



REPUBLIC OF KENYA



**Mwangi & another v Manyeki (Environment and Land Appeal
E003 of 2023) [2024] KEELC 220 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 220 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E003 OF 2023
LN GACHERU, J
JANUARY 25, 2024**

BETWEEN

PIUS MWANGI 1ST APPELLANT

CONSTANSTINA WAIGUMO KINURIO 2ND APPELLANT

AND

KIMOTHO MANYEKI RESPONDENT

*(Being an appeal against the whole Judgement of Hon. E.M Nyaga (SPM)
in Murang'a C.M.C.C NO. 377 of 2010 Dated 19th January 2023)*

JUDGMENT

1. The instant Appeal emanates from the Judgement of the trial Court in Murang'a CMCC No. 377 of 2010, where the Respondent had filed a claim against the 1st Appellant herein vide a Plaint dated 5th October 2010, and had sought for the following orders: -
 - a. A permanent injunction restraining the Defendant (1st appellant), his agents, servants or any person acting at the Defendant's instructions or authority from trespassing on or in any way interfering with the Plaintiff (Respondent) quiet possession of the parcel of land number Loc 11/ Maragi/ 3735, and also to pay the Plaintiff.
 - b. An order directing the Registrar of Lands, Murang'a to forthwith remove restrictions imposed against land parcel No.Loc 11/Maragi/ 3735 and to register the transfer to the said parcel of land , Loc 11/ Maragi/3735, in favour of the Plaintiff without requiring the production of the transferors passport photographs and certified copy of the PIN Certificate.
 - c. Costs of the suit and interest thereon.



2. The 1st Appellant filed a statement of defence and denied the claim. The 2nd Appellant joined in as an interested party. In his statement of defence, the 1st Appellant denied all the allegations made in the claim. He averred that the said suit was fatally defective, incompetent, frivolous and vexatious as the Court lacked jurisdiction to hear the matter since there was a succession cause pending. Further, he alleged that the suit was an abuse of the Court process was brought in bad faith with outright fraud since the deceased did not effect any transfer to the Plaintiff in his lifetime and the documents relied on by the Plaintiff are a fraud. He urged the Court to dismiss the Plaintiff's suit with costs.
3. The 2nd Appellant as an interested party file her statement of defence too dated 14th May 2015, and denied all the claims made in the Plaint. It was her averment that the suit property LOC 11/MARAGI/3735, belonged to the deceased Manyeki Kinurio, absolutely and exclusively. She also averred that the said land is an ancestral and family land and there is a Murang'a Succession Cause No. 203 of 2007, over the estate of the deceased. She urged the Court to cancel the Plaintiffs title over the said parcel of land Loc 11/Maragi/3735 and the same should revert to the name of Manyeki Kinurio and also prayed for dismissal of the Plaintiff's suits with costs.
4. The matter proceeded for viva voce evidence and after the trial, a judgement was entered on 19th January 2023, in favour of the Respondent's(Plaintiff's) herein. The trial Court held that the Plaintiff had proved his claim on a balance of probabilities and allowed the Plaintiff's(Respondent) claim entirely with an order that each party to bear his own costs.
5. The Defendant and Interested Party (1st & 2nd Appellants) were aggrieved by the said judgement and preferred the current Appeal vide Memorandum of Appeal dated 23rd January 2023. The appellants raised seven grounds of Appeal and urged the Court to allow the appeal and dismiss the Respondent's suit at the lower Court and allow the 2nd Appellant's claim at the lower Court and cancel the Respondent's title deed over the suit property, Loc 11/Maragi/3735, and restore the land back to the name of Manyeki Kinurio(deceased).
6. These grounds of Appeal are: -
 1. The learned magistrate erred in law and fact by allowing the Respondents suit against the appellants without appreciating that the Respondent had intermeddled with an estate of a deceased person.
 2. The learned trial magistrate erred in law and in fact by failure to note that land parcel no. Loc 11/ Maragi/3735, became an estate immediately upon the death of the registered owner in June 2003, and could only be transferred upon filing of succession proceedings in respect of the deceased owner.
 3. The learned magistrate erred in law and fact in finding for the Respondent who had no decree or order permitting him to transfer land no Loc.11/Maragi/ 3753, registered in the name of deceased person.
 4. The learned magistrate erred in law and in fact by his failure to address himself on the merits and demerits of the 2nd appellants claim against the Respondent.
 5. The learned trial magistrate erred in law and fact by his findings that the deceased had already transferred his rights prior to his demise over land parcel no. Loc 11/Maragi/3735.
 6. The learned trial magistrate erred in law and fact by finding for the Respondents against the appellants while the Respondent had committed a criminal offence under section 45(1) of the succession Act, Cap 160, Laws of Kenya.



