



**Patel & 2 others v Registrar & another (Civil Appeal E780 of 2023)
[2025] KECA 84 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KECA 84 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E780 OF 2023
PO KIAGE, M NGUGI & P NYAMWEYA, JJA
JANUARY 24, 2025**

BETWEEN

**DEVIKA SHAILESHKUMAR PATEL 1ST APPELLANT
SHAILESHKUMAR NATAVERBHAI PATEL 2ND APPELLANT
SHANIL VIRAJ PATEL 3RD APPELLANT**

AND

**CHIEF LAND REGISTRAR 1ST RESPONDENT
SHILPAN PATEL (SUING AS THE EXECUTOR OF THE ESTATE OF
NATAVERBHAI PRABHUDAS VALLABHAI PATEL) 2ND RESPONDENT**

*(An appeal from the Judgment and Decree of the Environment and Land
Court at Nairobi (Jacqueline Mogeni J.) made on 21st March 2023 in
Milimani Environment and Land Court Civil Case No. 721 of 2017)*

JUDGMENT

1. On 21st March 2023, the Environment and Land Court at Nairobi (J. Mogeni J.) delivered a judgment in Milimani ELC Case No 721 of 2017, allowing a suit filed by Shilpan Patel (in his capacity as the Executor of the Estate of Nataverbhai Prabhudas Vallabhai Patel), and who is the 1st Respondent herein. The defendants in the suit in the Environment and Land Court (hereinafter “ELC”) were Devika Shaileshkumar Patel, Shaileshkumar Nataverbhai Patel, and Shanil Viraj Patel, the 1st, 2nd and 3rd Appellants herein; and the Chief Land Registrar, who is the 2nd Respondent in this appeal.
2. The gist of the orders granted by the ELC were as follows:
 - a. A permanent injunction restraining the Appellants from transferring, leasing, subletting, effecting change of user, interfering and/ or otherwise dealing with the suit property being the



property known as LR Number 15005/33 (IR 184167) formerly known as LR No 15005/5 (IR 68597/1) or in any other manner howsoever interfering with the suit property.

- b. A declaration that the transfer of the property known as LR Number 15005/33 (IR 184167) formerly known as LR No 15005/5 (IR 68597/1) on 23rd June 2014 to the 1st Appellant was null and void.
 - c. An order directing the 2nd Respondent to cancel entries on the Certificate of Title over the property LR Number 15005/33 (IR 184167) formerly known as LR No 15005/5 (IR 68597/1) effecting the transfer to the 1st Appellant and indicating that the title was surrendered to the Government in consideration of change of user and change of new lease IR 184167.
 - d. An order cancelling the title issued over the suit property known LR No. 15005/33 (IR 184167) and any transaction that may have been registered against this title and directing that the title to the property known LR No. 15005/33 (IR 184167) formerly known as LR. No 15995/5 (IR 68597/1) does revert to the Estate of Nataverbhai Prabhudas Vallabhai Patel (the deceased) to be disposed of in accordance with the deceased's will.
 - e. A mandatory injunction compelling the 1st, 2nd and 3rd Appellants to vacate the suit property known LR No. 15005/33 (IR 184167) formerly known as LR. No 15995/5 (IR 68597/1) and deliver vacant possession of the suit property to the 1st Respondent's appointed agent. In default of compliance, the 1st, 2nd and 3rd Appellants were to be evicted from the suit property within 30 days from the date of the judgment, and the Officer Commanding Spring Valley Police Station was directed to enforce the eviction order.
 - f. Each party shall bear their own costs of this suit.
3. The facts as pleaded in the suit in the ELC were that the property known as LR. No. 15005/5 (I.R. 68591/1) (hereinafter "the suit property") was at all material times owned by the deceased Nataverbhai Prabhudas Vallabhai Patel (hereinafter "the deceased"), who had been granted a lease from the Government of Kenya for a term of 99 years from 1st January 1932. The 1st, 2nd and 3rd Appellants, who were the children and a grandchild of the deceased respectively, had been residing on the suit property. The deceased died on 25th May 2014 in a hospital in the United States of America, and in his will, he bequeathed the suit property to his six (6) grandchildren, who included the 3rd Appellant, to hold in common in equal shares. On 24th March 2015, a Grant of Probate was issued to the 1st Respondent which was confirmed on 22nd February 2016.
 4. The 1st Respondent commenced the process of vesting the suit property to the six (6) beneficiaries and repeatedly requested the 2nd Appellant, who was believed to be in possession of the original Certificate of Title to the suit property, to avail it, but with no success. The 1st Respondent, through his advocate, then requested the 2nd Appellant to execute a statutory declaration in support of an application to the Lands Registry to issue a provisional certificate of title in place of the certificate of title which was believed to be lost. The 2nd Appellant did not respond. On 15th July 2017, the 1st Respondent applied for a provisional certificate of title, but the application was rejected on 18th July 2017 by the 2nd Respondent on the grounds that the original title document was surrendered to the Government for purposes of issuance of a new certificate of title, pursuant to an application for change of user.
 5. The 1st Respondent thereupon carried out a search on the suit property which indicated that on 23rd June 2014, the suit property was transferred to the 1st Appellant to hold in trust for the 2nd and 3rd Appellants; the transfer was effected for a consideration referred to as 'natural love and affection'; the alleged transfer was almost a month after the deceased passed away; the original certificate of title was



