



REPUBLIC OF KENYA



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**Ng'ang'a & 2 others v Njuguna (Civil Appeal 288 of 2019)
[2025] KECA 272 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 272 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 288 OF 2019
SG KAIRU, JW LESSIT & JM MATIVO, JJA
FEBRUARY 21, 2025**

BETWEEN

CATHERINE NJERI NG'ANG'A 1ST APPELLANT

BETH NYAMBURA KIBIRO 2ND APPELLANT

SAMUEL CIIRA KIBIRO 3RD APPELLANT

AND

NANCY WANJIRU NJUGUNA RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi
(Achode, J.) delivered on 14th May 2019 in Succession Cause No. 2462 of 2019)*

JUDGMENT

1. Before this Court is an appeal against the ruling and order of the High Court of Kenya at Nairobi (Achode, J.) delivered on 14th May 2019 in Succession Cause No. 2462 of 2019.
2. A brief background of the matter is that the respondent filed an application before the Succession Court by way of summons dated 23rd February 2018 under certificate of urgency and sought the following orders:-
 1. That an injunction do issue against the administrators by themselves, their agents, servants, officers and/or nominees or anyone claiming under them restraining them from selling, transferring, alienating and/or interfering with Title No. Githunguri/Gathangari/2304 in any manner whatsoever pending the hearing and determination of this application or further court orders.
 2. That the Certificate of Confirmation of Grant herein issued to Catherine Njeri Ng'ang'a, Beth Nyambura Kibiru and Samuel Ciira Kibiro on the 26th January 2016 be revoked.



3. That the sale and transfer of the whole of Title No. Githunguri/Gathangari/2304 to third parties namely Stephen Chege Kiarie and Teresia Wanjiku Ndungu be cancelled.
 4. That confirmation of grant be done afresh upon cancellation of the confirmed Grant issued on 26th January 2016.
 5. That costs of this application be provided for.
3. The respondent's case as premised in the application and in her supporting affidavit sworn on even date was that the confirmed Grant was obtained fraudulently by making of a false statement or by concealment of material facts from the court; the confirmed Grant was issued while Nairobi High Court ELC Appeal No. 42 of 2015 was ongoing in which the Title No. Githunguri/Gathangari/2304 ('the suit land') that formed part of the estate of Emily Wairimu Chira (deceased) was in issue, which fact was not brought to the attention of the court; further that the respondent had purchased 0.20 Ha out of the suit land from the deceased way back in the year 1995 for a consideration of Kshs.165,000/- which was well within the knowledge of the appellants; that by an order of the court issued on 26th March 1997 in SRMCC No. 90 of 1997, the deceased was ordered to transfer 0.20 Ha of the suit land and further by the decree of the court issued on 21st January 2008, the deceased was compelled to sign the relevant documents to facilitate the transfer of the said portion to the respondent; that upon the demise of the deceased the appellants purposely declined to comply with the said orders despite their active engagement in prosecuting the matter; that the appellants sold to third parties the suit property without demarcating a portion measuring 0.20 Ha, and that the appellants failed to disclose to the court that the suit land is jointly registered in the name of the respondent and the deceased.
 4. The respondent also filed a further affidavit sworn on 19th November 2018 and maintained that sometime in 1995 she entered into an oral agreement with Emily (deceased) for the purchase of a portion of the suit land for a consideration of Kshs.165,000/-. After paying the purchase price she took possession of the same and started tilling with the knowledge of the deceased's children. She further averred that together with the deceased they appeared before the Land Control Board where they sought and obtained consent for the transfer of the suit land to her.
 5. The respondent averred that for no reason the deceased was reluctant to facilitate the transfer of the suit portion of land forcing her to file a suit in Senior Resident Magistrate's Court at Githunguri to wit, Civil Case No. 90 of 1997. The respondent emphasized that as revealed in the proceedings and in the ruling in the said case, the deceased in her defence had admitted having sold the suit land to the respondent and receiving the consideration thereto.
 6. The respondent averred that during the proceedings it came to her knowledge that the deceased had sold the whole of the suit land to Ruel Ngatia Ndonge and James Njoroge Mahinda who had placed a caution on the suit land. She averred that she reported the matter to the District Officer (DO) who summoned all the parties and after a series of meeting, the DO issued directives that the whole suit land be jointly registered in the name of the deceased and the respondent so as to protect the respondent's interest thereon.
 7. The respondent further averred that together with the deceased they remained joint owners of the suit land for a period of more than fifteen (15) years and that despite several court orders, the deceased did not take any action to transfer the portion of the suit land to the respondent but instead filed an appeal, to wit, ELC Appeal No. 42 of 2015 to challenge the decision made in SRM Civil Case No. 90 of 1997, which appeal abated after the demise of the deceased on 9th March 2009 and after the appellants failed to take steps to substitute her with her legal representative.