7. The Respondent opposed the Appeal and the said Appeal was canvassed by way of written submissions. The Appellants filed their Appeal on 3rd August 2023, through the Law Firm of Kirubi, Mwangi Ben & Co Advocates and submitted on why the Appeal should be allowed and the lower Court judgement be overturned.
8. It was the Appellants submissions that the suit land Loc 11/Maragi/3735, was initially registered in favour of Kinurio Manyeki on 25th August 1993, as a first registration and a title deed was issued to that effect. It was also submitted that the said Kinurio Manyeki died on 7th June 2002, as is evident from the certificate of death. Further, that the said Kinurio Manyeki was a husband and father to the 1st and 2nd Appellants herein.
9. It was also submitted that the Respondent got registered as the owner of the said parcel of land on 2nd December 2013, and he was issued with the title deed on 9th December 2013, which was about 11 years after the death of the original registered owner Kinurio Manyeki. It was therefore submitted that the transfer of the suit land by Respondent from the deceased person to himself on 2nd December 2013, amounted to intermeddling with the estate of the deceased which is contrary to Section 45 of Cap 160, which stated; -
- “ 45: Except as extremely authorised by this Act, by any other written law, or by a
- (1) grant of representation under this Act, no person shall, for any purpose, take possession or dispose, or otherwise intermeddle with, any free property of a deceased.”
- 2) 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 a term of imprisonment, not exceeding one year or to both such fine and imprisonment;
- and
- b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payment made in due course of administration”
10. The Appellants also submitted that the Respondent herein caused the suit land to be transferred to his name from the deceased without following the due process under the *Law of Succession Act*. Reliance was placed in the case of Gladys Nkirote Mitunga vs Julius Majaum Itunga (2016) eKLR where the Court held;
- “ offence of intermeddling with property of deceased person.....include taking possession or occupation of, disposing of, receiving, paying out distributing, donating, charging, mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *law of Succession Act*”.
11. The Appellants further relied on the case of Morris Mwitwi Mburungu vs Denis M & others (2016) eKLR, where the Court held; -
- “where any person interferes with the free property of the deceased or deals with the estate of the deceased person contrary to the provisions of section 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the Court. The transaction is subject



to be nullified and set aside at the instant of the innocent beneficiaries who may have been affected by the act, but they were not involved.”

12. It was also submitted that the Respondent was aware of the pendency of Muranga Succession Cause No 203 of 2007, involving the estate of Kinurio Manyeki, where land parcel No. Loc 11/ Maragi/3735, formed part and parcel of the said estate. That the Respondent had even filed an affidavit of protest against the mode of distribution of the said land as proposed by the 2nd Appellant, and yet he still proceeded to have the suitland transferred to his name before the Grant was heard and confirmed. That it is not in doubt that the registered owner of the suit land died in 2002, before effecting transfer of the suit land to the Respondent. That the law governing such an estate would be the law of succession, which the Respondent failed to follow.

Therefore, it was submitted that the mere act of transferring land parcel No. Loc 11/Maragi/3735, after the registered owner was dead without first subjecting the said land to succession proceedings amounted to a criminal offence by the Respondent’s(Plaintiff’s) as provided by Section 45 of the succession Act. It was further submitted that the Respondent ought to have followed up with his protest at the Murang’a succession cause no. 203 of 2007, and if successful, the said land should have been confirmed in his name.

13. It was the final submissions of the Appellants that the Appeal herein is meritorious and should allowed by dismissing the Respondent’s(Plaintiff’s) suit at the lower Court and allow the 2nd Appellant’s Counter-claim against the Respondent(Plaintiff) by cancelling the name of the Respondent in the register over the suit property and have it revert to the name of Kinurio Manyeki as this reversal will allow Murang’a Succession Cause to proceed and be concluded and the Respondent will have an opportunity to prosecute his protest in the said Succession Cause.
14. The Respondent on his part filed his submissions on 14th August 2023, through the Law Firm of Waiganjo Gichuki & Co. Advocates and submitted that indeed, land parcel No Loc 11/Maragi/3735, registered in the name of Kinurio Manyeki, who was a brother to the Respondent, Kimotho Manyeki in 1993. Further that the said Kinurio Manyeki, had in the year 1999, decided to transfer the suit land to the Respondent and they appeared before their area chief for authorization and also applied and obtained consent from the Land Control Board on 24th May 1999. That the actual transfer document dated 18th June 1999, were signed. He also submitted that he presented the said transfer forms and when the fees were assessed, he could not afford it immediately and therefore, he kept the transfer in his custody. However, the said Kinurio Manyeki died on 7th June 2002, before the Respondent could present the transfer form. Further that the Respondent was in possession of the land and he eventually presented the transfer form on 2nd December 2013, and the said transfer was effected.
15. It was the Respondent further submissions that by the time the Appellants were filing their defence in 2015, the suit property was already in his name and the appellants never applied for cancellation of his title, but only sought for his suit to be struck out and/or dismissed with costs. Therefore, the Respondent applied the maxim of equity which states that ‘equity regards as done, that which should have been done”, which states; -

