



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muruanjama v Otieno (Suing as the Administratrix of the Estate of Elisha Otieno) (Environment and Land Appeal E017 of 2024) [2025] KEELC 6310 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6310 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY**  
**ENVIRONMENT AND LAND APPEAL E017 OF 2024**  
**FO NYAGAKA, J**  
**SEPTEMBER 25, 2025**

**BETWEEN**

**MARTIN MWANIKI MURUANJAMA ..... APPELLANT**

**AND**

**DORCA AUMA OTIENO (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF ELISHA OTIENO) ..... RESPONDENT**

*(Being an Appeal against the Judgement and decree in Mbita Senior Resident Magistrates' ELC Case No. E015 of 2021 delivered on 3rd March 2024)*

**JUDGMENT**

1. By way of Complaint dated 27<sup>th</sup> April 2021, the Respondent sought the following orders in the trial court;
  - a. An order of declaration that the caution placed on land parcel number; Kasungu/Kamreri/4637 is null and void and is therefore removed from the records.
  - b. An order for payment of General damages on account of inconveniences and anguish.
  - c. Interest on (b) above if awarded at the rate of 12%p.a. as from September 2015 until payment in full.
  - d. The costs of this suit and interests thereon at Court Rates as from the date of filing this suit payment in full.
1. The Appellant, then the Defendant, entered Appearance and filed a Defence dated 16<sup>th</sup> June 2021 where he denied all the contents of the Complaint. The matter proceeded for hearing where the plaintiff called one (1) witness whereas the defendant called two (2) witnesses.



## Hearing at the trial court

2. PW1 was Dorcas Auma Otieno who testified that she did not know Martin Maruanjama but she got to know him when he put a caution on her husband's land. That she had filed a search certificate for Kasungu/Kamreri/4637. She produced a copy of title deed and certificate of official search as exhibits Pexh 1 and Pexh 2. She also produced a Limited grant as Pexh 3. She testified that she was not invited when a guarantee agreement was entered into and that she was not shown the benefit her husband obtained. She wished to have the caution removed and produced a letter to the registrar to wit; a copy of statutory declaration as Pexh 4.1. She produced a copy of a guarantee agreement as Pexh 5.1 and stated that she did not sign the guarantee agreement.
3. During cross examination, she testified that she was the registered owner of Kasungu/Kamreri/4637 where she stays. That she had an original title deed of the land and she did not know whether the defendant has the original title deed. She was living with her husband when the alleged guarantee agreement was executed and the suit property was not in her husband's name. She urged that she did not include the defendant as a creditor and that the signature on the guarantee document was not her husbands'.
4. Martin Maruanjama testified as DW1 and adopted his witness statement dated 19<sup>th</sup> January 2019 as evidence in chief. In his statement, he stated that the Plaintiff was unknown to him and he had never entered into any transaction relating to this suit with her. Further, the late Elisha Otieno was a Guarantor to one Asman Zaidi Ibrahim and he signed a Guarantee to that effect on 8<sup>th</sup> September 2015 which was done and read out by his lawyer from Waweru Gatonye & Co Advocates. This formed the basis of formal pledge to pay another person's debt or to perform another person's obligation in the case of default.
5. He urged that the late Elisha Otieno attested a spousal affidavit before his Lawyers on 11<sup>th</sup> September 2015 and indicated the land was not matrimonial property. Further, the Original Title No. Kasungu/Kamreri/4637 was placed as a security to secure the interest he had in this land after having credited the Late Elisha Otieno & Asman Zaidi Ibrahim an amount of Kshs. 7,072,000/= which the Deceased guaranteed to. Having been a creditor, he opted to safeguard his interest by lodging a caution which was effectively registered and the land became encumbered so that before its re-distribution or sale his money ought to be refunded. Additionally, this property having been encumbered, the same cannot be said to be property of Elisha Otieno neither can it be sold or re-distributed without notice as his interest was registered. He urged that since late 2015 and in the lifetime of the Late Elisha Otieno when the caution was registered, no issues were raised until the administratrix obtained letters of administration. Further, they have not showed their willingness to refund the amount he loaned. He urged the court to dismiss the suit with costs.
6. During cross examination, he stated that he had never transacted with Dorcas Otieno with or ever met Elisha Otieno. That Elisha Otieno was a guarantor to Osman and is was fugitive who was at large. That they discovered that he was acting fraudulently but he could not tell whether he acted fraudulently in this matter as well.
7. DW2 was Martin Njeru Nyaga, an advocate of the High Court of Kenya, practising in the law firm of Nyaga Njeru & Co. Advocates. He stated that he was conversant of the guarantee and the accompanying documents and that he was the maker of the documents. He produced the same as an exhibit but counsel for the plaintiff objected to the production of the documents as exhibits. The basis of the objection was that the maker was Paul Wanga and that the only documents that can be produced are the ones made by the witness.



