



Kamau v Kiarie & another (Legal Representative of the Estate of Naomi Wambui Kiarie - Deceased) (Environment and Land Appeal E003 of 2022) [2024] KEELC 222 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 222 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E003 OF 2022**

LN GACHERU, J

JANUARY 25, 2024

**PETER WAMITHI KIARIE & TERESIAH WANJIKU KIARIE
(LEGAL REPRESENTATIVE OF THE ESTATE OF NAOMI WAMBUI
KIARIE(DECEASED)).....APPELLANTS**

-VERSUS-

FRANCIS MWANGI KAMAURESPONDENT

BETWEEN

FRANCIS MWANGI KAMAU PLAINTIFF

AND

PETER WAMITHI KIARIE 1ST DEFENDANT

TERESIAH WANJIKU KIARIE 2ND DEFENDANT

**LEGAL REPRESENTATIVE OF THE ESTATE OF NAOMI WAMBUI KIARIE -
DECEASED**

(Being an Appeal from the judgement and decree of Hon. E. MUTUNGA(PM), delivered on 3rd March 2022, at the Principal Magistrates Court in Kandara ELC Case No 40 of 2019)

JUDGMENT

1. The Appellants were appointed as the Legal Administrators of the Estate of Naomi Wambui Kiarie on 7 October, 2019. On 24th September 2020, the Appellants applied for Summons for Confirmation of grant.
2. On 30th September 2020, the Respondent protested the Confirmation of Grant, and the mode of distribution on allegations that he was a creditor of the Estate of the deceased- (Naomi Wambui Kiarie).



The Respondent alleged that he bought a portion of land parcel No. Loc.4/Gatitu/227, from the deceased (Naomi Wambui Kiarie), and he demanded to be included in the list of members to whom the deceased estate is to be distributed amongst.

3. Though the Appellants had submitted that the Succession Court in its Ruling of 18th March, 2021, directed the Respondent to file a suit at the ELC Court so as to ascertain the ownership interest in the suit property, this Court did not see the said Ruling in the Record of Appeal. Consequently, the Respondent herein as Plaintiff filed an ELC Suit No. 40 of 2019, at Kandara Law Courts and the said suit, Kandara ELC Case Number 40 of 2019, was heard, concluded and judgement was entered in favour of the Respondent herein.
4. The Appellants being dissatisfied with the Judgement of Hon. E. Mutunga, PM, delivered on 3rd March 2022, appealed to this Court on the following grounds namely: -
 - I. The learned trial Magistrate erred in law and fact by finding that the MOU between the Respondent herein and the Deceased was a valid document and therefore failing to appreciate that the deceased, Naomi Wambui Kiarie, did not own the land at the time of the alleged signing of the Memorandum of Understanding, but rather that the land was owned by Naomi Wambui Kiarie's husband-Kiarie Kamau, who was deceased at the time Naomi allegedly executed the Memorandum of Understanding and a Grant for his estate had not been issued.
 - II. The learned trial Magistrate erred in law and fact by finding that the deceased, Naomi Wambui Kiarie, had legal authority or capacity to sell Loc.4/Gatitu/227, belonging to her late husband Kiarie Kamau, yet the deceased, Naomi Wambui Kiarie, did not have authority by way of Grant to sell her late husband's property Loc.4/gatitu/227, to the Respondent and that the alleged transaction amounted to intermeddling.
 - III. The learned trial Magistrate erred in law and fact by finding that because the Appellant did not call any witnesses, that they failed to defend themselves, yet the Appellants did not need to call any witnesses as the Respondent had already confirmed the illegality of the sale transaction in his pleadings, witness statements which were adopted as evidence, documents presented to court as evidence and also during cross examination.
 - IV. The learned trial Magistrate erred in law and fact by failing to address itself on Sections 82(b) and Section 55 of the *Law of Succession Act* with regards to the sale of a deceased's property without a Grant and Article 40(6) of *the Constitution*.
 - V. The learned trial Magistrate erred in law and fact by finding that the Appellant introduced evidence during submissions and yet all arguments by the Appellant in its submissions were premised on the law and the testimony and evidence produced by the Respondent during the hearing.
 - VI. The learned trial Magistrate erred in law and fact by not considering the Appellant's submissions.
 - VII. The learned trial Magistrate erred in law and fact by finding that the Respondent is entitled to a portion of land measuring 2.05 acres out of land parcel No. Loc.4/gatitu/227, and or from the estate of Naomi Wambui Kiarie, yet the law states that acquisition of land before confirmation of grant is unlawful and does not enjoy property rights under *the Constitution*, because no person has any power or legal authority or capacity to sell immovable property of the deceased before confirmation of Grant.



5. The Appeal was canvassed by way of written submissions. The Appellants filed their submissions dated 29th June 2023, through Cecilia Milimu Advocates, and urged the Court to allow the Appeal.

On his part, the Respondent filed his submissions through Milimo Muthomi & Co Advocates and implored the Court to dismiss the instant Appeal with costs.

The Appellants Submissions.

6. The Appellant submitted that the land parcel No. Loc.4 /gatitu/227, belonged to Kiarie Kamau, the late husband to Naomi Wambui Kiarie, the deceased herein. The Grant of Letters of Administration of the Estate of Kiarie Kamau, was issued to Naomi Wambui Kiarie on 12th August,2009, and the Certificate of Confirmation of Grant issued on 9th December 2009.
7. The Appellants further submitted that the Respondent and the deceased, Naomi Wambui Kiarie, entered into an illegal MOU on 21st December, 2007, as to the sale of Loc.4/ Gatitu/227, the suit property. This was done before Naomi Wambui Kiarie, could procure Confirmation of grant to administer her late husband's estate. Thus, the Appellants argued that the Respondent did not acquire ownership interest in the suit property.
8. The Appellants also argued that there cannot be a legal sale of a deceased's land before a Confirmation of the Grant over the deceased's estate is issued. Reliance was placed on the case of, In re Estate (Deceased) (2017)eKLR, where the Court faced with similar situation held as follows;

“Acquisition of land before confirmation of grant is unlawful and does not enjoy property rights under *the Constitution*.