the maxim of equity regards as done which should be done refers to the situation where the individuals are by agreement or by law supposed to perform an act, equity will consider the parties to be in the position where they would have been had the obligations under the contract were fulfilled”.

16. He also submitted that Kinurio Manyeki without coercion, executed a transfer of land over land parcel Loc.11/Maragi/3735, in favour of the Respondent and this was in recognition of the trusteeship



toward his brother. That all the necessary consents and authorizations were obtained and the Respondent presented the transfer for registration, when he was able to pay the fees. Therefore, when Kinurio Manyeki, executed the transfer form, he divested himself of the title of the suit property, which he intended that it should be owned by the Respondent herein. Further that the transfer fees were to be paid by the Respondent and not Kinuriu and thus, the land belonged to the Respondent.

17. The Respondent also submitted that he was not guilty of intermeddling with the estate of Kinurio and he only presented the transfer for registration when he got the money to do so. He also submitted that the evidence before the trial Court showed that the Respondent was in occupation of the suit land before the transfer was executed and his action of presenting the transfer for registration cannot amount to intermeddling. Therefore, it was the Respondent's final submissions that the Appeal lacks merit and should be dismissed with costs and there is nothing to fault the trial Courts findings.
18. The above being the pleadings as contained in the Record of Appeal, this Court as an Appellate Court has considered it, together with the Memorandum of Appeal, Record of Appeal, the rival written submissions and renders itself as follows; -
- 19). This being a first Appeal, as provided by section 65(b) of the *Civil Procedure Act*, the Court is allowed to determine the appeal on both the law and facts. Further, as provided in section 78 of the *Civil Procedure Act*, this Court is duty bound to re-evaluate, re-assess and re-analyse the evidence presented before the trial Court and then come with its own independent conclusion, while taking into consideration that it never heard nor see the witnesses as did the trial Court. See the case of *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 the Court held;-

An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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 allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

20. Further, this Court will also bear in mind that in arriving at the conclusion that it did, the trial Court was exercising its discretion and this Court will not simply interfere with the said discretion, just because this is an appeal. See the case of *Mbogo & Another vs Shah* (1968) E.A P 15, where 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 misjustice”



21. The Supreme Court in the case of *Sonko vs County Assembly of Nairobi City & 11 others* (Petition 11(E008 of 2022), emphasised the need of giving deference to the trial Courts conclusions in an appeal as follows;

A first appellate Court should accord deference to the trial Courts 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”

22. Being guided as above, the Court finds the issues for consideration are;

- a) whether the appeal herein is merited?
- b) who should pay costs of the appeal?

23. While considering whether the Appeal is merited or not, the Court will consider the grounds of appeal, the evidence on record, the findings of the trial Court and relevant provisions of law, together with the written submissions and then come up with its own independent decisions while taking into account that it never saw nor heard the witnesses.

24. It is not in doubt that the Respondent herein Kimotho Manyeki, and Kinurio Manyeki, were brothers. Kinurio Manyeki(deceased) was the husband to the 2nd Appellant and the father to 1st Appellant. He was also the registered owner of the suit property from 25th August 1993. It also not in doubt that the said Kinurio Manyeki died on 7th June 2002, and there is a succession proceeding pending over estate. The Appellants did include the suit property herein as one of the Assets of the deceased subject to distribution in the said succession proceedings. However, the Respondent herein filed a protest and alleged that the suit property, Loc 11/ Maragi/3735, was his property, which had been transferred to him by Kinurio Manyeki, in his lifetime and therefore, it cannot form part of the estate of Kinurio Manyeki. The trial Court found in favour of the Respondent and thus this Appeal.

25. This Court has considered the available evidence as provided for by the law. The Respondent had alleged in his pleadings that during the lifetime of Kinurio Manyeki, he transferred the suit property to him as he was holding the original suit land in trust for him. From the green card, it is clear that the suit property Loc 11/Maragi/ 3735, is a subdivision of 3340. This Court did not have the benefit of confirming who was the initial registered owner of this land parcel No. 3340, which was subdivided to give rise to the suit property.

