

**IN THE COURT OF APPEAL
AT NAKURU**

CORAM: MATIVO, GACHOKA & OKELLO

JJ.A. CIVIL APPEAL NO. NAK E045 OF 2021

BETWEEN

**TABITHA WANJIRU KINYANJUI
& MOSES NYANJUA KINYANJUI**

*(As Administrators of the Estate of
Sophia Wambui Kinyanjui (Deceased)).....***APPELLANTS**

AND

STEPHEN KINYANJUI MBURU.....RESPONDENT

*(Appeal from the Judgment and decree of
the Environment and Land Court of Kenya at
Nakuru (D. O.
Ohungo, J.) dated 5th November 2020*

in

***ELC Case No. 159 of 2012
(formerly HCCC No. 335 of 2011).***

JUDGMENT OF THE COURT

1. The litigation which culminated in the judgment the subject of this appeal was instituted by the late Sophia Wambui Kinyanjui (deceased) against Stephen Kinyanjui Mburu (the respondent) vide a plaint dated 10th November 2011. The deceased died on 31st May 2018 during the pendency of the litigation and she was substituted with Tabitha Wanjiru

Kinyanjui & Moses Nyanjua Kinyanjui, the administrators to her estate (the appellants).

2. The gravamen of the deceased's case against the respondent was that at all material times she was the lawful proprietor of three parcels of land known as Industrial Area Plot Nos. 217, 218 and 219. The claim for ownership of the said plots, which was uncontroverted, was that she inherited them from her late husband the late Johnson Kinyanjui Gitau (deceased) pursuant to orders issued in **Naivasha PMCC Succession Cause No.133 of 2008**. However, she subsequently discovered that her allotment letters pertaining to the said parcels of land were missing. Her search for the said documents was in vain. She decided to ask one Pauline Wanjiku, who was her employee the whereabouts of her allotment letters. However, her reply was *"stop pretending you are unaware that the parcels were sold to the respondent."* She averred that subsequently, she discovered that the respondent had fraudulently attempted to transfer her three plots to his name with the assistance or connivance of the said Pauline Wanjiku. The deceased denied selling the said parcels to the respondent. She accused the respondent of forging

her

signature appearing in three sale agreements in which it was claimed she sold the plots to the respondent. She prayed that the sale agreements be declared null and void, a permanent injunction restraining the respondent from interfering with her enjoyment of the said plots, costs of the suit, interests thereon and any other relief the Court deemed fit.

3. In his defence and counter-claim dated 1st December 2011, the respondent averred that he purchased the 3 plots from the deceased at an agreed consideration of Kshs.18,000,000/= pursuant to three separate agreements dated 8th November 2010 entered between himself and the deceased. Upon executing the said agreements, the deceased surrendered to him the allotment letters for each plot and all necessary documents for purposes of transferring the properties into his name. However, the deceased refused to grant him vacant possession. He denied the alleged fraud and stated that the appellant was charged in a criminal court for giving false information to the police, to wit, claiming that she never sold the land and accusing the respondent of fraud and forging the sale agreements.

4. In his counter claim, the respondent prayed for orders that:
(a) the suit be dismissed; (b) a declaration that the said parcels of land belonged to him; (c) the deceased be evicted from the said premises; (d) a permanent injunction restraining the deceased from interfering with the said plots; (e) damages for breach of contract; and, (f) costs of the suit.
5. In her reply to the defence and defence to the counter claim dated 12th September 2016, the deceased reiterated her claim and denied the averments in the defence and counter-claim.
6. Both parties adduced evidence and called witnesses in support of their respective positions. In the impugned judgment, the learned judge noted that the deceased's case rested solely on allegations of fraud and forgery of the sale agreements dated 8th November 2010, the petty cash vouchers and the circumstances under which the respondent obtained the allotment letters. After evaluating the evidence, the learned judge dismissed the allegations of fraud levelled against the respondent maintaining that the threshold for establishing fraud had not been met.