Upon meticulous consideration of the protest, all arguments filed and the law, I am of the following persuasion. I will restate once again what I stated in the case of the Matter of the Estate of M'Ajogi M'Ikiugu alias Ikiugu Ajogi (Deceased) on sale of estate property before confirmation of grant as follows:-

Sale of estate property before confirmation

Courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the *Law of Succession Act*, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the *Law of Succession Act*, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant.

Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged establishes the respective identities and shares of persons beneficially entitled, and another type of property. It is during confirmation hearing that the court when confirmed the grant specifies such persons and their respective shares. Therefore, before confirmation, the interest of the beneficiary remains amorphous and entangled within the estate; and vested in the administrator or executor as the estate property as by law stated Estate.

But for completeness of the foregoing discourse, I wish to go two steps up. First, a void transaction is in law a nullity. It is not only bad, but incurably bad. And every proceeding



or perceived right which is founded on it is not only bad but incurably bad. On this I can do no better than Lord Denning M.R in the case of *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169 at pg. 1172 that:

"...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. void without more ado, though it is sometimes convenient to have the court declare There is no need for an order of the court to set aside. It is automatically null and bad. You cannot put something on nothing and expect it to stay there. It will it to be so. And every proceeding which is founded on it is also bad and incurably collapse".

Second, any acquisition of land in violation of the *Law of Succession Act* is unlawful and a finding to that effect by a competent court brings the acquisition within the claw-back provisions of article 40(6) of *the Constitution* which declare that: -

The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

9. The Appellants also relied on the case of *Zacharia Wambugu Gathimu & Another vs John Ndungu Maina* (2019 eklr, that affirmed the same position and held;

"... from the said agreements, the vendor of land parcel No. Nyandarua/ Ndaragwa Block 4/ Miricho No.1007, the subject suit herein was shown as one John Kagai Nderui. From the discourse above and having found that the proprietor of the suit land was the deceased Rudia Waruguru, it therefore goes without saying that the said John Kagai Nderui, who was neither the registered owner nor a beneficiary to the estate of the deceased, had no interest on the land to pass...."

10. The Appellants further submitted that because the deceased did not have a confirmed grant at the time of entering into the MOU to allegedly sell a portion of Loc.4/gatitu/227, belonging to her late husband Kiarie Kamauthen, the trial court erred in law and fact by finding that the deceased could enter into a valid contract of sale of the said land parcel Loc.4/gatitu/227, with the Respondent herein.

11. They pointed out that at the time of signing the alleged MOU, the Respondent was aware that the deceased, Naomi Wambui Kiarie, did not have capacity to sell the suit property that belonged to Naomi's deceased husband, since she had not yet obtained the grant to administer her husband's estate or a confirmation of the grant thereof. That the said MOU, had indicated as follows;

"this sum is paid to Naomi side as an advanced payment in anticipation that Naomi will file and prosecute a succession cause in the matter of the estate of her husband one Kiarie Kamau."

12. The Appellants further illustrated that the MOU in Clause B states that;

".....that after obtaining letters of administration and the subsequent confirmation of the same, Naomi will sell a portion of land to the side of Francis...."

The Appellants noted that the said MOU was prepared by an Advocate of the High Court of Kenya in the Law the Firm of Kamiro R.N & Co. Advocates. thus, having engaged the services of an advocate, the Respondent was properly advised and was well aware that the MOU was an illegality.

13. The Appellants further submitted that the issue of the illegality of the MOU was raised in the Appellants submissions before the trial court, but was not considered. There is absolutely no mention



in the trial Court's Judgement aboutt this issue of the illegality of the MOU, that was being relied by the Respondent (Plaintiff at the trial).

14. The Appellants also submitted that the MOU was illegal, null and void. They invited the Court to interrogate the legallity or illegallity of the MOU herein as at the time of sale, the deceased Naomi Wambui Kiarie, did not have capacity or authority to transact over the suit property LOC 4/ GATTU/ 227, as the same was still registered in her husband name and she had not obtained any grant to transact over his estate.

15. In fact, they submitted that such transaction amounted to intermeddling with the deceased estate. They relied on Section 45 of the Succession Act which states;

“45(1) Except so far as expressly authorised by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose , take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person...”

2(a) Any person who contravenes the provisions of this section shall—

a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment;

b.

16. As to whether the trial court erred in law and fact by finding that the Appellants failed to defend themselves because they did not call any witnesses; the Appellants submitted that a point of law can be canvassed by way of submissions, which they did. They submitted that there was no doubt that the Respondent in his pleadings and in cross examination of the Appellants in Court had maintained that he bought the suit property from the late Naomi, before Confirmation of Grant was issued over the estate of the late Kiarie Kamau, who was the husband to Naomi. That was also the evidence of the Appellants in their pleadings and thus, the Appellants did not need to call witnesses to argue a point of law. Thus, the said point of law was argued through submissions.

17. It was their further submissions that for the trial Court to hold that they did not call evidence, that was misleading and misguided. Reliance was placed in the case of; Charter House Bank Ltd (Under Statutory Management) vs Frank N. Kamau (2016) eklr, where the Court held as follows on the issue of burden of proof; -

“we would therefore venture to suggest that before the trial court can conclude that the plaintiffs case is not controverted or is proved on a balance of probabilities by reason of the defendants failure to call evidence , the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant... where the defendant has subjected the plaintiff or his witnesses to cross examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgement cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the defendant has not testified.”