surrendered to the Government of Kenya on 18th November 2016 in consideration of the change of user and exchange of new lease IR 184167; and a new title described as LR number 15005/33 (IR 184167) was issued on 18th November 2016 to the 1st Appellant to hold in trust for the 2nd and 3rd Appellants for a term of 50 years from 1st May 2016. The 1st Respondent argued that the said transfer and change of user were done without his knowledge or consent, and were effected fraudulently, illegally and irregularly. He listed the particulars of fraud by the 1st, 2nd and 3rd Appellants, and asserted that the 1st, 2nd and 3rd Appellants did not acquire good title to the suit property as the purported transfer was null and void. The 1st Respondent stated that his interest in the suit property was in his capacity as the executor of the deceased's estate and his duty was to collect and distribute the deceased's estate in accordance with the deceased's will.

6. The Appellants in opposing the suit, admitted to residing on the suit property from 1999 as tenants, then later as proprietors. It was their claim that the deceased had no proprietary interest in the suit property and could not lawfully bequeath it since the suit property belonged to the Appellants, who purchased it in 2011. They proceeded to provide the history of their residence on the suit property. In summary, their case was that the 2nd Appellant convinced her father, the deceased, to assist the 1st Appellant with negotiating the purchase price of the suit property from a Mr. Sahota. While giving details of payments made of the purchase price, they contended that the 1st and 2nd Appellants were the purchasers of the suit property and not the deceased. According to the Appellants, the only involvement by the deceased was to negotiate a favourable deal, and to assist the 1st Appellant to seal the deal in the absence of the 2nd Appellant who was undergoing treatment in the United Kingdom.
7. Therefore, that on 18th April 2011, the deceased executed two instruments of transfer of the suit property, with one instrument of transfer conveying the property from Mr. Sahota to himself, while the other conveyed the suit property from himself to the 1st Appellant as trustee for the 2nd and 3rd Appellants. The Appellants contended that despite starting the process of transfer in 2011, they were not able to complete the transactions due to the 2nd Appellant's illness which had drained them of funds, and they were therefore unable to pay stamp duty, estimated at Kshs 2,100,000/= at the time. The stamp duty was later paid on 13th June 2014 to their advocates so as to finalize the transaction. They pleaded that even if it were to be argued that the suit property belonged to the deceased, by executing the transfer in favour of the 1st Appellant as a trustee for the 2nd and 3rd Appellants on 18th April 2011, the suit property fell under gift inter vivos and ceased to be part of the deceased's estate and could not be bequeathed as alleged. The 1st, 2nd and 3rd Appellant averred that they were the bona fide owners of the suit property having bought the same for value from the initial owner and the deceased never had any proprietary right in the suit property.
8. The 2nd Respondent entered appearance but did not file a response to the 1st Respondent's suit.
9. Various applications were filed by the parties in the trial Court that are of note in this judgment. The 1st Respondent filed an application dated 22nd November 2017 contemporaneously with the suit, seeking various temporary injunctions restraining the Appellants from dealing with the suit property. An application dated 3rd July 2018 was thereafter filed by the Appellants, seeking orders that the 1st Respondent gives security for their costs of defending the suit in the sum of Kshs 20,000,000/=, and that the firm of Hamilton Harrison & Mathews Advocates ceases to appear in the matter for the 1st Respondent, on the ground that the firm may have obtained privileged information from the 1st and 2nd Appellants, and there was thus potential conflict of interest on its part.
10. A ruling was delivered by the ELC (L. Komingoi J.) on the two applications on 2nd May 2018, in which the learned Judge found that no sufficient evidence has been brought by the Appellants to demonstrate



a conflict of interest exists to justify the firm of Hamilton Harrison & Mathews Advocates to cease acting for the 1st Respondent, and dismissed the application dated 3rd July 2018. The 1st Respondent's application dated 22 November 2017 was, however, found to be merited on account of the need to preserve the suit property, and the ELC accordingly granted interlocutory injunctions to this end. On 8th May 2019, the Appellants lodged a Notice of Appeal dated 7th May 2019 in the ELC.