26. Upon perusal of the Court record, this Court has noted from one of the annexures attached to the Supporting Affidavit of the 2nd Appellant, Constatina Waigumo Manyeki, in her Notice of Motion Application dated 25th April 2016, that is Affidavit in support of Summons for Revocation of grant sworn by the Respondent herein Kimotho Manyeki on 16th February, 2016, he had averred that the initial parcel of land was Loc 11/Maragi/434, measuring 8 acres, which belonged to their father Manyeki Kamau. He also averred that the said land was registered in the name of Kinurio Manyeki in 1964, to hold it in trust for himself and Respondent herein.

27. The Respondent had also averred that the said Kinurio Manyeki was supposed to give the Respondent 4 acres and he was to remain with 4 acres. But in breach of the existing customary trust, Kinurio Manyeki, subdivided the land into various parcels of land and the suit land was one of them. He also averred that the said Kinurio Manyeki (deceased) transferred the suit land to him in 1999, with a



promise to transfer another parcel to him to make 4 acres. However, this were just averments, but were not advanced during the hearing of the matter before the trial Court.

This Court is also not privy to what happened to the other subdivisions, but from the pleadings at the succession cause, it is evident that the said parcels of land are subject of distribution among the beneficiaries of Kinurio Manyeki(deceased), as is evident from the Affidavit of 2nd Appellant in the application for Confirmation of grant.

28. The Respondent had alleged that the deceased Kinurio Manyeki, was holding the suit property in trust for him. It is evident that customary trust is an encumbrance on the land. These are non- registrable rights which run with the land. They are overriding interest and run with the land. Further, Customary Trust is never implied by the Courts, but it is proved by whoever is claiming it by leading evidence. Trust is a question of fact which has to be proved by the one claiming it.

In the case of Juletabi African Adventure Ltd & another vs Christopher Michael Lockley (2017) eKLR, the Court held that:-

.. it is settled that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because: -

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”

29. Since the Respondent had alleged that his brother Kinurio Manyeki, was holding their father initial land in trust for himself and the Respondent, the Respondent who was the Plaintiff before the trial Court needed to adduce evidence to support his claim and clearly state the intentions of the parties.

The suit property herein was initially registered in the name of the Kinurio Manyeki in 1993 under the Registered Land Act, Cap 300(now repealed). Under section 27 of the said repealed Act, Cap 300, the registration of the said Kinurio Manyeki vested him with the absolute ownership together with all rights and privileges appurtenant thereon. This provisions of law are repeated in Section 24 of the Land Registration Act, 2012.

Further, section 28 of the Registered Land Act, Cap 300 (repealed), provides that the rights of a registered owner can only be defeated in the manner provided in the Act. This provision of law is mirrored in section 25(1) of the Land Registered Act. Again Section 30 of Cap 300 provides that;

“unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsists and affect the same, without their being noted in the register—

- a)
- b) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed”.

30. From the above provisions of law and decided cases, it is evident that right of a registered owner, like Kinurio Manyeki(deceased) can be defeated by prove of existence of a trust which is an overriding interest.



The Respondent herein was the Plaintiff before the trial Court and he is the one who had alleged. The burden of prove laid squarely upon him as provided by Section 107 of the *Evidence Act* which provides that whoever wishes that the Court to relies on alleged facts, he must prove existence of such facts.

31. It is clear from the Respondent's pleadings, that he had alleged that his brother Kinurio Manyeki, who was holding land parcel no Loc 11/Maragi/3735, had transferred the same to him in the year 1999. He told the Court that after the said transfer, he did not present it to the lands office for registration because he had no money. However, he continued to use and occupy the suit land because the intention of Kinurio Manyeki, was clear that he had transferred the suit land to him which he was holding in trust.
32. In support of his case, the Respondent produced a letter from the Chief of Township location dated 12th May 1999, being an application for transfer by Kinurio Manyeki of land parcel No Loc 11/Maragi/3735 to Kimotho Manyeki. He also produced letter of consent to transfer dated 10th February, 1999, from Kinurio Manyeki to Kimotho Manyeki as an absolute owner. The Respondent also produced the signed transfer dated 18th June 1999, which gave the value of the land for purpose of stamp duty as Ksh. 150,000/= . Further, the Respondent had testified that Kinurio Manyeki had handed him the original title deed and this Court has seen a copy of it with confirmation that the suit land was registered in the name of Kinurio Manyeki on 25th August 1993.
33. The Respondent had also testified that he did not have money to pay to effect registration of the suit property to his name. it was also his evidence that at the time of the demise of Kinurio Manyeki, he was the owner of the suit property, in occupation although he had not effected registration of the same into his name.
34. The Appellants on their party had alleged that the deceased did not transfer the suit land to the Respondent and that the said land forms part of the estate of Kinurio Manyeki, and is subject to distribution as per the provision of the Succession Act. The Appellants had alleged fraud on the part of the Respondent.
35. It is trite that fraud is a serious allegation which must be proved on the required standard. Fraud is a common law tort of deceit whose ingredients are false representation of false fact with the intention that the other party should act on it and that party suffers damage. It also means concealment of material fact to induce another party to act on false misrepresentation. See the Case of Charles Mutua Mutemi v Republic [2022] eKLR, where the Court held that;