8. The respondent urged that the replying affidavit of the 1st appellant was a replica of the affidavit filed in Nairobi ELC Appeal No. 42 of 2015 which did not hold water then and the same could not hold water in the instant matter.
9. The respondent denied being a house maid to the deceased and further denied that she was appointed by the deceased to work for her.
10. Lastly, the respondent maintained that the Certificate of Confirmation of Grant was obtained fraudulently based on concealment of material facts, the administrators particularly the 1st appellant acted in total breach of the court orders in SRMCC No. 90 of 1997; that the 1st appellant used the contested Grant to fraudulently transfer the whole of the suit land to herself to enable her sell the suit land.
11. In conclusion therefore, the respondent averred that she was a rightful beneficiary of 0.20 ha out of the suit land having purchased it from its original owner for a consideration and that it was only fair and just that the Certificate of Confirmation of Grant and the confirmed Grant be revoked.
12. In response to the application the appellants filed a replying affidavit sworn on 17th September 2018 by the 1st appellant, daughter to the deceased and one of the administrators of the deceased's estate, on behalf of the appellants. The 1st appellant averred that on 14th September 1995 their mother, Emily (deceased) after the demise of their father which occurred in 1974, subdivided parcel no. 1863 Githunguri/Gathangari into ten (10) portions each measuring one and a half (1½) acres. She later shared nine (9) portions; 2301 - 2309, amongst her children and retained one portion for herself.
13. The 1st appellant denied the allegation that the suit property was sold as alleged by the respondent as there was no sale agreement to that effect. She further denied that any judgment was entered in Civil Case No. 90 of 1997 and averred that their late mother never attended court on 28th February 1997 and therefore they were puzzled how the court sat at the registry as captured in the proceedings. The 1st appellant challenged the registration of the suit land in the joint name of the deceased and the respondent and alleged that the respondent was a fraudster who was driven by greed to grab their land as she was a house maid who helped their late mother. The 1st appellant deposed that the transfer forms were never signed by the Kiambu Land Registrar as required by law. The 1st appellant contended that the ownership of the suit land vested with them as the children of the deceased and therefore the respondent could not make allegations that she had purchased the same without proof.
14. Mr. Ondieki for the 1st appellant challenged the correctness of the proceedings of Civil Case No. 90 of 1997 for reason that according to the record, the last proceedings were held on 8th March 2006 but that the record reflected there were proceedings held on 28th March 2007 where Mr. Gatere advocate for the respondent informed the court that on 26th March 2007 the court had given an order that the appellants should transfer 0.20 Ha of land to the respondent based on the court's finding that the deceased admitted in open court of having sold half of the said portion of land to the respondent and of receiving consideration for same less Kshs.7,000/-; counsel urged that from the proceedings of 8th March 2006 the next proceedings were on 28th March 2007 more than one year later.
15. By the judgment of the learned trial court dated 14th May 2019 Achode, J. (as she was then) found that the appellants obtained the confirmed grant through none disclosure of a material fact, namely, that the respondent had a beneficial interest as a purchaser of a portion of the suit land. The learned trial Judge held that a revocation was not necessary in the matter for the ends of justice to be met and hence declined to grant the same. The learned Judge further found that the 1st appellant, to whom the suit property was assigned in the mode of distribution, had no land to sell or property to pass to any



third party, and that any such third party could not therefore seek refuge under section 93 of the *Law of Succession Act*. This was because at the time of confirmation of the Grant, the respondent was the rightful owner of suit land.