11. On 20th January 2020, the 1st Respondent filed another application, seeking that the 1st to 3rd Appellants and the 2nd Respondent be ordered to produce for inspection the original transfer dated 6th June 2011 and registered on 23rd June 2014, allegedly executed by Nataverbhai Prabhudas Vallabhai Patel (the deceased) and which purported to convey the suit property to the 1st Appellant as trustee for the 2nd and 3rd Appellants. Further, in default of compliance, the defence filed by the Appellants and the 2nd Respondent be struck out. The Appellants in turn also filed an application dated 2nd December 2020, seeking orders that the proceedings in the ELC be stayed pending the hearing of their summons for revocation of the 1st Respondent's grant of probate in Milimani H.C. Succession Cause No. 3097 of 2014.
12. In a ruling delivered on 17th June 2021, the ELC (L. Komingoi J.), while noting that the Appellants' summons for revocation in Milimani H.C. Succession Case No 3097 of 2014 was dated 20th January 2017, found that the Appellants' application dated 2nd December 2020 was brought too late in the day with the intention of further delaying the expeditious hearing of the matter and dismissed the application. Komingoi J., however, found merit in the 1st Respondent's application dated 20th January 2020, after noting that the original transfer was critical to the suit, and that the Appellants had indicated that they did not have it in their possession. The learned Judge allowed the said application in the following terms:
 - a. "That the Defendants do produce to the Plaintiff for inspection the original transfer dated 6th June 2011 and registered on 23rd June 2014 allegedly executed by Nataverbhai Prabhudas Vallabhai Patel (deceased) conveying the suit property to the 1st Defendants as trustee for the 2nd and 3rd Defendants within twenty-eight (28) days from the date of this ruling. In default, the defences by the 1st to 3rd Defendants and the 4th Defendants shall stand struck out with costs.
 - b. That costs of this application be in the cause."
13. The Appellants appear to have filed a Notice of Appeal dated 24th June 2021 against the ruling, which is on record, but there is no record of them producing the original transfer for inspection. The hearing of the suit therefore proceeded as an undefended suit. The 1st Respondent testified as PW1, and reiterated that it was the intention of the deceased that he would leave his home in Nairobi to his six grandchildren in equal proportions as contained in his will, and that he only became aware of the transfer to the Appellants when his lawyers applied for a provisional certificate of title. PW 1 referenced the document of transfer which showed the date of registration as 23rd June 2014, one month after the deceased had passed away.
14. PW 2 was Ushman Patel, a daughter of the deceased, who testified that the transfer of the suit property to the 1st to 3rd Appellants was not in accordance with her father's wishes for his grandchildren, nor was it for love and affection for the 1st Appellant. She testified that the funds used to buy the property were from her father who was in Kenya when the property was bought, but flew out of the country after the property was bought and he had signed the purchase documents. Her testimony was that the 1st to 3rd Appellants were tenants on her father's property. Prashula Ellsworth (PW 3), another daughter of the deceased, Brian Ellsworth (PW 4), a son-in-law of the deceased, and Rikesh Patel (PW5), a grandson of the deceased, all testified to having been present when the deceased's will was read in the presence of the



- 2nd Appellant, who became visibly upset, and who did not at the time mention that the suit property was held in trust for him.
15. PW 6 was Jacob Mugeni Oduor, a forensic document examiner, who produced a report filed on 27th September 2021 on the examination of specimen of a signature of the deceased on the copy of the transfer dated 6th June 2011 of the suit property, in comparison with six (6) known signatures of the deceased including one on his original Kenyan passport, one in the will dated 14th December 2012 and on 3 visa cards. He concluded that the signatures on the passport and the three visa cards were different from the one on the transfer form. He detailed the technique he used to arrive at his conclusion during cross examination by the advocate for the Appellants.
 16. There is no record of the Appellants testifying or anyone testifying on their behalf. However, after the close of the 1st Respondent's case, the Appellants filed an application dated 7th December 2022, in which they sought the following substantive orders:
 2. That pending inter-partes hearing and determination of this application, this Honourable Court be pleased to stay further hearing of this suit before Hon. Lady Justice Jacqueline Mogeni or any other court.
 3. That pending the hearing and determination of this suit, this Honourable Court be pleased issue summons to the Partner in- charge of the transaction relating to the suit property from the Firm of Dentons Hamilton Harrison & Mathews Advocates for cross examination and/or interrogation as to breach and abuse of fiducial relationship between the Firm of Hamilton Harrison & Mathews Advocates and the 1st Defendant herein.
 4. That this Honourable Court be pleased to strike out this suit in its entirety on account of the Plaintiff /Respondent lack of locus standi ab initio to institute this suit on behalf of the Estate of Natavexbhai Prabhudas Vallabhai Patel here in Kenya.
 17. The Appellants alleged that the firm of Dentons Hamilton Harrison & Mathews Advocates received the purchase price for the suit property from the 1st Appellant on behalf of the vendor, and that the 1st Respondent lacked locus in representing the Estate of Nataverbhai Prabhudas Vallabhai Patel because the will, which allegedly granted him powers to represent the interest of the Estate of the deceased, was drawn in India and was alien to Kenya Law. The said application was dismissed in a ruling delivered by the ELC (J. Mogeni J.) on 28th February 2023, on account that the prayers on the firm of Dentons Hamilton Harrison & Mathews Advocates being res-judicata, and the subject will was already confirmed through Grant of Probate and a Certificate of Confirmation.
 18. Subsequently, in the judgment delivered on 21st March 2023, J. Mogeni J. found that a scrutiny of the documents presented by the 1st to 3rd Appellants, and which were relied upon by the 1st Respondent to reinforce his claim, left no doubt that serious fraud and illegalities were committed in the process of the transfer of the suit property to the 1st Appellant's name, and that it had been sufficiently proved that the 1st Appellant fraudulently and illegally caused the suit land to be registered in her name by presenting forged documents to the 2nd Respondent. Consequently, the register of land parcel No. LR No.15005/5 (IR 68597/1) formerly known as LR No.15005/5 (IR 68597/1) should be rectified by deleting the 1st Appellant 's names and restoring the names of Nataverbhai Prabhudas Vallabhai (deceased). The prayer for orders of permanent injunction against the Appellants was also granted by the learned Judge.
 19. The Appellants, being aggrieved by this decision, filed the instant appeal. They have raised eight (8) grounds of appeal in their Memorandum of Appeal lodged on 19th September 2023, namely:



1. The learned Judge erred in fact and in law in failing to appreciate that the 1st Respondent did not have locus standi to institute the proceedings before the superior Court.
 2. The learned Judge erred in fact and in law in failing to properly consider that the striking out of the Appellants' defence was draconian and prejudicial to their constitutional right to fair hearing.
 3. The learned Judge erred in law by failing to consider the content of the transfer dated 6th June 2011 could be proved by secondary evidence as provided under Section 64 as read with section 67 and 68 of the Evidence Act, CAP 80, Laws of Kenya.
 4. The learned Judge erred in law and in fact in failing to consider that the 1st Appellant's Certificate of Title is to be held as conclusive evidence of proprietorship of the suit property as provided under section 26 of the Land Registration Act CAP 300 Laws of Kenya.
 5. The learned Judge erred in fact and in law by failing to appreciate the 1st Respondent's advocates ought not to have appeared as such in the proceedings as it was apparent from the outset that they could be required as witnesses to give evidence that they received the purchase price of the suit property from the Appellants.
 6. The learned Judge erred in fact by failing to appreciate that the Appellants had possession of the suit property for more than twenty (20) years without any interruption from the Deceased.
 7. The learned Judge erred in law by failing to appreciate that in the absence of primary evidence the Honourable Court can always rely on circumstantial evidence to establish the factual issue in question.
 8. The learned Judge erred in fact and in law in arriving at a decision that the 1st Respondent had sufficiently proved that the 1st Appellant fraudulently and illegally caused the suit property to be registered in her name by presenting forged documents to the 2nd Respondent.
20. The Appellants therefore seek an order that the proceedings in the trial Court and the judgement and decree made on the 21st March 2023 be set aside, we order a retrial of the suit therein de novo, and the costs of the suit and the appeal be awarded to the Appellants with interest. We heard the appeal on this Court's virtual platform on 12th March 2024, and learned counsel Mr. Kevin Kinuthia appeared for the Appellants, while learned counsel Mr. Wilson Mwihuri appeared for the 1st Respondent. There was no appearance for the 2nd Respondent despite having been duly served with the hearing notice. The counsel present highlighted their respective submissions.
21. In commencing our determination of the appeal, we are mindful that the duty of this Court as a first appellate court, as reiterated and set out in the decision of *Selle & Another vs Associated Motor Boats Co. Ltd & Others* (1968) EA 123, is to reconsider the evidence, evaluate it and draw conclusions of fact and law. We will depart from the findings by the trial Court only where we find that they were not based on evidence on record; where the Court is shown to have acted on wrong principles of law as was held in *Jabane vs Olenja* (1986) KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & Another vs Shah* (1968) EA 93.
22. The Appellant in their submissions dated 28th September 2023, began with a chronology of the proceedings in the ELC, including the applications they had filed therein, which were the subject of the rulings dated 2nd May 2019, 17th June 2021 and on 28th February 2023, and pursuant to which they lodged Notices of Appeal dated 7th May 2019 and 24th June 2021, with respect to the first two rulings. The Appellants accordingly identified the key issues to be determined in their appeal as:



- a. The Learned Judge erred in failing to properly consider that the striking out of the Appellants' defence was draconian and prejudicial to their constitutional right to fair hearing
 - b. The Learned Judge erred in failing to appreciate that the 1st Respondent's Advocates ought not to have appeared as such in the proceedings as it was apparent from the outset that they could be required as witnesses given that they received the purchase price of the Suit property from the Appellants
 - c. The Learned Judge erred in arriving at a decision that the 1st Respondent had sufficiently proved that the 1st Appellant fraudulently and illegally caused the suit property to be registered in her name by presenting forged documents to the 2nd Respondent.
23. The Appellants' counsel submitted that it was necessary to dispose of a preliminary matter, being whether this Court had jurisdiction to hear an appeal on the interlocutory orders given by the trial Court at this stage of the litigation. Counsel stated that it was trite law that a party was not bound to appeal from every interlocutory order which was a step in the procedure that led to the final decree, and that it was open, on an appeal from such final decree, to question an interlocutory order. Counsel submitted that the Appellants lodged Notices of Appeal against the rulings of Komingoi J. delivered on 2nd May 2019 and 17th June 2019, and relied on the decision in *Equity Bank Limited vs West Link Mbo Limited* [2013] eKLR by Githinji JA that as soon as a Notice of Appeal is lawfully filed, an appeal is deemed to be in existence. Further reliance was placed on the decision in the case of *Alba Petroleum Limited vs Total Marketing Kenya Limited* [2019] eKLR that where a Notice of Appeal was lodged by an aggrieved party following an interlocutory decision, the Court had jurisdiction to reopen, review and reconsider the issue even after judgment has been rendered. It was thus the Appellants' counsel's submission that the Court had jurisdiction to hear appeals against the interlocutory decision rendered by the trial Court in these proceedings.
24. Lastly, the Appellants' counsel submitted that the 1st Respondent never moved this Court to deem the Notices of Appeal against the rulings of Komingoi J. as withdrawn under Rule 83 of the then applicable Court of Appeal Rules, 2010 (Now Rule 85 of the Court of Appeal Rules, 2022), and in any event that Rule 85 of this Court's Rules was not applicable given that there was a Certificate of Delay to account for the time taken to obtain the proceedings of the trial Court. Counsel also alleged that the ruling dismissing the Appellants' applications for stay of proceedings was rendered 18 days prior to delivery of the trial Court's judgment, and the Appellants were left with no option but to challenge the rulings of Komingoi J. in these proceedings.
25. The 1st Respondent's counsel on his part submitted that apart from filing the Notices of Appeal against the two rulings by Komingoi J., the Appellants did not challenge these decisions on appeal, and no authority was cited by the Appellants for their pronouncement that a party was not bound to appeal from every interlocutory order which was a step in the procedure that led to a final decree. In addition, the Appellants' counsel was selectively reading the ruling delivered in *Equity Bank Limited vs West Link Mbo limited* [supra], and a complete reading of the ruling revealed that the Court of Appeal was handling an application under Rule 5 (2)(b) of the rules of this Court, to the effect that as soon as a Notice of Appeal is lawfully filed, an appeal is deemed to be in existence and a litigant can move the Court for grant of an order of stay under Rule 5 (2)(b) of this Court's rules.
26. Counsel contended that the argument that a Notice of Appeal suffices as an appeal ignores the mandatory provisions of Rule 88 of the Court of Appeal Rules on the content of a memorandum of appeal, as well as Rule 89 on the contents of a record of appeal. The 1st Respondent placed reliance on the decision in *Equity Bank Limited vs West Link Mbo Limited* [supra] that a notice of appeal is



a manifestation of a party's intention to appeal, and is not and cannot amount to the appeal itself as argued by the Appellants.

27. On the decision in the case of *Alba Petroleum Limited vs Total Marketing Kenya Limited* [supra], the 1st Respondent's counsel likewise submitted that the argument that where a notice of appeal is lodged, the Court can reopen, review and reconsider the issue after judgment was selective reading of the judgment, and that in its entirety, the judgment of the Court was that the subject interlocutory ruling was immediately appealable, and the failure to appeal against the ruling conclusively determined the issue therein as between the parties.
28. We need to first determine the preliminary issue that has arisen as to whether we can entertain the subject matter of the interlocutory rulings delivered by the ELC in this appeal. We note that the Appellants have included them as part of the grounds in the instant appeal. The question we need to answer in this respect is whether the filing of a Notice of Appeal against an interlocutory ruling can entitle a litigant to raise the issues in the preliminary decree in an appeal filed against the final decree. To this extent the decisions relied upon by the Appellants are distinguishable in material respects. In *Equity Bank Limited vs West Link Mbo limited* [supra], the notice of appeal filed against the interlocutory ruling was being considered, not in a substantive appeal against a final decree, but in the context of an application for stay of execution of the ruling.
29. In *Alba Petroleum Limited vs Total Marketing Kenya Limited* [supra] on the other hand, there was no notice of appeal filed against the interlocutory ruling. When the issue raised in the ruling was raised in the appeal against the final decree, this Court, while citing the decision of the Supreme Court in *Mawathe Julius Musili vs. Irshadali Sumra & Others*, SC Petition No. 16 of 2018, held that the failure by the appellant to file an appeal against the interlocutory ruling meant that this Court lacked jurisdiction to re-open, review and reconsider the issue of limitation as determined on merit. It is also notable that while section 66 of the *Civil Procedure Act* provides for a right of appeal from a decree, any part of a decree, or order of the High Court to the Court of Appeal, section 68 of the Act is specific that where any party aggrieved by a preliminary decree does not appeal from that decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.
30. Coming back to the question before us, which is whether the mere filing of a Notice of Appeal against an interlocutory ruling entitles a party to urge that appeal in an appeal against the final decree, we think not, for two reasons. Firstly, the Court of Appeal Rules are clear that certain actions need to be taken within certain timelines for one to have a competent appeal that can be the subject of determination by this Court. Rule 82 of the then applicable Court of Appeal Rules of 2010 provided as follows in this respect:

- “(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—
 - a. a memorandum of appeal, in quadruplicate;
 - b. the record of appeal, in quadruplicate;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule



- (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”

31. Similar provisions are now found in Rule 84 of the Court of Appeal Rules of 2022. The Appellants have not included the Memoranda and Records of Appeal they filed pursuant to the filing of their Notices of Appeal, nor any evidence that they sought directions that their appeals against the interlocutory rulings be heard and determined together with the appeal against the final decree. The legal effect of filing a notice of appeal against an interlocutory ruling and not pursuing the hearing within the required timelines is that the appeal is considered abandoned, irrespective of whether or not there is an application made by a party to have the notice of appeal struck out. It is instructive in this respect that Rule 85(1) of the Court of Appeal Rules of 2022 (previously Rule 83 of the 2010 Rules) provides for this eventuality where a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, and also provides that this Court may, on its own motion, deem the notice of appeal withdrawn.

32. This is particularly the case since the interlocutory appeals would have been dispositive of issues raised on the striking out of the Appellants’ defence and the 1st Respondent’s locus standi. It was in this regard noted by this Court in *Alba Petroleum Limited vs Total Marketing Kenya Limited* [supra] as follows:

“42.... An interlocutory order is immediately appealable if it falls in one of the following general categories:

- (1) the order affects a substantial right;
- (2) the order is final as to some but not all of the parties or claims;
- (3) the order in effect determines the action and prevents a judgment from which appeal might be taken;
- (4) the order discontinues the action;
- (5) the order grants or refuses a new trial;
- (6) the order rules upon the court’s jurisdiction over the appellant’s person or property adversely to the appellant.”

33. Secondly, it is notable that the Memorandum of Appeal dated 7th August 2023 and the Record of Appeal dated 19th September 2023 lodged in the instant appeal clearly indicate that the Appellants are aggrieved and dissatisfied by the entire decision of the Environment and Land Court (Hon. Justice Jacqueline Mogeni) in *Milimani ELC Case No. 721 of 2017* made on 21st March 2023, and this was the decision that was being appealed to this Court. In the said judgment, the ELC framed the issues before it which it proceeded to determine as follows:

- a) Whether the suit property was illegally and fraudulently transferred to the 1st defendant to hold in trust for the 2nd and 3rd defendants.
- b. Whether the register of land parcel No.LR Number 15005/33 (IR 184167) formerly known as LR No.15005/5 (IR 68597/1) should be rectified by



reverting the suit property to the name of the estate of Nataverbhai Prabhudas Vallabhai Patel (the deceased”).

- c. Whether an order of permanent injunction should issue restraining the 1st to 3rd defendants and all persons claiming under them from interfering with the suit property.
- d. Who should bear the cost of the suit and interest thereon?”

34. These are the only issues which can be the subject of the instant appeal, and it is our finding that the grounds of appeal and issues raised by the Appellants as regards the striking out of the Appellants’ defence and on the propriety of the appearance of the 1st Respondent’s firm of advocates in the proceedings in the ELC are not properly before us. This finding is informed by the fact that there was no competent appeal filed against the findings made by the ELC on the said issues, nor were they the subject of the decision that is the subject of the appeal that is properly before us. We accordingly have no jurisdiction to hear and determine the said issues, and the grounds of appeal and submissions touching on the two issues are accordingly struck out. In effect therefore, the rulings by the ELC determined the issues of the striking out of the Appellants’ defence and on the propriety of the appearance of the 1st Respondent’s firm of advocates with finality.
35. The only outstanding issue in this appeal, and which is the issue that has been properly raised by the Appellants, is whether the 1st Respondent sufficiently proved that the 1st Appellant fraudulently and illegally caused the suit property to be registered in her name. While citing the holding by the English House of Lords in *Three Rivers DC vs Governor and Company of the Bank of England* (2001) UKHL 16 and of this Court, in *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR and *Urmila w/o Mahendra Shah vs Barclays Bank and Another* [1979] eKLR, that fraud was a serious accusation which procedurally must be pleaded and proved to a standard above balance of probabilities but not beyond reasonable doubt, the Appellants submitted that in her judgment, the learned Judge allowed evidence to be called on an unpleaded issue and relied on the report of Jacob Mogeni Oduor, the document examiner, to conclude that the deceased’s signature on the transfer registered on 23rd June 2014 was forged. Further, that a cursory glance of the plaint revealed that the issues of forging of the deceased’s signature on the transfer was never set out as an act of fraud against the Appellants.
36. In addition, though the Appellants’ counsel cross examined the 1st Respondent’s witnesses, the Appellants could not offer any rebuttal evidence on the unpleaded issue of forgery of the deceased signature, given that their Statement of Defence had been struck out, and it could not therefore be argued that the parties left the unpleaded issues to the trial Judge for determination. Lastly, that the learned Judge considered circumstantial evidence on the family relations and the date of registration of the transfer, which was not evidence of actual fraud but of constructive fraud. Reference was in this respect made to the case of *Katende vs Haridas and Company Limited* Civil Appeal No. 84 of 2003 (2008) 2 EA 174. Therefore, the 1st Respondent did not satisfy the burden of proof in his plea of fraud against the Appellants and the finding by the ELC that the 1st Respondent sufficiently proved that the 1st Appellant fraudulently and illegally caused the suit property to be registered in her name by presenting forged documents to the 2nd Respondent was made in error.