7. At paragraph 41 of the impugned judgment, the learned judge noted that the three sale agreements in respect of each plot are all dated 8th November 2010 had identical terms. The learned judge further observed that each party called a document examiner who testified in support of their respective cases. After addressing his mind to the expert evidence, the learned judge concluded that it was more probable that the deceased signed the agreements and the petty cash vouchers.
8. In addition, the learned judge noted that the agreements provided that part of the purchase price would be paid to the deceased's **account number 02002932884**, Equity Bank Ltd, Naivasha in the joint names of the deceased and her son John Mwaura Kinyanjui. The learned judge also noted that the respondent produced bank transfer documents showing that he transferred into the said account Kshs.1,720,000/= in 7 different transactions between 9th November 2010, barely one day after the agreement was signed and 5th January 2011. The learned judge noted that the deceased admitted that was her account. The learned judge also noted that the deceased's

son Moses Nyanjua Kinyanjui admitted receiving Kshs.200,000/= from the respondent on 16th May 2011 through his account at

the Co-operative Bank and found the explanation tendered for the said payment to be wanting. The learned judge stated:

“49. I further note that the agreements provided that the sales were by way of transfer of the originals of the letters of allotment to the defendant. Parties are in agreement that the defendant got the said originals of the letters of allotment. While the plaintiffs claim that the defendant fraudulently obtained them, Sophia admitted that her report to the police in which she accused the defendant of fraudulently obtaining the allotment letters, resulted in her being charged together with her nephew Moses Nyanjui Gachie with giving a false report to the police. She admitted that the case was concluded and they were convicted and fined Kshs.80,000/= in total. It is thus apparent that the defendant came to possess the letters of allotment pursuant to the agreements.

50. Further, besides the defendant and Sophia, the agreements had 7 other signatories who were Sophia's witnesses in addition to being her children and beneficiaries. I doubt if it would have been possible to get all those family members to sign if there was no agreement.

51. Regarding the 3 petty cash vouchers dated 8th November 2010, I note that each of the agreements provided that a deposit of Kshs. 4,000,000 was to be paid in cash to

Sophia upon signing of the agreements and in exchange of the original letter of allotment. The petty cash vouchers indicate that the payments totaling Kshs.10,000,000/= were made to Sophia as first

instalments for the respective plots. Whereas the defendant submitted all 3 petty cash vouchers to his expert for analysis, the plaintiffs only submitted the ones in respect of plot 219 and 217. To the extent that the agreements provided for payment of deposits in cash, I agree with the defendant's forensic document examiner that Sophia signed the 3 petty cash vouchers dated 8th November 2010.

9. Regarding the appellants' contention that the agreements were null and void for want of attestation as required by Section 3

(3) of the Law of Contract Act, the learned judge after reproducing the said provision had this to say:

"53. A perusal of the agreements shows that the parties thereto were Sophia as vendor and the defendant as purchaser. Their signatures were attested by Ambrose Mulandi Advocate who it is not disputed was then employed by Ms Mary Njeri Mburu practising as Njeri Mburu & Co. Advocates. Mary Njeri Mburu acknowledged that the attestation stamps in the agreements looked like hers. Besides attestation by Mr Mulandi, Sophia's children were present and also signed as witnesses. I am satisfied that the agreements meet the criteria under Section 3 (3) of the Law of Contract Act and are therefore neither null nor void for want of attestation.

54. In view of the foregoing...the parties had valid sale agreements."

10. Ultimately, the learned judge issued the following orders:

**a) Judgment is hereby entered against
the defendant and in favour of the
estate of Sophia**

Wambui Kinyanjui (deceased) for KShs.6,080,000/= (Kenya Shillings Six Million Eighty Thousand) being balance of the purchase price together with interest thereon at court rates to be calculated from the date of filing of this suit.