Fraud is a common law tort of deceit whose ingredients are false representation of a false fact with the intention that the other party should act on it and that party suffers damage.”
36. Fraud is also defined in the Black's Law Dictionary, 9th Edition at page 131 as follows;

a knowing misrepresentation of truth or concealment of material facts to induce another to act to his or her detriment”
37. The Appellants are the ones who alleged fraud and so the burden of prove shifted to them to prove that indeed the Respondent committed fraud in having the transfer forms with himself. The threshold for proof of fraud has been stated in several decided cases.



38. In the case of Railal Gordhanbhai Patel Vs Lalji Makanji (1957) E.A 314, the Court of appeal for East Africa held as follows; -

... allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required.”

39. In the case of Central Kenya Ltd vs Trust Bank Ltd & 4 others. C.A No.215 of 1996, the Court of Appeal held:

..... fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

40. The Appellants needed to set out the particulars of fraud in their pleadings and specifically prove them in the course of the hearing. These were the holdings of the Court in the case of Vijay Morjaria Vs Nansingh Madhusingh Darbar & Another (2000) eKLR, where the Court of Appeal held as;

it is well established that fraud must be specifically pleaded and that the particulars of fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts....”

41. Even after pleading fraud, the Appellants also needed to tender evidence to prove the existence of the alleged fraud. The Court of Appeal in the case of Gladys Wanjiru Ngacha Vs Teresa Chepsaat & 4 others (2013) eKLR held:-

.....it is not enough for the appellants to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial Court. In the case of Mutsonga vs Nyati (1984) KLR 425, at page 439, this Court held:

“whether there is any evidence to support an allegation of fraud is a question of fact”

We find that the appellant did not prove fraud on the part of the Respondent”.

42. Being guided as above, this Court will now consider the pleadings and the evidence tendered in determining whether the Appellants were able to prove allegations of fraud as pleaded by them. Though the burden of proof was upon the Respondent as the Plaintiff before the trial Court, the moment the Appellants pleaded fraud, and the same was denied by the Respondent, then evidential burden of proof shifted to the Appellants herein.

43. In the case of Raila Amolo Odinga & Another Vs IEBC & Another (2017) eKLR, where the Supreme Court had the following to say on the evidential burden of proof.

Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant throughout the trial with the Plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”



44. As already pointed out by this Court, the Respondent had pleaded and adduced evidence that the late Kinurio Manyeki transferred the suit property to him.

The Court has seen the transfer form produced by the Respondent which shows that the suit land was transferred to Kimotho Manyeki, the Respondent herein as a gift. The Respondent had testified that the intention of Kinurio Manyeki was to have the suit property registered in favour of the Respondent and thus the reasons why he handed him over the original title deed.

45. However, the Appellants alleged that the documents produced by the Respondent were fraudulent. It is trite that: "He who alleges must prove." See sections 107 & 108 of the *Evidence Act*.

Having alleged that the exhibits produced by the Respondent were fraudulently acquired, then the Appellants ought to have called evidence to disapprove this allegation made by the Respondent as evidential burden had shifted to them.

46. How would the Appellants have proved the allegations of fraud? Firstly, the Respondent had produced letter of consent to transfer the suit property dated 10th February 1999. The same was allegedly issued by Kiharu Land Control Board. The appellants ought to have called a witness from the said Kiharu Land Control Board to confirm that they never issued the said consent on the material date.

47. Secondly, the Respondent had produced a letter from the Chief of Township Location one Robert M. Karanja, which indicated that the said Chief had given authority for the transfer of the suit land from Kinurio Manyeki to Kimotho Manyeki. The Appellants ought to have called evidence from that office to confirm or disapprove the said letter of authority to transfer the land.