The 1st Respondent’s counsel submitted that the 1st Respondent had pleaded, in the Plaint dated 10th November 2017 filed in the ELC, that the Transfer of the suit property was effected fraudulently, illegally and irregularly. While citing the decision in *Vijay Morjaria vs Nansingh Darbar & Another* (supra) that the acts alleged to be fraudulent must be set out, counsel submitted that the 1st Respondent complied with the requirements and it was not correct that the trial Judge allowed evidence to be



led on an unpleaded issue. He urged that should this Court find that the issue was unpleaded, the exception set out by this Court in the case of *Joseph Amisi Omukanda vs Independent Elections and Boundaries Commission & 2 others* [2014] eKLR will apply, namely where the parties raise and address an unpleaded issue and leave it for the decision of the Court, as also held in *Odd Jobs vs Mubia* (1970) EA 476.

37. The 1st Respondent's counsel accordingly submitted that the evidence of the document examiner was not challenged and it was not open for the Appellants to question the said evidence when their defence was struck out. Additionally, the Appellants' advocates cross examined all the 1st Respondent's witnesses, and therefore no party was taken by surprise or suffered any prejudice by the report by the document examiner. Lastly, on the circumstantial evidence, counsel submitted that the transfer by the deceased indicated that it was for natural love and affection, and the evidence of the family members was crucial to demonstrate to the Court that there was no love and affection as alleged. Additionally, the evidence by the document examiner was that the deceased did not sign the transfer documents, and the evidence met the threshold required to prove that the signature on the transfer document was forged. Therefore, the totality of evidence clearly demonstrated that the suit property was fraudulently transferred from the estate of the deceased to the Appellants.
38. The applicable law on the proof of fraud was set out by this Court in the decision in *Arthi Highway Developers Ltd vs West-End Butchery Ltd & 6 Others* [2015] eKLR as follows:

“ 53. It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from *Bullen & Leake & Jacobs, Precedent of Pleadings 13th Edition* at page 427: ‘Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (*Wallingford v Mutual Society* (1880) 5 App. Cas.685 at 697, 701, 709, *Garden Neptune V Occident* [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see *Lawrence V Lord Norreys* (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (*Davy V Garrett* (1878) 7 Ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice’.

See *Insurance Company of East Africa vs. The Attorney General & 3 Others* Hccc135/1998.

Whether there was fraud is, however, a matter of evidence.”

39. The standard of proof where fraud is alleged in civil matters has been held in decided cases to be higher than the ordinary standard of balance of probabilities. (See *Railal Gordhanbhai Patel vs. Lalji Makanji* [1957] A. 314, *Urmila w/o Mahendra Shah vs Barclays Bank and another* [supra], *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [supra], *Kinyanjui Kamau vs George Kamau Njoroge*



(2015) eKLR; and Bruce Joseph Bockle v Coquero Ltd (2014) eKLR). In the present appeal, the pleadings and particulars as regards the fraud on the part of the Appellants and 2nd Respondent were set out as follows in the 1st Respondent's Plaint dated 10th November 2017 that he filed in the ELC:

“21. The transfer and change of user were done without the knowledge or consent of the Plaintiff and were effected fraudulently, illegally and irregularly.

Particulars of Fraud by the First, Second and Third Defendants

- a. Transferring the Suit Property to the 1st Defendant in contravention of the deceased's will.
- b. Obtaining a transfer for the Suit Property without the knowledge or consent of the Plaintiff and the other five beneficiaries.
- c. Applying for a change of user for the suit property without the knowledge and consent of the Plaintiff and the other five beneficiaries.
- d. Obtaining a certificate of title over the Suit Property in the 1st Defendant's name to hold in trust for the 2nd and 3rd Defendants.”