18. The Appellants further submitted that at the trial court, the Appellants herein filed their defence dated 27th October 2019, and that the Appellants counsel equally cross examined the Respondent herein during the hearing of the Plaintiff's evidence. Therefore, they refuted the claims that they did not defend the Plaintiff's (Respondent) case at the trial court simply because they did not call witnesses or give evidence in court.
19. The Appellants reiterated that the Respondent's case at the trial court was based on an illegality, and as such the Appellants herein needed not bring witnesses to controvert the illegality because the evidence presented by the Respondent through his documentation at the trial court proved the illegality by their mere existence under the law.
20. On whether the learned trial Magistrate erred in law and fact by finding that the Respondent is entitled to a portion of land measuring 2.05 acres out of land parcel Loc.4/Gatitu/227; the Appellants submitted that the trial Court erred in law and fact by upholding the unlawful MOU between the Respondent and the deceased, Naomi Wambui Kiarie, and thus apportioning him land measuring 2.05 Acres out of land parcel Loc.4/gatitu/227, was also unlawful, null and void.
21. The Appellants stood firm in their submissions and reiterated that any alleged sale of land to the Respondent herein before confirmation of grant was illegal and void. They further reiterated that a void transaction in law is a nullity and it is not only bad, but incurably bad, and every proceeding or perceived right which is founded on it is not only bad but incurably bad.
22. The Appellants further argued that there is no mention of this specific land in the MOU or even the size or acreage to be sold and therefore the finding of the trial court that the Respondent was entitled to 2.05 acres of land from Loc.4/Gatitu/227 was without basis. The Appellants also contended that it was an absolute overreach with no explanation as to how the trial court arrived at the decision on the acreage or the size property allegedly bought by the Respondent.
23. In concluding their submissions, the Appellants urged this Honorable Court to allow their appeal as prayed, and overturn the findings and Judgement of the trial court dated 3rd March 2023.

Respondent's Submissions

24. The Respondent in responding to the issue raised as to whether the Appellants had capacity to enter into the MOU; he submitted that when Naomi Wambui Kiarie (deceased), sold the said land parcel to the Respondent, she was the administrator of the estate of her husband Kiarie Kamau alias Kibui Kamau.
25. The Respondent noted that the children of the deceased among them the Appellants herein, were aware of the said transaction and they even witnessed the said agreements. Further, he submitted that the administrators of the estate of Naomi Wambui Kiarie were also aware of the said transaction.
26. The Respondent supported this position through evidencing copies of the said agreement citing pages 16, 17, 18, 19, 20, 22,30 & 31.
27. The Respondent cited the case of Bedan Nagi Ngano v Phylis Grace Karimi & another [2010] eKLR, wherein the Court stated;

“From the annexures, it is clear that the 1st Respondent did "purchase" some land from Applicant and other beneficiaries of the deceased estate. I agree with counsel for the applicant though the said beneficiaries lacked the legal capacity to dispose of the deceased's property.



In this case however, I note that the very person who sold the said portions and who is now the administrator to the estate is the one who has turned round and asked the court to declare the first Respondent a stranger to that estate. He is therefore seeking to benefit from an illegal situation that he himself created. The court cannot allow him to have his cake and eat it. He sold the land to the 1st Respondent. He signed the agreement thus admitting that he had received the money in question while clearly knowing that he had no capacity to sell the deceased's estate. He who comes to equity must come with clean hands. This applicant's hands are overtly and badly soiled. This court as a court of equity cannot allow him to benefit from the illegality he himself took part in for his own benefit. The 1st Respondent may not be a beneficiary to the estate of the deceased but he is not a stranger either. She has a beneficial interest in the properties she bought from the applicant and her late mother. Now that the applicant is the legal administrator of the said estate, the most prudent thing for him to do is to apply for confirmation of the grant so that the estate can be distributed once and for all. The 1st Respondent is not an intermeddler in the deceased estate. She has a beneficial interest in the same. The situation on the ground should therefore be maintained until the shares of all the beneficiaries are finally determined."

28. The Respondent reiterated his position and affirmed that the agreement between Naomi Wambui Kiarie (deceased) and himself are legal and binding. He concurred with the sentiments of the trial magistrate which stated;

"From the corroborated evidence, it's clear that the plaintiffs especially PWI that there was a binding agreement and that upon payment of the purchase price in reference to land being Loc.4/Gatitu/227, the same was to be transferred to him from the estate of the deceased but the same didn't happen".

29. The Respondent further relied on the case of; In re Estate of Johana Nyaga (Deceased) [2018] eKLR, where it was held: -

"The 1st protestor's evidence of the sale agreements for each and every plot she bought from the family of deceased is overwhelming. All the agreements were witnessed by advocates and were conclusive evidence of the sale. The 1st Protestor also produced the agreement in which the parties agreed that she buys ¼ acre plot at Shs. 150,000/= which was to meet hospital expenses for the deceased and his wife who was the original administrator. The respondents have come to this court with unclean hands and have requested the honourable court to invalidate a transaction on the basis that it offend Section 82 and section 15 of the Succession Act CAP 160. The respondents want to have their cake and eat it.

I am satisfied that the 1st protestor has established her case against the petitioner in this confirmation of grant...I hereby enter judgment for the two protesters against the petitioner to the effect that each of them shall be given the land bought from the family of the deceased in the terms this court will set out".