- b) Since each party contributed to the dispute that led to the filing of this suit, I order that each party bears own costs.**
- c) The sums in (a) above to be deposited in court and will be released to the administrators of the estate of Sophia Wambui Kinyanjui (deceased) who will have obtained a full grant in respect of the said estate pursuant to the provisions of the Law of Succession Act.**
- d) Upon the defendant depositing the sums in (a) above in full:**
 - i. An order of eviction shall issue to remove the plaintiffs, their agents and servants from plot numbers 217, 218 and 219 Industrial Area Naivasha Municipality.**
 - ii. A permanent injunction shall issue to restrain the plaintiffs from reselling or offering for sale properties plot numbers 217, 218 and 219 Industrial Area Naivasha Municipality; restraining the plaintiffs, their servants and or agents or anyone claiming through them from disposing by way of sale the curios, artefacts, hardwoods, softwood crafts and all other stocks including furniture and fittings or removing the said items from plots numbers 217 and 218 Industrial Area Naivasha Municipality.**

11. Aggrieved by the above verdict, the appellants are now before this Court seeking to overturn the said decision citing 19 grounds of appeal in their memorandum of appeal dated 24th May 2021. In summation, the appellants are faulting the learned judge for: (a) finding that there were valid sale agreements, (grounds 1, 3, 4, 9; (b) relying on the respondent's expert report and discrediting the appellants' expert report without justifiable reasons (ground 2); (c) finding that the respondent paid consideration for the suit properties (ground 5, 6, 7, 8, 12, 13, 14,); (d) finding that the deceased handed over the letters of allotment to the respondent (ground 11); (e) failing to find that fraud was proved against the respondent (ground 15; (f) failing to find that the reliefs granted were not merited, (grounds 16 &17) (g) failing to consider the appellants' evidence and submissions and not appreciating the law (grounds 18 & 19).

12. The appellants pray for orders that: (a) the said Judgment set aside; (b) the plaintiffs' suit be allowed and the defendant's counter-claim be dismissed; (c) an order that the respondent did not pay any consideration for the suit

properties, and (d)

the costs of this appeal and that of the trial court be provided for.

13. We heard this appeal virtually on 25th February 2026. Learned counsel Mr. Ayeko appeared for the appellants. He relied on his written submissions dated 10th February 2026. Learned counsel Mr. Konosi leading Mr. Ndubi appeared for the respondent. He submitted orally.
14. Regarding the validity of the sale agreements, the appellants' counsel submitted that the learned judge disregarded the appellants' forensic evidence without a proper explanation. In addition, counsel questioned the validity of the sale agreements urging that it is not clear who attested and who drew the agreements, therefore, the agreements do not accord with Sections 34 and 35 of the Advocates Act. To buttress this argument, counsel relied on the High Court decision in **Allesandro Piccio & Ano. vs. Giulio Giro [2025] KEHC 341 (KLR)** which underscored the mandatory requirements of Section 35.
15. The appellants' counsel also questioned the finding that the respondent paid the consideration and placed reliance on this

Court's decision in **Neptune Credit Management Limited & another vs. Jani & Ano. (Civil Appeal 201 of 2019) [2022] KECA 619 (KLR) (13 May 2022) (Judgment)** which underscored that consideration goes to the core of any agreement. To support his argument, counsel cited the evidence of Mr. Mulandi advocate who testified that he did not witness any money being paid, even though he attested the agreement. According to counsel, this evidence contradicts the agreements. Counsel contended that the trial court did not consider the validity of the payment vouchers and cited the High Court decision in **Stephen Kinini Wangonde vs. The Ark Limited [2016] KEHC 3449 (KLR)** in support of the proposition *inter alia* that expert evidence does not trump up all the other evidence.

16. The appellants' counsel also faulted the learned judge for failing to appreciate that the respondent acted fraudulently and for upholding agreements which were void *ab initio*.
17. The respondent's counsel Mr. Konosi did not file written submissions, but he submitted orally. Regarding the question whether there were valid agreements, and the

conflicting evidence tendered by the experts, Mr. Konosi submitted that

the learned judge correctly determined that there was a valid agreement in respect of the three parcels of land and on the basis of the said finding, the learned judge ordered the respondent to pay the balance of the purchase price. Addressing the question whether the sale agreements were properly attested, Mr. Konosi referred to page 53 of the record and argued that the learned judge correctly pointed out that the signatures were attested by Ambrose Mulandi advocate of Mary Njeri Mburi & Company advocates. Counsel also noted that all the beneficiaries signed the agreement as witnesses.

