d. Whether the threshold for the award of Kshs. 500,000 in damages was met
  - e. Who should bear costs.
21. On the issue of jurisdiction of the trial court, the Appellant in their grounds of appeal stated that the offence of intermeddling with the estate of a deceased person is contrary to Section 45 (2) of the [Law of Succession Act](#) which is within the purview of a succession court dealing with succession causes. However, the 1<sup>st</sup> Respondent in their Grounds of Opposition stated that the issue of jurisdiction was never raised in the trial court, that the same is appearing before this court for the first time and cannot form the basis of this appeal. None of the parties before this court submitted on the issue of jurisdiction. This court cannot belabor on the issue and this ground therefore falls.
22. On whether the Appellant was accorded fair trial, the Appellant in their grounds of appeal and submissions stated that the trial court closed the Defendant’s case on its own motion on 3<sup>rd</sup> October 2023 without determining the application dated 19<sup>th</sup> September 2023 seeking stay of proceedings pending investigations which rendered the application nugatory, that the trial magistrate declined to recuse herself upon application despite the obvious bias and prejudicial conduct on her part, when the trial court issued orders to the effect that directions could only be issued after hearing of the main suit, and by rendering judgment without hearing both parties.
23. The 1<sup>st</sup> Respondent in their Grounds of Opposition and submissions held a contrary opinion that the Appellant never challenged the trial court orders and/or rulings of 3<sup>rd</sup> October 2023 and that of 7<sup>th</sup> November 2023, and that the appeal before this court is on merit of the judgment of the trial court and not interlocutory decisions which were never challenged. That the Appellant’s assertion that the court rendered judgment without hearing both parties is self-defeating since the records are clear that the Appellant was granted an opportunity to present their witnesses on 8<sup>th</sup> August 2023, 27<sup>th</sup> September 2023 and 3<sup>rd</sup> October 2023 all of which the Appellant failed to do so.
24. This court has perused the records and established that indeed on 8<sup>th</sup> August 2023, 27<sup>th</sup> September 2023 and 3<sup>rd</sup> October 2023, the matter came up for defence hearing and directions of the court were clear that the Appellant would proceed with the hearing failure to which the defence case would stand as closed. That the said directions were never varied or stayed. This court further notes that on 26<sup>th</sup> September 2023, the court made orders that directions on the application dated 19<sup>th</sup> September 2023 would be



given after the hearing. On 17<sup>th</sup> October 2023 the matter came up for further directions and orders regarding the applications dated 19<sup>th</sup> September 2023 and 16<sup>th</sup> October 2023, and a ruling reserved for 31<sup>st</sup> October 2023. However, on 7<sup>th</sup> November 2023, Miss Kirui, Counsel for the Appellant, indicated to court that, “The court can give whatever directions that it wants to give. We already knew that the application will be dismissed. Just proceed and issue any directions that you wish.” The trial court then reserved 22<sup>nd</sup> November 2023 for delivery of the judgment.

25. The court in *Alba Petroleum Limited v Total Marketing Kenya Limited* (2019) eKLR cited with authority the case of *Nguruman Limited v Shompole Group Ranch & Another* (2014) eKLR that: -
- “... a five judge bench of this Court noted that there was no notice of appeal filed against the ruling of Ang’awa, J. delivered on 22<sup>nd</sup> December 2009. It was held in the absence of a notice of appeal against the ruling of Ang’awa, J. this Court lacked jurisdiction to grant any relief against the said ruling.”
26. This court is therefore inclined to agree with the 1<sup>st</sup> Respondent that the appeal before this court is on merit of the judgment and not the interlocutory directions that were never challenged. The Appellant cannot therefore allege that they were not accorded fair trial.
27. On whether allegations of fraud and forgery were proved to the required standard, the Appellant stated in the grounds of appeal that the trial court made a finding that the 1<sup>st</sup> Respondent proved allegations of fraud and forgery on a balance of probability when the required threshold is beyond the balance of probability and on a strict proof. The Appellant submitted that the standard of proof in allegations of fraud and forgery are higher than in ordinary civil cases. The Appellant stated that the trial court then shifted the burden of proof of the allegations of fraud and forgery to them by holding that they had failed to prove circumstances under which it advanced loan facilities. The Appellant in their submissions relied on Section 107 and 108 of the *Evidence Act* that a party who approaches court for judgment to any legal right or liability dependent on existence of facts must prove that those facts exist and that the burden of proof lies on the person who would fail if no evidence at all were given. That the evidentiary burden therefore lay on the Respondent’s feet.
28. The Appellant submitted that the trial court in their judgment made reference to an alleged letter of offer dated 8<sup>th</sup> May 2014, a loan agreement dated 17<sup>th</sup> June 2014, and a charge that had not been produced in evidence by any of the parties and did not form part of the 1<sup>st</sup> Respondent’s list and bundle of documents. That the trial court made a finding that the 1<sup>st</sup> Respondent proved allegations of fraud and forgery despite making a contrary finding that the circumstances under which the original title belonging to the deceased ended up in the Appellant’s custody were questionable. The Appellant submitted that there was no evidence that the Appellant’s agent signed the loan documents or that it was aware that an illegality was being perpetuated having been furnished with all documentation for securities perfection by the 2<sup>nd</sup> Respondent. That the trial court inferred that fraud and forgery had been jointly perpetrated by the Appellant and the 2<sup>nd</sup> Respondent when it was uncertain of the events that led to the charging of the securities and perfection.
29. On the contrary, the 1<sup>st</sup> Respondent submitted that it is undisputed that the deceased, Justin Samini Ngamba, passed away on 30<sup>th</sup> June 2007 and is still the registered owner of property title number Mbwaka/Maereni/282. When the property was charged by the Appellant in 2015 in favour of the 2<sup>nd</sup> Respondent, the deceased was long dead and could not guarantee the facility. That during hearing of the case, the Appellant was given an opportunity on three occasions to ventilate their case but they never did and that the trial court made a decision in favour of the 1<sup>st</sup> Respondent.