30. The same position was buttressed by Justice F. Gikonyo In re Estate of Murira Karigicha (Deceased) [2018] eKLR stated:

"It is clear to the court that the 1st Petitioner sold the lands in question but with the intention of furing the transactions validated on the basis that they offended section 82 and Section 45 of CAP 160. He contred a scheme which may look honest and innocent but whose true character was to defraud the objectors herein. Such person who has come to the court



with unclean hands will not get the aid of law This court cannot therefore be hoodwinked by a dishonest litigant to set aside its orders as that would conveniently use the court to perpetuate a fraud and ill intentions of the party. This is that is happening in this case. See the evidence and this is a justifiable inference.... Now that he has seen that he is getting a smaller share than expected he is hiding behind the law to take away the acres his father and he sold. This court will not be used to assist undeserving beneficiaries to swindle persons on contrived or other pretences. The 1o petitioner has not moved the court to seek justice but to enforce his desire to get more land from the people he sold the land himself”.

31. Further, the Respondent cited Justice H.K Chemitei In re Estate of Ngugi Muchugu Karuu - Deceased [2019] eKLR stated:

“What therefore is the way forward? It is admitted by the Respondent that their mother sold the land for her own upkeep and maintenance. Some of the beneficiaries have directly benefited from the proceeds and they have admitted as much. The sale was nevertheless illegal to the extent that no consent was obtained from all the beneficiaries or from the court. Further the existing caution was removed despite a court ruling in existence. The logical thing therefore is to have the land revert to its original wholesome title. The beneficiaries should therefore agree on a mode of distribution taking into consideration the interest of the purchasers who they acknowledge. In fact, it appears it is only PW1 and PW2 whose interest had not been taken into consideration. The purchasers shall therefore be treated as creditors to the estate and the administrator after taking care of those who have not benefited should proceed to consider their interest”. (Underlining supplied.)

32. In line with the foregoing discussions, the Respondent submitted that the Appellants and Naomi Wambui Kiarie(deceased), by their own conduct relinquished their rights over the said parcel of land.
33. The Respondent contended that he has beneficial interest in the said parcel of land and urged the honourable court to uphold the trial court’s decision. The Respondent agreed with the trial court’s findings, when it held;

“...I noted that the defendant did not call any witness to testify thus the evidence by the plaintiff remained unchallenged and uncontroverted. The defendants claim is unsubstantiated thus the statement of defence as filed contains mere denials...”

34. The Respondent further submitted that the Appellants filed a defence, but failed to defend it and adduce any evidence to contradict the Respondent’s claim hence the same remained uncontroverted.
35. The Respondent argued that the Appellants had an opportunity to defend their case, but they did not and instead they closed their case as seen in page 135 of the Record of Appeal. The Respondent also noted that the Appellants tried to introduce evidence in their submissions by stating that the deceased signature was forged, and the same was not signed. Further, they failed to adduce evidence to proof their allegation that the said signature had been forged. The trial court stated;

“Have noted the submissions by the defendant that he is introducing evidence at that stage when he had time to call his witnesses. The term of the contract between the deceased were not obtained by fraud, mistake, thus remain binding to parties and ought to be adhered to. ”



36. The Respondent cited the case of Justin Mwango Chonga v Mwarone Munga Janji & 4 others (2021) eKLR:
- “ A defence filed without being subjected to cross examination remains as such and the court is not under any duty to consider it, if the defendant is not interested in defending the suit. The 5th Defendant’s Defence therefore remains mere allegations and the Plaintiff’s evidence remains evidence uncontroverted.”
37. The Respondent argued that his claim remained unchallenged and uncontroverted and further submitted that the Appellants cannot be allowed to re-open and or relitigate the lower court case on Appeal.
38. The Responded reiterated and insisted that the judgement of the lower court is correct, legally so and proper in view of the evidence tendered and circumstance of the lower court case. He urged the court to dismiss the Appellants’ Appeal with costs.
39. In conclusion, it was the Respondent’s submissions that the appeal does not have any merit and does not raise cogent ground for appeal that would warrant the setting aside or interference of the lower court’s judgment.
40. The above being the pleadings and the submissions by both parties, this Court is called upon to determine the merit or demerit of the instant appeal and then come up with a conclusion on whether it is merited or not.
41. Being a first appeal, the court is allowed by section 65(b) of the *Civil Procedure Act*, to determine the appeal on both the law and facts. The exercise of the court’s discretion is based on the facts placed before the court and this court will not simply interfere with the trial courts discretion just because it is an appeal.
42. In the case of Mbogo & Another vs Shah (1968) EA pg 15, the court held: -
- “ an appellate court will not interfere with the exercise of the trial courts discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result, there has been mis justice”
43. Further, section 78 of the *Civil Procedure Act*, empowers this court as an appellate court to re-evaluate, re-assess and re-analyse the evidence as contained in the Record of Appeal, and the grounds set out in the Memo of Appeal. This duty of the first Appellate court was captured by the Court of Appeal in the case of John Teleyio Ole Sawoyo vs David Omwenga Maobe(2013) eklr, which held as follows;
- “ this being a first appeal, we have a duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyse the evidence afresh, re-evaluate it and arrive at our own independent conclusion, but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same”



44. This duty of a first Appellate court was also captured by Hancox JA (as he then was), in the case of *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu*(1982-88) 1KAR- 278, at pg 292, as follows:-

“ a Court of Appeal will not normally interfere with a finding of fact by 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 the finding he did”

45. The said Court went further to state as follows; -

“... the Court of Appeal would hesitate before reversing the decision of a trial judge on his findings of facts and would only do so if;

- (a) it appeared that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or
- b) that the impression based on demeanour of material witnesses was inconsistent with evidence in the case generally”

Being guided as above, this court will proceed to set out issues for determination and then re-consider, re- evaluate and re-analyse the evidence as presented before the trial court, while giving deference to the same, given that this court did not see nor hear the witnesses and also did not observe their demeanours. See the case of *Sonko v County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) had this to say:

“A first appellate court should accord deference to the trial court’s conclusions of fact and only interfere with those conclusions if it appeared to it, either that the trial court had failed to take into account any relevant facts or circumstances or based the conclusions on no evidence at all, or misapprehended the evidence, or acted on wrong principles in reaching the conclusions.”