8. The Court directed that the witness could only produce the documents he had drawn by himself. The guarantee document was produced as D-Exh 6, the letter dated 10.2.2015 as Dexh 7.
9. During cross examination, he stated that he is the one who drew the guarantee document and that it was not necessary to state the value of the property. That if the value of the property was to be more, the same would not been an issue as it could be sorted. He further stated that Paul Wanga was working with Waweru Gatunye and he was not present when the guarantee document was signed. Further, that he wrote to Waweru Gatunye for the spousal consent, he was informed that the marriage was not working. He stated that it was his responsibility to serve his client's interest, and it was not his responsibility to investigate. It was his testimony that the joint venture was between the plaintiff and her husband and the guarantee agreement was registered. Additionally, he stated that he was not aware that the guarantee was taken to the Land Control Board or of the consent from Land Control Board. He stated that the lender ended up to be a conman and the guarantor jumped bail. Further, that the guarantor did not forge the documents as alleged.
10. Upon considering the pleadings tendered, testimonies of the witnesses and the submissions of the parties, the trial court entered judgement in favour of the plaintiff as against the defendant by entering a declaration that the caution lodged on the suit land was null and void and further, that the defendant pay damages of Kshs. 250,000/- to the Plaintiff vide the judgement delivered on 3<sup>rd</sup> March 2024.
11. Being aggrieved with the judgement and decree, the appellant instituted the present appeal vide a memorandum of appeal dated 3<sup>RD</sup> May 2024 premised on the following grounds;
  1. The Learned trial magistrate erred in law and in fact in holding that the guarantee agreement filed and relied upon by the appellant was invalid for want of registration even when the said guarantee bears marks from the Land's registry showing proof of registration and payment of stamp duty.
  2. The Learned trial magistrate erred in law and in fact in holding that the guarantee agreement required the approval of the Land Control Board for it to be a valid.
  3. The Learned trial magistrate erred in law by shifting the burden of proof from the Plaintiff to the Defendant with regard to proving the authenticity of the signature of the deceased on the guarantee agreement. The plaintiff being the one alleging that the signature did not belong to Elisha Otieno (deceased) ought to have called an expert witness and proved her a negations.
  4. The Learned trial magistrate erred in law and in fact in awarding the Plaintiff Kshs. 250,000/- being general damages for inconvenience and anguish while the Plaintiff did not prove that she has suffered any inconvenience or anguish.
  5. The Learned trial magistrates erred in law and in fact in holding that a spousal consent was necessary for registration and validity of the guarantee agreement when the subject property was registered solely in the name of Elisha Otieno (deceased).
  6. The Learned trial magistrate erred in law and in fact in failing to put into consideration the fact that the original title of the suit property Kasgunga/Kamreri/4637 was provided to the Appellant by the deceased Elisha Otieno after signing of the guarantee agreement and the same still in the custody of the Appellant's advocate.
  7. The learned magistrate erred in law and fact in falling to put Into account the fact that the Appellant is a lawful creditor to the Deceased's estate by dint of a guarantee agreement signed by the deceased and the issue should have been dealt with In the succession case.



8. The Learned Magistrate erred in law and in fact by failing to consider the appellant's written submissions before him.
9. The Learned Magistrate erred in law and in fact in putting into consideration irrelevant factors and ignoring relevant factors thereby arriving at a wrong finding.