16. In conclusion therefore the learned Judge allowed the application on the following terms:-
 - a. The sale and transfer of all the property known as Githunguri/Gathangari/2304 to third parties namely Stephen Chege Kiarie and Teresia Wanjiku Ndungu be and is hereby revoked and the Title Deed pursuant to the said sale be and is hereby revoked and cancelled.
 - b. The administrators to file a fresh mode of distribution which incorporates the respondent within 45 days.
 - c. A conservatory order be and is hereby issued barring any sale, transfer or alienation of all the property known as Githunguri/Gathangari/2304 pending distribution.
17. Aggrieved and dissatisfied with the said ruling the appellants preferred an appeal to this Court. In their memorandum of appeal dated 26th June 2019 the appellants fault the learned Judge on the following grounds:-
 1. The superior court misapprehended the law and facts and drew wrong conclusions to the prejudice of the 1st appellant.
 2. The superior court erred in law by failing to re- evaluate the entire evidence and draw its own conclusion.
 3. The superior court failed to appreciate that the integrity of the record for the purported application in 1997 and 2006 respectively was in question and there are no pleadings to support the theory advanced by the respondent.
 4. The superior court failed to appreciate that in 1996 there was no requirement to annex photos on transfers.
 5. The superior court did not take into account the cancellations in the documents to the prejudice of the appellants.
 6. The superior court ignored the fact that the transaction was under investigation by the Criminal Investigation Department.
 7. The superior court erred in law and violated Article 10, 25(c), 50(1) of *the Constitution* when it totally ignored the submissions by the appellants contrary to the doctrine of legitimate expectation.
 8. The superior court failed to appreciate that that the proceedings in Civil Case No. 90 of 1997 on 26th March 1997 and 4th April 1997 were fraudulent and tainted with corruption to the prejudice of the appellants.
 9. The superior court erred in violating Articles 23, 24, 25, 26 of the Women's Protocol to the African Charter on Human and People's Right as read with Article 2(5) (6) of *the Constitution*.
 10. The superior court misapprehended the facts and applied wrong legal principles to the prejudice of the appellants."
18. We heard this appeal on the 8th July 2024 through the GoTo virtual platform of this Court. Learned counsels Mr. Ondieki and Ms. Kiteng'e were present for the appellants whereas learned counsel Mr. Nyakiangana was present for the respondent.



19. Counsel highlighted their submissions. Mr. Ondieki relied on the appellants' written submissions dated 23rd February 2024.

He urged that the appellants had never at any stage been heard in the matter. He contended that the hearing of 26th March 1997 at the lower court was never addressed in the superior court. He questioned the integrity of the proceedings before the lower court arguing that the matter was presided over by two magistrates, Hon. Rugiri at 9.00 a.m. and Hon. Lichuma at 4.00 p.m., in total violation of Article 25 (c) as read with Articles 50, 48, and 159(e) of *the Constitution*. Further that Emily (the deceased) who was then 77 years old was not treated with respect and dignity as the court only stated that she admitted without stating what it was that she had admitted. The language used in the proceedings was also not indicated. He urged that therefor the proceedings never met the threshold prescribed under *the Constitution* or the Articles 23, 24, 25 and 26 of the Women's Protocol to the African Charter on Human and Peoples' Rights.