Issues for Determination

46. Having carefully considered the rival written submissions and the cited authorities in support thereof, the available evidence and the relevant provisions of law, the Court has identified the following issues for its determination:

- i. Whether the learned trial Magistrate erred in law and fact by finding that the deceased, Naomi Wambui Kiarie had legal authority or capacity to sell Loc.4/gatitu/227, belonging to her late husband Kiarie Kamau.
- ii. Whether the learned trial Magistrate erred in law and fact by finding that the MOU between the Respondent herein and the Deceased was a valid document.
- iii. Whether the learned trial Magistrate erred in law and fact by finding that because the Appellants did not call any witnesses that they failed to defend themselves.
- iv. Whether the learned trial Magistrate erred in law and fact by finding that the Respondent is entitled to a portion land measuring 2.05 acres out of land parcel Loc.4/gatitu/227.

47. Before delving into the issues for determination, this court will point out the issues not in dispute. The suit land herein is a portion of land from Loc 4/ Gatitu/ 227. This parcel of land is allegedly in Kandara



- area, and as per the available evidence, it was initially owned by one Kiarie Kamau, who is deceased and was a husband to Naomi Wambui Kiarie (deceased). These are the parents of the Appellants herein.
48. It is not in dispute that in the year 2007, the said Naomi Wambui Kiarie had not taken out letters of Administration over the estate of her deceased husband. However, Succession Cause No. 209 of 2007, was filed in Thika CMCC over the estate of Kiarie Kamau alias Kibui Kamau. It is also evident that land parcel No. Loc 4/ Gatitu/ 227, was registered in the name of Naomi Wambui Kiarie & Kamau Kiarie on 2nd August 2013, and is approx. 3.5 acres. There is a title deed attached in the Record of Appeal.
 49. Therefore, from the said title deed, this parcel of land is owned by both Naomi Wambui Kiarie and Kamau Kiarie. This registration was done after Certificate of Grant over the estate of Kiarie Kamau alias Kibui Kamau (deceased husband of Naomi) was confirmed on 12th August 2009 and confirmed grant was issued on 9th December 2009.
 50. It is evident that the above suit property is not solely owned by Naomi Wambui Kiarie. The Respondent had produced various agreements for receipt of money and one of them is dated 19th November 2006, for allegedly sell of land for Ksh 20,000/=. However, the said land that was to be sold was not described. The MOU dated 21st December 2007, which was also referred to, does not contain the description of the said parcel of land.
 51. It is also not in doubt that the said Naomi Wambui Kiarie, the mother to the Appellants died in 2014. There was a pull and push over the filing for letters of Administration over her estate, which culminated in filing of citation, by the Respondent herein Francis Mwangi Kamau, and the High Court directed the citees who were children of Naomi Wambui Kiarie(deceased) to petition for grant in respect of the Estate of the said deceased, Naomi Wambui Kiarie.
 52. Following the above directives by the High Court, two Succession causes were filed, being Succession Cause No 29 of 2016, at Kandara Law Courts filed by Francis Mwangi Kamau, the Respondent herein and Succession Cause No 273 of 2016, at Murang'a filed by the Appellants herein. The two succession causes were later consolidated and heard at Kandara Law Courts. This court has not been well informed of the outcome of the said succession cause. However, what is clear is that the suit property herein Loc 4/ Gatitu/ 227, was one of the Assets of Naomi Wambui Kiarie subject of the said succession cause.
 53. It is also evident that during the pendency of the succession cause, the Respondent filed this suit claiming for his ownership right over the suit property. The Appellants as Defendants in that suit being Kandara ELC No 40 of 2019, filed a Defence to the said suit, which defence consists of mere denial. But it is trite that he alleges must proof, and the Respondent herein (as the Plaintiff) had that onerous task of availing sufficient evidence to prove his case on the required standard.
 54. The trial court after hearing the evidence and analyzing the same found that the Plaintiff (Respondent) herein had proved his case on the required standard and allowed his claim. The Appellants were aggrieved by the said decision and thus this Appeal., wherein, they faulted the trial court findings of facts and the law. The Appellants have urged this court to interfere with the said determination of the trial court, and set it aside and dismiss the Respondent's (Plaintiff's) suit at the lower court.
 55. Is the Appeal herein merited? The court will answer this question through analysis and determination of the issues set out earlier.



i. Whether the learned trial Magistrate erred in law and fact by finding that the deceased, Naomi Wambui Kiarie had legal authority or capacity to sell Loc.4/gatitu/227, belonging to her late husband Kiarie Kamau.