### **Appellant's submissions**

12. Counsel for the Appellant urged that the Learned Magistrate erred in law and in fact, when she held that the filed guarantee agreement was invalid for want of registration. Counsel urged that the Appellant entered into a contractual agreement with the deceased (Elisha Otieno), where the deceased's parcel of land known as Kasgunga/Kamreri/4637 was used as a security to guarantee money disbursed for a joint venture. That the guarantee agreement was put into writing in compliance with Section 3 of the Law of Contract Act. Further, that the Appellant proceeded to have the guarantee agreement registered in accordance with Section 43(2) of the Land Registration Act.
13. Counsel urged that the guarantee agreement bears two distinct stamp markings—one indicating payment of stamp duty and the other signifying franking by the Ministry of Lands. These markings serve as conclusive evidence that the document was duly registered, as affirmed in Imperial Bank of Kenya v Kariuki Construction Company Limited & 2 Others [2014] eKLR. Counsel submitted that the Learned Magistrate erred in law and in fact for in holding that the said guarantee was not registered.
14. Counsel submitted that the magistrate erred in law and in fact by shifting the burden of proof to the Appellants. Further, counsel submitted that the burden of proof lies with the Respondent as per Section 107 and 109 of the Evidence Act. He stated that to establish the existence of a guarantee agreement between the Appellant and the deceased (Elisha Otieno), the Appellant submitted the executed agreement, which was signed by both parties. He urged that the Respondent challenged the authenticity of the deceased's signature on the agreement, pointing out that the Respondent is illiterate and therefore lacks the capacity to credibly assess or challenge the authenticity of the deceased's signature. In light of this challenge, the burden of proof shifted to the Respondent to demonstrate that the signature did not belong to the deceased, by calling an expert witness to verify its authenticity. Counsel submitted that the Magistrate erred in placing the burden of proof on the Appellant with respect to the signature's authenticity, contrary to the legal position set out in Ephantus Nyaga Ngoroi v Ndwiga Stephana [2020] eKLR.
15. Counsel urged that the Appellant stated that the suit property solely belonged to the deceased, and supported this claim by producing a title deed showing the deceased as the sole registered proprietor. Additionally, the Appellant produced an Affidavit dated 11<sup>th</sup> September, 2015, in which the deceased (Elisha Otieno) had deponed that the suit property was not matrimonial in nature and that the Respondent had no proprietary interest in it. He stated that the claim that the property was matrimonial and that the respondents' spousal consent was required prior to the registration of the guarantee agreement were unsubstantiated, as the Respondent failed to provide any evidence to support her assertions. Accordingly, the Appellant urged, the suit property did not constitute matrimonial property, and thus no spousal consent was necessary for the registration of the guarantee agreement. That this position was upheld in Mbai & Another (Both Suing as the Representatives of the Estate of the Late John Mbai Kavoi - Deceased) v Mbai & 2 Others (Environment & Land Case 54 of 2021) [2024] KEELC 5531 (KLR) (25 July 2024) (Judgment). Counsel reiterated that the Learned Magistrate erred in law and in fact in holding that spousal consent was necessary for registration and validity of the guarantee agreement when the subject property was solely registered in the name of the deceased. Furthermore, that the law requires that general damages must be proven, even where they



are not capable of precise quantification. That this principle was reaffirmed by the Court of Appeal in [Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd](#) [1992] eKLR.

16. Counsel maintained that the trial magistrate erred in law and in fact by failing to consider the case put forward by the Appellant. Further, that the trial court made a finding that relied only on the case put forward by the Respondent. That the Appellant put his case forward through the Defence as well as filing his submissions and brought forth the existence of the guarantee agreement wherein the suit property was used as security by the deceased (Elisha Otieno) to guarantee money disbursed for a joint venture. Further, that it is important to note that, as stated during the hearing, the original title deed to the suit property was voluntarily surrendered by the deceased to the Appellant's advocate following the execution of the guarantee agreement, and it remains in the advocate's custody to date. This act was a clear affirmation of the deceased's intention to secure the Appellant's interest under the guarantee agreement. The Appellant thereby acquired a legal and equitable interest in the suit property, rendering any subsequent dealings with the title invalid. Counsel maintained that the Court ought to find that the title held by the Appellant's advocate is the only valid title of the suit property. He stated that the Appellant is willing to surrender the said title to the Respondent upon full settlement of the outstanding loan secured by the guarantee agreement.
17. Counsel urged that the trial magistrate abdicated his duty to act impartially and misdirected himself by failing to consider the Appellant's case and the supporting evidence. He urged the Court to allow the Appeal, set aside the Judgment of the trial court, uphold the validity of the guarantee agreement, declare that the title currently held by the Appellant's Advocate is the only valid title to the suit property, and award the costs of the Appeal to the Appellant.

### Respondents' submissions

18. Learned counsel for the respondent urged that the Appellant has a duty to justify the lodging of the said caution in the suit property as was held in the case of [Maria Ngangi Gwako v Charles Mwenzi Ngangi](#) (2014)1 eKLR. He urged that the Appellant has relied on a guarantee agreement which is not duly registered and failed to produce a spousal consent, proof of transactions, valuation report and land control board consent which should accompany an agreement of the same nature for registration. That the statutory demands stipulated under the [Land Registration Act](#) are mandatory legal requirements and the right to exercise the statutory remedies accrues only after full compliance with the legal framework on statutory demands. The Statutory demand in the present case was in accordance with section 56 of the [Land Registration Act](#) and therefore the act of the Appellant in seeking to enforce the guarantee agreement in non-compliance with the statutory demand is not sustainable in law. He urged that the appeal must fail with costs to the Respondent for want of merit.