30. The court in *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* (2000) eKLR set out the principle that an allegation of fraud and forgery must be specifically pleaded and proved 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 facts.”
31. The Court of Appeal in *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* (2020) eKLR, held as follows: -
- “... Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities...” In *R.G Patel v Lalji Makanji* (1957) EA 314 the former Court of Appeal for East Africa stated as follows:
- “Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
32. Upon perusal of the trial court records, this court notes that the 1<sup>st</sup> Respondent specifically pleaded fraud and forgery aimed at defrauding the deceased’s estate and to distinguish the beneficiaries thereto of their rights to property title number Mbwaka/Maereni/282. That the deceased having passed away on 30<sup>th</sup> June 2007, it was not humanly possible to guarantee a loan in 2015, 8 years after his demise. The onus was therefore on the 1<sup>st</sup> Respondent to prove that there was fraud and forgery.
33. During the hearing, the 1<sup>st</sup> Respondent produced as evidence of the court a copy of the death certificate showing that the deceased died on 30<sup>th</sup> June 2007 at the age of 67 years. A letter of the area chief dated 19<sup>th</sup> September 2022 was produced confirming death of the deceased and it contained a list of his dependants. The 1<sup>st</sup> Respondent further produced a copy of the title deed as proof that the land was registered in the name of the deceased, and that it was issued on 27<sup>th</sup> March 1986. Additionally, there was production of the 45-day Redemption Notice and Notification of Sale of the land parcel which notification was addressed to the deceased.
34. On whether the threshold for the award of Kshs. 500,000 in damages was met, the Appellant submitted that the award of exemplary damages is qualified when it is in consonance with Section 45 of the *Law of Succession Act* which prescribes punishment for intermeddling as a fine not exceeding Kshs. 10,000 or to a term of imprisonment not exceeding one year or to both. That the 1<sup>st</sup> Respondent did not prove any injury suffered to warrant an award of exemplary damages.
35. The 1<sup>st</sup> Respondent submitted that intermeddling with the deceased’s property was specifically pleaded in the Plaint and that in arriving at the conclusion that indeed there was intermeddling contrary to Section 45 of the *Law of Succession Act*, the trial court gave an account of the analysis of facts surrounding the fraudulent transaction. That on the award of Kshs. 500,000 in damages, the trial court correctly found the whole transaction was premised on an illegality.



36. The court in *Leornard Ataro Peter Ajaro v Attorney General* (2008) eKLR held as follows: -

“... in order to qualify for an award of exemplary damages, one has to show that the defendant acted in a high handed, arbitrary and oppressive manner.”

37. In *Godfrey Julius Ndumba Mbogori & Another v Nairobi City County* (2018) eKLR, the court set out applicable principles in awarding exemplary damages as follows: -

The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: -

- i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
- ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
- iii) where exemplary damages are expressly authorized by statute.

38. From the foregoing, it is clear that what the 1<sup>st</sup> Respondent went through was arbitrary and oppressive which actions were intended to defraud the deceased’s estate and to distinguish the beneficiaries thereto of their rights to property title number Mbwaka/Maereni/282.

39. In the upshot, the appeal herein has no merit and is dismissed. Cost to the 1<sup>st</sup> Respondent.

**DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 4<sup>TH</sup> DAY OF DECEMBER 2024**

.....

**J.K. NG’ARNG’AR, HSC**

**JUDGE**

In the presence of: -

Mr. Waliaula Advocate for the Appellant

No appearance for the Respondent

Court Assistant – Shitemi

Court: Copy of Judgment to be forwarded today.

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**J.K. NG’ARNG’AR, HSC**

**JUDGE**