56. As the court had pointed out earlier, the suit property Loc 4/ Gatitu/ 227, originally belonged to Kiarie Kamau(deceased), who was the husband of Naomi Wambui Kiarie. The estate of Kiarie Kamau(deceased), was distributed through the Confirmed Grant issued on 12th August 2009, and dated 9th December 2009. The suit property was distributed between Naomi Wambui Kiarie and Kamau Kiarie. Each was to get a half share to hold for their households.
57. The Court has seen the title deed issued on 2nd August 2013, and the land is approx. 3.5 acres. The first sale agreement referred to by the Respondent as Plaintiff before the trial court is dated 19th November 2006, for selling of land in Gatandi. Certainly, by this time, the grant had not been confirmed. The land was still in the name of Kiarie Kamau, and not Naomi Wambui Kiarie.
58. It is therefore clear that if there was a sale agreement to sell the suit property or any property of Kiarie Kamau(deceased), then it was done before confirmation of grant. Section 82(b)(2), of the Succession Act provides that; personal representatives have powers to sell the assets of the deceased, but it goes on to state that “no immovable property shall be sold before confirmation of grant”.
59. There are numerous court decisions on this aspect. The Appellants herein had relied on the findings of the High court in the case of in re Estate of Isaac Kaburu Marete(deceased) (2017) eklr, which they also cited in their submissions herein. The superior court in the above case had held;
- “acquisition of land before confirmation of grant is unlawful and does not enjoy property rights under *the constitution*..... I will restate once again what I stated in the case of the Matter of the Estate of M’Ajogi M’Ikiugu Ajogi(deceased) on sale of estate property before confirmation of grant as follows: - Courts have said time and again, and I will not be tired of stating it again, that under section 82(b)(2) of the Succession Act, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the Succession Act, the law had placed a restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents....”
60. The above position has been held in so many other determinations of the courts. This argument was advanced by the Appellants before the trial court. This court has considered the findings of the trial court and has noted that the trial court did not deal with the issue of the sale agreement having been entered before the grant was confirmed. The law is very clear that “no immovable property of an estate can be sold before the confirmation of grant.”
61. The trial court had stated as follows: -
- “from the corroborated evidence, it is clear that the Plaintiff especially PW1, that there was a binding agreement, and that upon payment of the purchase price in reference to land being Loc 4/ Gatitu/227, the same was to be transferred to him from the estate of the deceased, but the same did not happen”



62. As seen earlier from the MOU and available evidence before the trial Court, Naomi Wambui Kiarie, the alleged vendor or seller had not obtained a confirmed grant. Why did the trial court decide to go against the laid down law? That has not been explained in the trial Court's judgement.
63. It is trite that without a confirmed grant, the legal representative of Kiarie Kamau(deceased), could not enter into any sale agreement for sale of immovable property of the estate. Indeed, the trial magistrate erred in law and fact when he held that there was a binding agreement.
64. Section 55 of the Law of Succession Act provides that no grant of representation, whether or not limited in its term, shall confer power to distribute any capital assets, or make any division of property, unless and until the grant has been confirmed as provided by Section 71 of the Succession Act. In the case of *In re Estate of Paul M'Maria (Deceased)* [2017] eKLR, the Court held that;

“ [10] The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the Law of Succession Act is tainted with killer poison; and is unlawful acquisition; thus, property so acquired does not enjoy the protection of property rights under article 40(6) of the Constitution. See the claw-back provision of the Constitution that: -

40(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

65. Further, the law forbids any person, may it be a beneficiary or not from dealing with the estate of a deceased person before being allowed by the court through succession proceedings. Section 45 of the Succession Act provides that dealing with such an estate of the deceased without authority one commits an offence known as intermeddling. See the case of *Samuel Ariga Bosire vs Abagusii Otenyo Self Help Group(2021) eklr*, where the court held;

“ ... an administrator is not allowed to dispose of any part of the deceased s property even if he is a beneficiary.....if he does so, he will be guilty of intermeddling with the deceased estate under section 45 of the Law of Succession Act and is guilty of an offence under sub section (2) punishable by a fine not exceeding ksh. 10,000/= or to a term of imprisonment not exceeding 1 year or both penalties”

66. It is clear from the available evidence before the trial court that Naomi Wambui Kiarie (now deceased), could have entered into a sale agreement for sale of the deceased estate before confirmation of grant. That could have been intermeddling which is forbidden by Section 45 of the Succession Act. The court will rely on the findings of the court in the case of *Morris Mwiti Mburugu vs Dennis Kimanthi M'mburugu(2016) eklr*; where the court held:

“from the foregoing, it is clear and I so hold, that where any person interferes with the free property of the deceased or deals with the estate of a deceased person contrary to the provisions of sections 45 and 82 of the Act, is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of the innocent beneficiaries, who may have been affected by the act, but were not involved in the same.”



67. Since Naomi Wambui Kiarie allegedly entered into transaction for sale of the deceased estate, before grant was confirmed or without authority of the court, then she had no legal authority to sell land parcel NO. LOC 4/ GATITU/ 227, and the trial magistrate erred both in law and fact when he held that Naomi Wambui Kiarie had capacity to sell the said land.

(ii) Whether the learned trial Magistrate erred in law and fact by finding that the MOU between the Respondent herein and the Deceased was a valid document.

68. The crux of the matter herein are the allegedly various agreements between the Respondent herein and the deceased Naomi Wambui Kiarie, who had allegedly sold a portion of the suit property to the Respondent and the Respondent had allegedly paid the purchase price through several instalments. The first sale Agreement is dated 19th November 2006, and it is alleged that Naomi Wambui Kiarie has sold land at Gatandi for ksh 20,000/= and a deposit of 2000/= was received as down payment by Naomi Wambui. The said sale Agreement was witnessed by three witnesses among the Peter Wamithi Kiarie, one of the Appellants herein.

69. There are several other instances that the said Naomi Wambui received Money from Francis Mwangi Kamau. There was finally a Memorandum of Understanding dated 21st December 2007, wherein, it was agreed that Naomi Wambui had received ksh 30,000/= from Francis Mwangi Kamau, in anticipation of filing succession cause. Further, it was allegedly agreed that after obtaining letters of Administration and confirmation of grant, Naomi was to sell a portion of land to Francis equivalent of the money advanced.