18. Regarding the payment of the purchase price, Mr. Konosi referred to paragraphs 56 to 59 of the record in support of his assertion that the learned judge properly analyzed how the sum of Kshs.11,920,000/= was paid leaving a balance of Kshs.6,080,000/= which is due to the deceased's estate. Further, Mr. Konosi drew the Court's attention to the record showing that Kshs.10,000,000/= was paid in cash in addition to cash transfers made to the deceased's account and her son, the 2nd appellant.

19. Addressing the expert evidence, Mr. Konosi submitted that

expert opinions are not binding and underscored that
the

Court must look at the evidence tendered holistically. He referred to the evidence of Mr. Kenga, a document examiner, who said he relied on copies of the documents he examined while the respondent's document examiner stated that he examined originals from which he drew conclusions.

20. This is a first appeal, therefore, our mandate as a first appellate court is well-established as being a re-hearing or retrial of the case based on the material on record. This duty is well defined in **Rule 31(1) (a) of the Court of Appeal Rules (2022)** which requires this Court to re-examine both issues of law and fact. While this Court has the power to arrive at our own independent conclusions, we must exercise restraint and be slow to overturn a trial court's findings of fact because we did not have the advantage of seeing or hearing the witnesses. (See **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**).

21. Rule 31 (1) (a) of the Court of Appeal Rules (2022) requires this Court to re-examine both issues of law and fact. However, despite this broad mandate, we are alive to the

fact that the trial judge had the unique advantage of observing witness behavior and credibility firsthand. Therefore, we will only

overturn a trial court's factual finding if it is shown to be clearly wrong or if the judge failed to take into account material circumstances or probabilities. (See **Ongwen & 5 Others vs. Omollo & 6 Others [2023] KECA**).

22. At the outset, it is important to mention that this case largely stood on findings of issues of fact. The principle that an appellate court should be slow to interfere with the factual findings of a trial court is a long-standing rule of practice. This is primarily because the trial judge has the unique advantage of seeing and hearing witnesses firsthand and observing their demeanor. An appellate court should not interfere with witness credibility findings unless there is a sufficient balance of improbability against the trial judge's view.

23. We start by addressing the issue whether it was demonstrated by way of evidence that there existed valid sale agreements between the deceased and the respondent. The appellants' position is that there was no agreement at all and that the agreements relied upon by the respondent were forged.

24. In contract law, courts determine the existence of a

contract through an objective test. The Court does not look at what the

parties privately intended (subjective), but at what a reasonable person would understand from their outward words and conduct. The foundational authority for the objective test is the English decision in ***Smith vs. Hughes*** [1871] LR 6 QB 597 whose significance is that it shifted contract law away from the subjective "meeting of the minds" (*consensus ad idem*) toward an assessment of external manifestations of agreement. Blackburn J. famously stated that if a person so conducts themselves that a reasonable person would believe they were assenting to the terms proposed and the other party enters the contract based on that belief, the person is bound regardless of their real intention. The question before us narrows to whether a reasonable person presented with the facts before us would conclude that there existed valid contracts between the deceased and the respondent.

25. Significantly, before us are three agreements in respect of the three parcels of land allegedly entered between the deceased and the respondent. The terms in the three agreements are very clear as to who the parties are, the subject matter, the consideration and the mode of payment. However, the

deceased's case before the trial court and in this appeal is that the signature purporting to be hers in the agreements is not hers. She maintains that it was forged, pointing an accusing finger against the respondent who she accused of committing fraud and fraudulently obtaining her allotment letters by colluding or conniving with her worker, Pauline Wanjiku. She also disputed signatures appearing in numerous payment vouchers relied upon by the respondent in support of his assertion that he paid to the deceased substantial amounts towards the purchase price receipt of which she acknowledged by signing the said documents. In short, the appellant accused the respondent of committing fraud. In determining the said issue, the learned judge stated:

“40. Fraud is a serious allegation which beyond being pleaded and particularized must be strictly proved. See Kuria Kiarie & 2 others vs. Sammy Magera [2008] eKLR. The burden of proof facing a party alleging fraud is higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt...”