48. Thirdly, the Respondent produced a deed of transfer of land dated 18th June 1999. The same had a valuation of ksh 150,000/= for stamp duty and the charges were indicated as ksh 3,415/= on 18th June 1999. This is the amount of money that the Respondent alleged that he did not have and thus the reasons why he did not present the transfer for registration. The Appellants alleged that the late Kinurio Manyeki did not sign the said transfer form. Yet, they did not call evidence from Murang'a lands office to disapprove the Respondent's allegations. Without having called the relevant witnesses and adduced crucial evidence, did the Appellants herein discharge their evidential burden of proof?

49. What is the effect of failure to call crucial witness or evidence? It is trite that if evidential burden is not discharged, then the person bearing such burden will definitely lose as the assertions and or allegations made by the other party have not been rebutted. The Appellants herein failed to call evidence to rebut the Respondent's allegations. This Court will borrow the findings of the Court in the case of *Bukenya & Another vs Uganda* (1972) E.A 549, Where the Court held;

where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution"

50. Though the above findings are in regard to a criminal case, this Court finds it relevant in this case. The Appellants who had alleged fraud failed to call crucial witnesses and the inference herein is that if the said witnesses were called, their evidence would have been adverse to the Appellants case.

51. Flowing from the above analysis of the evidence tendered before the trial Court, and being guided by the decided cases quoted, this Court finds and holds that though the Appellants had alleged fraud on the part of the Respondent, they did not tender sufficient evidence to prove such fraud on the required standard. It was not enough to allege fraud. Evidence needed to be adduced to prove the same.



52. In the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR, where the court dismissed the Appeal as it was not demonstrated that the Appellants had proved fraud to the required degree and stated that:

It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* [2008] 1KLR (G & F) 742 wherein the court stated that “..... we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”
In case where fraud is alleged it is not enough to simply infer fraud from the facts.

53. Having found that the Appellants failed to prove allegations of fraud, did the Respondent prove his case before the trial Court on the required standard of balance of probabilities? It is trite that he who desires the Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist. (See Section 107 of the *Evidence Act*).
54. The bone of contention herein is that the Respondent alleges that the late Kinurio Manyeki had transferred the suit property to him, but he had not effected transferred by the time of his death. The Appellants contention is that the suit land was still registered in the name of Kinurio Manyeki at the time of his death and it forms part of his estate and is subject of succession proceedings as provided by the Law of succession Cap 160 Laws of Kenya.
55. To support his allegations, the Respondent produced various exhibits. Though the appellants had alleged that the said exhibits were obtained fraudulently, this Court has found that the Appellants have not been able to prove the allegations of fraud. The issue now for determination is whether the transfer form that were signed by the late Kinurio Manyeki, but were presented for registration after the death of the said Kinurio Manyeki could validly pass a good title to the Respondent.
56. The Respondent had alleged that the late Kinurio Manyeki held the land in trust for him and thus the reasons for the transfer. As the Court held earlier, found and holds, even if the late Kinurio Manyeki, was the registered owner with an absolute ownership as provided by Section 27 of Cap 300(repealed) this ownership can be defeated by prove of Customary Trust. Customary Trust cannot be implied by the Court, but it is proved by evidence.
57. The Respondent had alleged that the suit property was initially owned by his father Manyeki Kamau and the same was registered in favour of Kanurio Manyeki to hold it in trust for himself and the Respondent. That evidence was not rebutted by the Appellants.
58. The Respondent alleged that he has been in occupation of the suit property during the lifetime of the late Kinurio Manyeki. This evidence was also not rebutted by the Appellants. It was Respondents further evidence, that in acknowledgement of the existence of the said customary trust, the late Kinurio Manyeki, applied for consent to transfer the suit property from Kiharu Land Control Board and he obtained it. He thus transferred the suit property to the Respondent as a gift.
59. The suit property was registered in favour of Kinurio Manyeki(deceased) on 25th August 1999, under the Registered *Land Act* Cap 300(now repealed), and the said land is thus governed by the provisions of Cap 300.
60. This Court having found that there is no evidence of fraud or forgery over the documents or exhibits produced by the Respondent finds no reasons to dispute that the late Kinurio Manyeki did obtain consent to transfer the suit property to the Respondent, who was his young brother. He either



intended to transfer the same to the Respondent because he held it in trust, or he transferred it to him as a gift. Whichever was the case, the late Kinurio Manyeki's intention was very clear. He wanted the Respondent to be registered as the absolute owner of the suit property as is evident from the letter of consent to transfer dated 10th February 1999.