20. Mr. Ondieki submitted that a transfer by sale agreement could not allow land to be vested jointly in the owner and in the purported buyer. Further, that there was no agreement for sale between the respondent and the late Emily over the suit portion of land and therefore no transfer documents. Mr. Ondieki contended that the respondent could not claim ownership over the suit land as she did not have any document to prove compliance with section 3(3) of the *Law of Contract Act* 1990. In addition, it was submitted that the respondent was not entitled to any claim in the deceased's land as she was neither a beneficiary, nor was she bequeathed, nor a bona fide purchaser.
21. Counsel contended that the issue of integrity of proceedings was never addressed by the superior court hence reason for the appeal. In addition, he contended that the issue of fraud in obtaining the Confirmation of Grant was never proved to the required standard and therefore the learned Judge misdirected herself in finding that there was fraud on the part of the appellants and placed reliance in this Court's decision in *Nancy Kahoya Amadiva vs. Expert Credit Limited & Another* [2015] eKLR.
22. On his part, Mr. Nyakiangana stated that he was relying entirely on the respondent's written submissions dated 27th February 2024, which he highlighted. He submitted that the entries in the green card in respect of the suit land were not disputed. He pointed out entry no. 7 which showed that on 10th April 2007 the suit land was jointly registered in the names of Emily (the deceased) for portion of 0.367 Ha and the respondent for a portion of 0.20 Ha He further submitted that the appellant being aware of the position filed a Succession Cause and failed to disclose that as a material fact.
23. Mr. Nyakiangana contended that in the ELC Appeal No. 42 of 2015 that arose from the decision of SRMCC No. 90 of 1994, the 1st appellant participated fully but did not disclose that fact in the Succession Cause No. 2462 of 2009 (the subject of this appeal) when she applied for letters of administration, that there was a dispute in court over the ownership of the suit land. He urged that the Confirmation of Grant could not stand as a result of the non- disclosure of material fact.
24. On the issue of section 3 of the *Law of Contract Act* Mr. Nyakiangana noted that the superior court addressed it and relying on this Court's decision in *Kivindu & Another vs. Musau & 4 Others (Civil Appeal 233 of 2020)* [2023] KECA 1015 (KLR) (28 July 2023) (Judgment) correctly held that section 3(3) of the Law of Contract came into effect on 1st June 2003 and therefore the oral agreement of the parties predated the section hence the oral agreement was not subject to it.
25. Mr. Nyakiangana argued that several constitutional issues have been raised by Mr. Ondieki. He urged that the issues were never raised before the superior court. He submitted that the matter at hand was brought under section 76 of *Law of Succession Act* for revocation of the Grant and hence the constitutional issues and those of Women's Convention were not relevant to this matter. Counsel also



- submitted that Mr. Ondieki had failed to inform the Court that the superior court did not revoke the entire distribution of the property of the Estate of the deceased, but only dealt with the suit land which was jointly registered in the name of the deceased and the respondent and the 1st appellant was directed to file a fresh mode of distribution incorporating the respondent.
26. Lastly Mr. Nyakiangana contended that the issues raised in the memorandum of appeal faulting the superior court for failing to re-evaluate the entire evidence cannot stand as the superior court was not supposed to re-evaluate any evidence as it was not sitting as an appeal court. In conclusion therefore Mr. Nyakiangana urged this Court to dismiss the appeal.
 27. In response to the Court's question as to whether *the Constitution* ousted section 76 of the *Law of Succession Act* which provides grounds under which a Grant can be revoked, Mr. Ondieki stated that the superior court ought to have looked at those grounds in the context of Article 20(1) and 25(c) of *the Constitution*.
 28. In rejoinder to Mr. Nyagiangana's submissions Mr. Ondieki emphasized that two magistrates presided over SRM Civil Case No 90 of 1997, that one sat at 9.00 a.m. and the other at 4.00 p.m. raising concerns as to whether that court was a court as contemplated by the law under Article 160 of *the Constitution*. He submitted that under Article 24 of *the Constitution* anything done in contradiction of *the Constitution* is null and void and hence challenged the whole transaction from the beginning to the end. Lastly, Mr. Ondieki submitted that the *Law of Contract Act* as at 1990 was amended and therefore required that an agreement must be in writing.
 29. Ms. Kiteng'e (appearing with Mr. Ondieki for the appellants) in further rejoinder argued that the superior court failed to take into consideration documents adduced by the appellants at the hearing of the application for revocation of the Grant bringing into question the integrity of the Githunguri proceedings. She further argued that the superior court failed to grant the appellants an opportunity to be heard and hence violated their right to procedural fairness and due process of the law.
 30. On the issue of the ELC Appeal No. 42 of 2015, Ms. Kiteng'e submitted that abatement did not mean that a matter was decided on merit and added that given that the deceased was an 80 year old lady, one could not say that she was heard. Lastly, on the issue of the integrity of the record of the lower court Ms. Kiteng'e submitted that she had not seen any authority wherein a court had an opportunity to determine that a purchase took place unless documents were adduced and argued that the court could not have granted the transfer of the contested portion of the suit land.
 31. This being a first appeal, our mandate is akin to a retrial. Under Rule 31 (1)(a) of this Court's Rules, 2022, we are required to re-appraise the evidence and draw our independent inferences and conclusions. See *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA
 123. We will only depart from the findings by the trial Court if they were not based on the evidence on record; where the said court is shown to have acted on wrong principles of law as held in *Jabane vs. Olenja* [1986] KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & Another vs. Shah* [1968] E.A.
 32. Having considered the submissions of counsel, the record of the superior court and the law, we are of the view that it is important that we make it very clear what appeal is before us. The appellants preferred this appeal to this Court following the decision of the High Court Succession Cause No. 2462 of 2019 by Achode, J. (as she was then) delivered on the 14th May 2019. What was before the learned trial Judge was an application under section 76 of the *Law of Succession Act* [hereinafter LSA] for the revocation of the Confirmed Grant to the estate of the deceased confirmed to the appellants on 26th January 2016 in respect of land parcel no. Githunguri/Gathangari/2304. We noted that there