26. The principle that fraud must be specifically pleaded and strictly proved is a cornerstone of civil litigation. Because

an allegation of fraud is serious and carries severe consequences,

courts require a high degree of precision in how it is presented and established. Courts have consistently held that a party wishing to rely on fraud must plead it clearly and specifically. It is not enough to make vague or general allegations; the material facts (particulars) that constitute the fraud must be set out in the pleadings. This Court in **Elizabeth Kamene Ndolo vs. George Matata Ndolo [1996] eKLR** highlighted that the burden of proving serious allegations like fraud lies on the accuser, requiring a standard higher than the standard balance of probabilities, yet lower than beyond a reasonable doubt. Because fraud is a grave allegation, it must be proved by "*clear and cogent*" evidence that leaves little room for innocent interpretation. The facts and the material before us do not meet this high threshold. Accordingly, we affirm the trial court's finding that fraud was not proved.

27. The cornerstone of the appellants' case is that the signatures in the sale agreement did not belong to the deceased. In support of this assertion the appellants were buttressed by a report dated 28th September 2012 prepared by Emmanuel Kenga, a retired police officer and a forensic document examiner who concluded that the signatures in

question were

written by a different person. Regarding the methodology he used, Mr. Kenga stated:

“In the course of examining the questioned signatures and the standard signatures, I had to subject the signatures on a platform of "Projectina". In the process, I was able to observe the penspeed, penlifts, penstrokes, pen movement, and the general resemblance of the signature. All these factors made me form the above opinion.”

28. However, on cross-examination, Mr. Kenga admitted that he examined photocopies. On the other hand, the respondent's witness, Chief Inspector Daniel Gutu, a forensic document examiner examined the questioned sale agreements for the three plots and the various payment vouchers and specimen signature. He concluded that the signatures were not forged. Mr. Gutu in his report described the methodology he used as follows:

“I subjected the disputed signatures, specimen and known signatures to image juxtaposition and magnification procedures using Video Spectral Comparator (VSC 6000) for better visibility and inspection of individual characteristics for absolute identification. I considered all the possibilities of natural variations resulting from the time span the handwritings were made, writing instruments, and the changing writing habits.

Also, my opinion is based on the following peculiar characteristics in the writing that

provided me with forensic evidence of common authorship:

a. Signatures initialization and their terminal strokes;

b. Signatures construction and their arrangements;

c. Natural pen lifts, Natural variations, Curves;

d. Pen pressure and ink flow;

e. Signatures spacing and baseline alignment.”

29. The trial court was faced with two conflicting expert opinions.

This reminds us of Sir George Jessell MR in the case **Abringer vs. Ashton [1873] 17 LR Eq 358 at 374** who described expert witnesses as "*paid agents*". More than a century later, Lord Woolf joined the list of critics of expert witnesses in his *Access to Civil Justice Report*, published in 1996 in which he quipped:

"Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients."

30. Instances of trial courts being confronted with conflicting expert opinions are common. The question is, how should a court resolve conflicting expert evidence and how much

weight should be attached to such evidence. The High Court in

Mohamed Ali Baadi and Others vs. Attorney General and Others [2018] eKLR (High Court Petition No. 22 of 2012), (a bench of 5 judges) had this to say about how a court should treat expert evidence and the weight to be accorded to such evidence. It stated:

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To our mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues require specialized, technical or scientific knowledge only an expert in the field is likely to possess.

While expert evidence is important evidence, it is nevertheless merely part of the evidence which a Court has to take into account. Four consequences flow from this.