61. There was also undisputed evidence that the said Kinurio Manyeki handed over the original title deed to the Respondent. That was like handing him over the completion documents, and all that the Respondent needed to do was to present the transfer form, the Land Control Board, consent letter and the title deed to the lands office for registration. The Respondent alleged that he failed to do so immediately because he had no money. This allegation was not disputed by the Appellants.
62. The Respondent had submitted that Section 87 of Cap 300 (repealed) which is mirrored in Section 40 of the *Land Registration Act* provide that transfer must take effect immediately and do not depend on occurrence of any event. This Court will occur with the above submissions and hold that the transfer to the Respondent took immediate effect upon execution and registration was only an administrative event.
63. For the above holding, this Court will be persuaded by the finding of the Court in the case of Pardeep Singh Ghatahora vs Exotic Crafts Ltd & Another (2018) eKLR, wherein the Court held: -

...The Defendant has placed sufficient evidence before the Court showing that as at the date of his death, the deceased had signed the agreement for the sale and the instrument of transfer. What remained was the registration of the said transferrin favour of the 1st Defendant. In the said instrument of transfer, the deceased had acknowledged having received the purchase price in full. The Plaintiff not placed any evidence before the Court to show the purchase price was not paid..... the deceased having executed the instrument of transfer in favour of the 1st Defendant and having provided all the completion documents, there was nothing for left for estate of the deceased to do regarding the transaction. I am of the view that after the purchase price was paid and the execution of the instrument of transfer, the deceased held the suit property in trust for the 1st Defendant pending registration of the said transferrin favour of the 1st Defendant. I am not persuaded in the circumstances that the suit property formed part of the estate of the deceased”.

64. In the instant suit, the late Kinurio Manyeki, had executed transfer in favour of the Respondent. Therefore, from the date of execution of the said transfer, he held the Suit land in trust for the Respondent and this Court is equally persuaded that it does not form part of the estate of Kinurio Manyeki. This Court is also persuaded by the findings in the case of Sammy Some Kosgei vs Grace Jelel Boit (2013) eKLR, where the Court held;-

..... I am of the view that the deceased signed all the disputed documents including the applications to subdivide and the transfer forms. I believe the Plaintiff's evidence that the sub division was done inter -alia in order to transfer the two plots to the Plaintiff”

65. Equally, this Court believes that the late Kinurio Manyeki signed the transfer form in order to transfer the suit land to the Respondent herein. He did so during his lifetime, and his intention was very clear and the Court can also conclude that the said transfer was gift *inter vivos* and the suit land is not part of the estate of the deceased Kinurio Manyeki.
66. The Appellants had also alleged that the Respondent is guilty of *intermeddling*, by registering the property of the deceased property without following the procedure of distribution of such property through succession proceedings. However, this Court will take refuge in the doctrine of equity which



provides that “equity regards as done what ought to have been done”. This maxim of equity means that when an individual is required by an agreement or by law to perform some act of legal significance, equity will regard that act as having been done as it ought to have been done, even before it has actually happened.

67. In this case, the Respondent was supposed to have registered the suit property in his name immediately the transfer form was executed. He did not and he has given reasons for the delay. Equity will therefore regard as done, what ought to have been done registration in favour of the Respondent.
68. The Court of Appeal in the case of Willy Kimutai Kitil vs Michael Kibet (2018) eKLR, had the following to say on the application of the doctrine of Equity in determination of matters in Court.

..... By Article 10(2)(b) of *the Constitution* of Kenya, equity is one of the national values which binds the Courts in interpreting any law. Article 10(1)(b)... Further, by article 159(2)(e), the Courts in exercising judicial authority are required to protect and promote the purpose and principles of *the constitution*.... Thus, since the current Constitution by Article 10(2)(b) elevated equity as a principle of justice to a constitutional principle and requires the Courts in exercise of judicial authority to protect and promote that principle, amongst others. it follows that the equitable doctrines of constructive trusts and estoppel are applicable....”