70. Further, it was allegedly agreed that the purchase price was 7000/= per one point being (0.1) acre. However, in this alleged MOU, the land where the portion was to be sold to Francis Mwangi Kiarie was not identified. The MOU only referred to Ksh. 30,000/=, but in the Complaint, the money allegedly paid to Naomi was Ksh. 143,750/=. This MOU did not specify whether it also referred to the previous payments or only to the subsequent payments, as clause d stated as follows: - “The side of Francis will continue to advance the money to the side of NAOMI, with this understanding”

71. Without clear evidence on whether the MOU also considered the previous payments, then this court is not very certain why the Respondent in his Complaint had alleged that he had paid ksh 143,750/=, to Naomi Wambui Kiarie as the purchase price. The MOU only refers to ksh. 30,000/= as the money collected by Naomi Wambui Kiarie from Francis Mwangi Kamau, as advanced payment in anticipation that Naomi would file a succession cause.

72. The above MOU is what the trial Court had referred to as a binding agreement. But was the MOU very clear that the parcel of land referred to was LOC 4/Gatitu/227, and that the size of it was 2.05 acres? Firstly, the MOU referred to a portion of land after succession process had been completed. In the confirmed grant, there are three parcels of land for distribution, being Loc 4/Gakui/237, Loc 4/Gakui/1146 and Loc 4/ Gatitu/227. Naomi Wambui was getting a ½ share in each of the above parcel of land. How did the Respondent settle on this Loc 4 /Gatitu/227? All the referred sale agreements did not indicate that the portion of land was actually supposed to be carved from Loc 4/ Gatitu/ 227. Why did the trial magistrate hold that the MOU, was binding over sale of Loc 4/ Gatitu/ 227?

73. Further, it is trite that for a sale agreement to be enforceable, it had to abide by the provisions of Section 3(3) of the *law of Contract Act*, which provides;

“no suit shall be brought upon a contract for disposition of an interest in land unless-

a) the contract upon which the suit is founded -



1. Is in writing
 2. Is signed by all the parties thereto; and
- b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
74. The above provision of law is also found in Section 38(1) of the *Land Act*, which provides as follows; -
- “other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for disposition of an interest in land, unless the contract upon which the suit is founded:-
- 1) is in writing,
 - 2) is signed by all the parties thereto; and b) the signature of each party signing has been attested to by a witness who was present when the contract was signed

75. In the case of *Nelson Kivuvani vs Yuda Komora & Ano*. Nairobi Hccc No. 956 of 1991, the court held: -

“The agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligation express or implied of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”

Therefore, it is clear that for a sale agreement to be valid and binding, it must contain the names of the parties, the description of the property, the purchase price and the conditions thereto.

76. This Court has considered and evaluated the MOU allegedly regarded by the trial court as binding and has noted that it does not meet the above criteria. Though the said MOU was written in Kikuyu language and later translated to English and the produced as exhibits, the Appellants had denied all the allegations made in the Plaint. The Respondent needed to call any of the alleged witness to the MOU, to support his allegations.
77. Further, the said MOU dated 21st December 2007, and even the earlier agreement of 19th November 2006, though they had referred to sale of land, the said parcel of land or property was not described. The purchase price was not given, and there were no conditions given or date of completion. Indeed, this MOU cannot be said to be a valid sale agreement for disposition of land. Therefore, this Court finds and holds that the trial magistrate erred in Law and fact, when he held that there was a binding sale agreement, which this court has found did not meet the criteria for a valid contract for sale of land.

(III) Whether the learned trial Magistrate erred in law and fact by finding that because the Appellants did not call any witnesses that they failed to defend themselves.

78. In his judgement, the trial magistrate held as follow; -

“upon perusal of the court proceedings, I note that the defendant did not call any witnesses to testify, thus the evidence by the plaintiff remained unchallenged and uncontroverted. The defendant claim is unsubstantiated, thus the statement of defence as filed contains mere denials as in the case of *Motex Knitwear Limited vs Gopitex Knitwear Ltd*(2009) klr.”



79. The Appellants has faulted this findings of the trial Court and argued that at all time, the burden of proof remained with the Plaintiff (Respondent), herein and he was supposed to discharge it. Further, the Appellants argued that since the Respondent had admitted that he bought the suit property before confirmation of grant, then the only argument was on legality of the MOU, and the same was done through cross examination of the Plaintiff(Respondent) and his witness and also through submissions.
80. The Appellants further argued that they had filed their defence, attended court and cross-examined witnesses and filed submissions and cannot be said to have not defended the suit. Indeed, it is correct that the Appellants herein did participate in the proceedings, but they did not give evidence or call witnesses.
81. However, it is trite that he who alleges must proof, and the burden of proof is always on the Plaintiff in a civil matter and the standard required is to prove the case against the defendant on a balance of probabilities” See sections 107 and 108 of the Evidence Act. Also, see the case of Stanley Maira Kaguogo vs Isaac Kibiru Kahuthia(2022) Eklr, Where the court discussed at length the issue of burden of proof and held:-

“The principle is that whoever desires any court to give judgement as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist. The burden of proof in a suit or proceedings, lies on the person, who fails if no evidence at all were given on either side”

82. In this case, the Respondent was the one who had alleged, and it was incumbent upon him to prove his case on the required standard of balance of probabilities. At the trial court, the Plaintiff(Respondent) gave evidence to support his case. The Defendants had filed their defence, but they opted not to call evidence. Therefore, the Plaintiff’s evidence was uncontroverted and the defence by the Defendants (Appellants) remained mere allegations. See the case of Edward Muriga Through Stanley Muriga vs Nathaniel D. Schulter, Civil Appeal No. 23 of 1997; where the Court of Appeal held: -

“the Respondent filed a defence in which they denied the Appellant’s claim..... the Respondents did not give evidence and so the only explanation as to how the accident occurred was the version put forward by the Appellant..... the allegation in the defence.... Is not evidence and remains forever an allegations”

83. However, it is not in doubt that the fact that the defence was a mere denial did not reduce the burden on the Plaintiff to prove his case on the required standard. see the case of Kipkebe Ltd Vs Peterson Ondieki HCCA No. 80 of 2015; where the court held: -

“the question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges must prove. It is the plaintiff to prove her case on a balance of probability, and the fact that the defendant does not adduce evidence is immaterial”

84. The fact that a defence is held to be mere allegations in no way lessens the burden on the plaintiff to prove his/her case. For this, the Court relies on the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR, where the Court stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the



reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.