40. It is our view that the claim that the transfer and change of user was done without the knowledge or consent of the deceased is a clear plea that the deceased did not participate in the said processes, the transfer and change of user was fraudulent, and any indication of the deceased's participation was forged. The issues of fraud and forgery were therefore sufficiently pleaded. The evidence produced by the 1st Respondent in this respect demonstrated as follows: the deceased made a will dated 6th July 2013, the grant of Probate with respect to the will was issued to the 1st Respondent on 24th March 2015 by the High Court of Kenya in Nairobi and a Certificate of Confirmation of the Grant on 22nd February 2016. The deceased in his will indicated the manner the suit property was to be shared equally among his grandchildren.
41. A certified copy of the title to the suit property was also produced as an exhibit by the 1st Respondent, showing a transfer to the deceased on 11th May 2011, and a further transfer on 23rd June 2014 to the 1st Appellant as trustee for the 2nd and 3rd Appellants, and surrender to the Government of Kenya on 18th November 2016 in consideration for change of user and exchange of a new lease. Of note is that the 1st Respondent in addition produced evidence of a sale agreement dated 7th April 2011 pursuant to which the deceased bought the suit property, and of the subsequent transfer of the suit property to the deceased dated 18th April 2011.
42. By the date of the registration of the transfer of the suit property to the 1st Appellant and surrender of the title to the Government, the deceased had already died on 25th May 2014, as shown in the death certificate produced as an exhibit by the 1st Respondent, which fact and date of death was not controverted by the Appellants. The 1st Respondent therefore sufficiently proved the deceased's bequests with respect to the suit property, and the non-participation of the deceased in the registration of the transactions transfer the suit property to the Appellants. The fraudulent dealings with respect to the suit property were therefore sufficiently proved by the 1st Respondent.
43. Additionally, evidence was called by the 1st Respondent to prove forgery of the documents used to register the transfer the suit property to the Appellants, by way of a report and testimony of an expert witness. A document examiner was called by the 1st Respondent as a witness, and he carried out a



writing analysis and forensic document examination of known signatures of the deceased on ATM cards, his will, sales agreement, and his passport; and the suspected forged signature of the deceased in the copy of a transfer dated 6th June 2011 by which the deceased purported to transfer the suit property to the 1st Appellant to hold as trustee of the 2nd and 3rd Appellants. The document examiner detailed his methodology, which “involved magnification of signatures at a magnification of 1-x10 using Regula Magnifier 1004M, evaluation and comparison of all signatures submitted for absolute identification of individual characteristics that provided with evidence in each particular analysis”, as well as the characteristics he took into account including the age of the different signatures.

44. The document examiner’s findings were as follows: Signatures for analysis are dated between 2008 and 2012 (Q - 18/4/2011, K1 - 7/4/2011, K2 - 7/09/2008, K3 - 14/12/2012, K4 - September 2011, KS - March 2011, K6 - May 2010) therefore minimum variance in the signatures expected. Disputed signature indicated by arrow in pencil on the Transfer marked 'Q' is different compared to known signatures of Nataverbhai Prabhudas Patel; signature on transfer document has initial stroke loop that is test-tube shaped with narrow opening connectivity strokes is very simple with gap at the core, the terminal stroke is 'S' shaped looped with a baseline stroke that is relatively long, single letter 'A' formation in middle, generally fine quality is bold - indication slow pen movement, contrary (sic) to known signatures the initial strokes have a simple loop with sharp upper left end and smooth base, wide open initial stroke loop, two letter 'A' formations in the middle, complex connectivity strokes, thin ink line quality an indication of a fast author, and upward slant baseline. Based on the above dissimilarities, signature indicated by arrow in pencil on Transfer document marked 'Q' dated 6th June 2011 was made by a different author.”
45. There was no expert witness called by the Appellants to controvert the document examiner’s evidence, and we therefore see no reason to discount the evidence as regards the deceased’s forged signature on the transfer document dated 6th June 2011. Our opinion is also fortified by the fact that the transfer dated 6th June 2011 was registered over three years later, on 23rd June 2014, after the death of the deceased; which was also not consistent with the history of transactions involving the deceased, that showed that the sale and transfer of the suit property took place days apart on 7th and 18th April 2011 respectively.
46. Lastly, we note that all the other testimony adduced by the 1st Respondent merely corroborated the evidence of the deceased’s wishes with respect to the suit property, and his non participation in the transfer and change of user processes, which was already sufficiently proved by the documentary evidence and document examiner’s testimony. The Appellants have therefore not established any grounds or basis for us to upset the findings and orders made by the learned ELC Judge. This appeal therefore fails in its entirety and is accordingly dismissed. As this is a family-related dispute, each party shall bear their own costs of the appeal.
47. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL



NYAMWEYA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