69. Bearing in mind the above holding of the Court of Appeal, this Court finds and holds that the maxim of equity applies herein and thus finds and holds that the transfer form once it was executed by the late Kinurio Manyeki, transferred the suit land absolutely to the Respondent.
70. Having found that the Respondent is the absolute owner of the suit property and that the same did not form part of the estate of the deceased Kinurio Manyeki, then he was right to have the said land registered in his name.
71. The Respondent had alleged that the 1st Appellant had caused a restriction to be placed on the suit land due to a family dispute. The Court found in favour of the Respondent and allowed his claim as per the plaint dated 5th October 2010.
72. The Appellants had filed their defence and Counter-claim and alleged fraud. This Court has found and held that the said allegations of fraud was not proved. By the time the Defendants filed their defence and Counter claim in the year 2015, the Respondent had already been registered as the owner of the suit property. This registration was through a decree that was obtained through an *exparte* Judgement that was issued on 7th October 2013.
73. After the *exparte* judgement was issued, the restriction on the suit property was removed and the land was registered in the name of the Respondent vide a Court order or decree. The Appellants later filed an application dated 21st January 2015, to set aside the said *exparte* judgement. The said *exparte* judgement was set aside vide a consent order entered on 13th April 2015, which allowed prayers No 1 and 2. Which prayers were for review and setting aside of the *exparte* judgement and restraining.
74. However, the prayer for cancellation of the Respondent as the registered owner was not allowed. Therefore, the Respondent remained as a registered owner of the suit property, which registration was done through a Court order and he still remains the registered owner todate.
75. The Respondent prayers in the Plaint dated 5th October 2010, was for permanent injunction and/ or for restraining order and removal of restriction. The Respondent claim was allowed as the trial Court found that he had proved his case on the required standard. Even if all the two prayers were allowed, prayer No. 2 had been overtaken by event as the suit property was already in the name of the Respondent.



76. The Respondent being the registered owner of the suit property from December 2013, then as provided by Section 24(1) of the [Land Registration Act](#) he is deemed to be the absolute proprietor with rights appurtenant there on. As an absolute owner, he is supposed to enjoy quiet possession of the same.

He alleged in his Complaint that the 1st Appellant has been harassing him to an extent that the Respondent's wife suffered injuries. The Appellants did not dispute the said allegations.

77. A permanent injunction is issued to restrain the happening of an event. The Respondent is the registered owner of the suit property and as provided by section 26 of the [Land Registration Act](#), he has an absolute and indefeasible ownership. See the case of *Bandari Investments & Co. Ltd vs Martin Chiponda & 139 Others* (2022) eKLR, where the Court held; "Permanent injunction is perpetual restraint and is issued after the suit is heard and finally determined. Permanent Injunction fully determines the rights of the parties before the Court and is normally meant to perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiffs to be protected."

78. Having alleged harassment by the Appellants, the Respondent is entitled to protection by the Courts. The trial Court allowed his claim on permanent injunction to restrain the Appellants from trespassing and interfering with his ownership and occupation of the suit property Loc 11/Maragi/3735. This Court having re-evaluated the available evidence finds that indeed the Respondent was entitled to the prayers sought in the Complaint dated 5th October 2010.

79. Flowing from the above analysis of the evidence before the trial Court, this Court as an appellate one finds that the trial Court did not err in law and fact as the Respondent did not intermeddle with the estate of the deceased. Further this Court has found and held that the suit property did not form part of the estate of Kinurio Manyeki and also the finds that the suit property was registered through an *ex parte* decree which was never cancelled even after the Appellants were allowed to file their Defence and Counter claim.

80. The Court has also found that though the 2nd Appellant alleged fraud on the part of the Respondent, that allegation of fraud was not proved. Further this Court has found and held that by signing the transfer for after obtaining consent to transfer from the Land Control Board, then the late Kinurio Manyeki transferred his rights absolutely to the Respondent prior to his death and thus the Respondent has not committed any criminal offence under Section 45 of the [Law of Succession Act](#).

81. For the above reasons, all the grounds as enumerated in the Memorandum of Appeal dated 23rd January 2023, fails.

Consequently, this Court finds no reasons to interfere with the trial Court's findings in its judgement of 19th January 2023. This Court upholds the judgement of the trial Court and proceeds to dismiss the instant appeal.

Who should pay costs of this Appeal.

82. It is trite that costs is awarded at the discretion of the Court as provided by section 27 of the [Civil Procedure Act](#). Further costs is ordinarily awarded to the successful litigant. The Respondent herein is the successful litigant and is entitled to costs of this Appeal and costs of the lower Court suit. See the case of *Devram Manji Daltani vs. Danda* [1949] 16 EACA 35 as was quoted by the Court in the case of *Limuru Country Club & 6 others v Rose Wangui Mambo 15 others* [2019] eKLR, where the Court observed that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.



83. The final analysis is that the Appeal herein is found not merited and the same is dismissed entirely with costs to the Respondent, both at this Court and the trial Court. The judgement of the trial Court dated 19th January 2023, is upheld.

It is so ordered.

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

L. GACHERU

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Delivered online in the presence of;

1st Appellant

Mr Mwangi Ben for the 2nd Appellant

Mr Waiganjo Gichuki for the Respondent

Joel Njonjo – Court Assistant