(See also Kirugi and Another v Kabiya and Others [1983] e KLR).

85. The Respondent herein despite the absence of evidence from the Appellants, was obligated to prove his case on a balance of probabilities. Although there was no evidence from the Appellants, it is evident that they participated in the trial by cross examining the Plaintiff(Respondent) and his witness. The trial court had a duty to consider the available evidence and then determines whether the case had been proved on the required standard of balance of probabilities.
86. The Court of Appeal in the case Mbuthia Macharia vs Annah Mutua & Another [2017] eKLR, discussed the burden of proof and stated thus:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.”

87. This Court as an Appellate Court has re-evaluated the available evidence before the trial court and the judgement delivered thereon and concludes that the trial court only considered the fact that the Appellants did not adduce evidence, to controvert the Plaintiff(Respondent) evidence. However, the trial court did not properly evaluate the evidence on record, and did not even indicate whether the case had been proved on the required standard of balance of probabilities. Since the burden of proof was upon he who had alleged, and the person who had alleged herein was the Respondent, even if the Appellants chose not to adduce evidence, the Plaintiff's (Respondent) evidence should have been sufficient to discharge that burden of proof.
88. Further, this court had noted that the alleged Vendor; Naomi Wambui Kiarie had entered into a sale agreement over s deceased estate before confirmation of grant and the MOU relied upon was not valid. That was an illegally and contrary to *law of Succession Act*. For the above reasons, the court finds and holds that the trial magistrate erred in law and fact when he held that the Appellants did not call witnesses and did not defend the suit and so the plaintiff evidence was unchallenged and he took it to be the truth without thoroughly interrogating the same, and thus arrived at a wrong finding. Indeed, the Respondent as the Plaintiff before the trial court had not discharged the onerous task of proving his case on the required standard of balance of probabilities.

(IV) Whether the learned trial Magistrate erred in law and fact by finding that the Respondent is entitled to a portion land measuring 2.05 acres out of land parcel Loc.4/gatitu/227.

89. This Court has analyzed and considered, the judgement of the trial court, and indeed the trial court held that the Plaintiff who is the Respondent herein is entitled to a portion of land measuring 2.05 acres, out of land parcel Loc 4/ Gatitu/227, by virtue of purchase of the same from Naomi Wambui Kiarie. This Court has found and held that the said Naomi Wambui Kiarie could not sell the suit land before the grant was confirmed. Further, it held and found that the MOU and sell agreement relied on by the Respondent (Plaintiff before the trial court), did not identify the suit property to be the one allegedly referred to in the MOU, and there was no indication that the actual purchase price had been paid for by the Respondent. Again, the court has found and held that the MOU relied on was not valid



and the same could not have formed the basis of finding that the Respondent was entitled to a portion of land measuring 2.05 acres, from the suit land, Loc 4/ Gatitu/ 227.

90. For the above reasons, this court concludes that the trial magistrate erred in law and fact in finding and holding that the Respondent herein was entitled to the portion of land measuring 2.05 acres from the suit land.

91. This Court does not dispute the fact that the Respondent herein had advanced money to Naomi Wambui Kiarie, but it is not very clear that he was advancing the said money to buy what portion of land. Perhaps the Respondent should have been included as a creditor for the estate of Naomi Wambui Kiarie, but not as purchaser of the suit land. See the case of re Estate of Ngugi Muchugu Karuu (deceased) (2019) Eklr, where the Court when dealing with similar situation held;

“What is the way forward? It is admitted by the Respondent that their mother sold the land for her own upkeep and maintenance. Some of the beneficiaries have benefitted from the proceeds and they have admitted as much....

The sale was nevertheless illegal to the extent that no consent was obtained from the beneficiaries or the court..... the purchasers shall therefore be treated as creditors to the estate and the administrator after taking care of those who have not benefitted should proceed to consider their interest”

92. Having carefully re-considered, re-evaluated and re-analyzed the evidence adduced before the trial court as contained in the Record of Appeal, together with the rival written submissions, the court finds and holds that the trial magistrate erred in law and fact and arrived at a wrong determination. See the case of Mbogo & Another vs Shah (1968) EA PG 15; where the court held;

“An Appellate court- will not interfere with the exercise of the trial court discretion, unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous or unless it manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result, there has been mis justice.”

93. In this Appeal, this Court has found that the trial court misdirected itself when it held that there was a binding agreement, whereas the same was entered before succession cause had been filed and grant confirmed. Therefore, the trial court arrived at an erroneous decision. Consequently, this Court proceeds to interfere with the trial Court’s decision of 3rd March 2022, by setting aside the said judgement and thus dismissing the Respondent’s (Plaintiff’s claim before the trial court) dated 11th October 2019, with costs and allows the instant Appeal as prayed in the Memorandum of Appeal dated 29th March 2022.

94. The Applicants are entitled to costs of the suit before the trial Court and on this Appeal.

95. The Appeal is consequently allowed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A, THIS 25TH DAY OF JANUARY, 2024.

L. GACHERU

JUDGE.



Delivered online in the presence of;

M/s Milimu for the Appellants

Mr Muthomi for Respondent

Joel Njonjo - Court Assistant.

L. GACHERU

JUDGE.

25/1/2024