### 3 Analysis and determination

19. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of [Gitobu Imanyara & 2 others Vs Attorney General](#) [2016] eKLR. It was held as follows;

“ An appeal to this Court from a trial by the High 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 nor heard the witnesses and should make due allowances in this respect.”



20. In *Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR the Court held as follows;

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

21. Upon considering the memorandum of appeal, the record of appeal and the submissions of the parties, the following issue arises for determination;

1. Whether the trial court erred in declaring the caution null and void
2. Whether the trial court erred in its award of damages
3. Who to bear the costs

22. The Court decides the issues in sequence.

**a. Whether the trial court erred in declaring the caution null and void**

23. The Plaintiff's case in the trial court was that the Appellant lodged a caution against her husbands' parcel of land on 25<sup>th</sup> September 2021 which was on the basis that her husband had used the suit land as security to guarantee a loan for a third party. It was not in dispute that the land was registered in the name of one Elisha Otieno (Deceased) who was her husband at the time. In the trial court, the defendant produced evidence of the request by the advocates conducting the transaction, for a spousal consent on the guarantee on the suit land. This was vide a letter dated 10<sup>th</sup> September 2015 through the firm of Njeru, Nyaga & Company Advocates. The spousal consent was however never availed. Additionally, during the trial, it came out that the defendant had never seen the late Elisha execute the guarantee and there was no evidence tendered to show that the guarantee was registered.

24. Section 43 of the *Land Registration Act* provides as follows;

- (1) Every instrument effecting a disposition of land under this Act shall be in the form prescribed in relation to that disposition under this Act or any other written law.
- (2) No instrument effecting any disposition of an interest in land under this Act shall operate to sell or assign land or create, transfer or otherwise affect any land, lease or charge until it has been registered in accordance with the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made.

25. In principle, the alleged guarantee operated like a charge. In this regard, the provisions of Section 56 of the *Act* are relevant;

- (1) A proprietor may by an instrument, in the prescribed form, charge any land or lease to secure the payment of an existing, future or a contingent debt, other money or money's worth, or the fulfilment of a condition and, unless the chargee's remedies have been by instrument, expressly excluded, the instrument shall, contain a special acknowledgement that the Chargor understands the effect of that section, and the acknowledgement shall be signed by the Chargor or, where the Chargor is a corporation, the persons attesting the affixation of the common seal.
- (2) A date for the repayment of the money secured by a charge may be specified in the charge instrument, and if no such date is specified or repayment is not demanded by the charge on



the date specified, the money shall be deemed to be repayable three months after the service of a demand, a written, by the chargee.

- (3) The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.
  - (4) The Registrar shall not register a charge, unless a land rent clearance certificate, certifying that no rent is owing in respect of the land, and the consent to charge has been presented, or unless the land is freehold.
  - (5) A charge shall have effect as a security only and shall not operate as a transfer.
26. The ‘guarantee’ having not been registered, could not offer any protection to a third party. I have analysed the evidence in the trial court and it is my considered view that the appellant failed to establish the existence of a valid guarantee that conferred any interest on him with regards to the suit land. He failed to produce the witness who stated that he was present during the execution to support the evidence and there was no evidence that the guarantee was registered. It follows that the trial court was correct in its finding that the caution was null and void.

### **Whether the trial court erred in its award of damages**

27. The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of *Butt v Khan* (1981) KLR 470 where the court pronounced itself as follows;

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.

28. An appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubee v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

29. I note that the trial court was not precisely particular in the award of general damages. It did not state the reasons for the said award. However, having found that the appellant had erroneously placed a caution on the suit land, an award of damages lay against him. I am guided by the provisions of Section 75 of the *Land Registration Act* which provides;

Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has sustained damage, to pay compensation to such person.

30. Given the impact of a caution on the proprietary rights of a party since it impedes many things, including preventing transactions on the title, I find no reason to interfere with the award of damages by the trial court. The trial magistrate exercised discretion correctly.
31. The upshot of the foregoing is that the appeal is dismissed with costs to the Respondent.



**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM  
25<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**HON. DR. IUR NYAGAKA**

**Judge**

From 2:08 PM to 2:22 PM, in the presence of,

Court Assistant: Fiona

Joel Nyaga Advocate for the Appellant

Shikuku for Advocate the Respondent