Firstly, expert evidence does not “trump all other evidence.” It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.

Secondly, a judge must not consider expert

***evidence in a vacuum. It should not therefore
be***

“artificially separated” from the rest of the evidence. To do so is a structural failing. A Court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the Court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is cogent and give reasons why the court prefers the evidence of one expert as opposed to the other.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact.”

31. Significant lessons can be drawn from the above excerpt. One, expert evidence does not “trump all other evidence”. Two, expert evidence must not be considered in a vacuum. Three, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence. Four, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact. In summation, the Court is required to examine the evidence in totality rather than in isolation.

Talking about the totality of the evidence, the trial court was confronted with three sale

agreements all signed by the deceased and her family members signed the agreements. The lawyer who prepared the agreement testified that he prepared the agreements and all the parties signed in his presence and he attested their signatures.

32. As was correctly noted by the learned judge, the agreements provided that part of the purchase price would be paid the deceased's **account number 02002932884**, Equity Bank Ltd, Naivasha in the joint names of the deceased and her son John Mwaura Kinyanjui. The learned judge also noted that the respondent produced bank transfer documents showing that he transferred into the said account Kshs.1,720,000/= in 7 different transactions between 9th November 2010. The learned judge correctly observed that the deceased admitted that was her account. We can only add that the deceased or even the appellants herein did not dispute that the said cash was deposited in the said account. They did not offer any other explanation to suggest that it was not paid in line with the sale agreements. As if the said payment is not enough, the learned judge also noted that the deceased's son Moses Nyanjua Kinyanjui admitted receiving Kshs.200,000/= from

the

respondent on 16th May 2011 through his account at the Co- operative Bank. The learned judge found the explanation for the said money totally wanting. In addition, there are numerous payment vouchers signed by the deceased acknowledging receipt of cash payments towards the purchase price.

33. Upon analyzing the totality of the evidence evaluated so far, we are persuaded that the disputed agreements were signed by the deceased and her family members, therefore, there existed valid agreements between the deceased and the respondent. It was also established as a fact that the deceased's family members also signed the agreements and that the agreements were witnessed by an advocate of the high court. Further, the evidence tendered by the appellants' document examiner is totally unreliable and it cannot dislodge the evidence tendered by the respondent's expert which is supported by the rest of the evidence highlighted above.

34. It is also our finding that the argument that no consideration was paid on the face of all the payments supported by the bank transfers and the payment vouchers

is without merit. Similarly, the contestation that there was no valid agreement

is without merit. On the contrary, there is ample evidence that the essential elements of a valid contract were proved. In addition, the alleged forgery was not proved at all. In any case, there is evidence that the deceased was charged with the offence of giving false evidence to the police, convicted and fined.

35. In view of the conclusions arrived at on each and every issue so far addressed, we find no reason to find, just like the trial court, that the deceased handed over the letters of allotment and other documents pertaining to the 3 plots to the respondent in line with the sale agreements so as to facilitate the transfer process. The argument that the documents were lost, insinuating, that the respondent procured them illegally or fraudulently is shallow and escapist. As stated above, the respondent had paid substantial sums to the deceased.

36. The other ground urged by the appellants is that, their evidence and submissions were not considered. However, by requiring the trial court to consider and weigh all the evidence does not mean that the judgment of the trial court must also include a complete embodiment of all evidence

led and submissions, as if it comprises a transcript of the proceedings.

We have carefully read the impugned judgment. We are satisfied that the learned judge first summarized the parties evidence listing all the witnesses testimony, the parties' submissions and analysed all the evidence and submissions and made his determination based on the totality of the material before him.

37. We have said enough to demonstrate that this appeal lacks merit. Accordingly, we find no reason to fault the trial court's decision, which we hereby affirm. The effect of this is that this appeal is dismissed with costs to the respondent.

Dated and delivered at Nakuru this 8th day of May, 2026.

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

(DR.) J. O.

OKELLO

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed.

DEPUTY REGISTRAR