were two cases related to the Succession Cause [out of which this appeal arises] being Githunguri SRMCC No. 90 of 1997 and ELC Appeal No. 42 of 2015 both which were concerned with the issue of ownership of Githunguri/Gathangari/2304 the suit land herein. The appellants' deceased mother was the defendant in the lower court proceedings and the plaintiff was the respondent, and as shown in the instant proceedings, the case was determined in favour of the respondent and the deceased was ordered to transfer to the respondent 0.20 Ha out of the suit property leaving the balance portion of 0.367 Ha in her name (the deceased).

33. Aggrieved by the decision of the Magistrates court, the deceased filed appeal in the ELC court challenging the findings of the lower court including the challenge on the authenticity of the proceedings of the lower court and the order made to transfer the portion of the suit land to the respondent; the validity of the contract between the parties and the legality of registering the suit land in the names of the deceased and the respondent. That appeal abated following the demise of the deceased and after she was not substituted in the appeal with her personal representative.
34. We have considered and find that the same grounds of appeal raised by the deceased in the ELC appeal court are similar to those that have been raised by the appellants in this appeal. The challenge regarding the findings of the Magistrate's court was raised before the learned trial Judge and she stated:
- “ 22. The question of the authenticity of the lower court proceedings is however not an issue to be determined before this court. This is an issue which ought to have been raised before the Environment and Land Court in which the appeal against the lower court decision was filed and during which time the proceedings were relied upon.”
35. The learned Judge had this to say in regards to the reference of the lower court case in the Succession Cause before her:
- “
22. It is my considered view that the lower court proceedings have been produced in the present cause merely to show that there was a Civil Case No. 90 of 1997 whose decision the deceased appealed against in the Environment and Land Court. And further that the grant herein was confirmed during the pendency of the appeal, which dealt with the ownership of the suit land. This is bearing in mind that the 1st Administrator/Petitioner participated in the proceedings of the appeal in the Environment and Land Court.”
36. We agree with the learned trial Judge that the mandate to consider the authenticity of the lower court's proceedings including the challenge on the validity of the contract of sale between the respondent and the deceased and the duty to re-evaluate, re-analyse and re-examine the evidence adduced before the lower court was the mandate of the ELC sitting on appeal over the decision of the lower court. Having let the appeal abate, the appellants cannot purport to prosecute that appeal through the instant appeal. Their reliance on the Court of Appeal case of Trust Bank Ltd vs. Ajay Shah & Nixon Chandaria Civil Appeal No. 16 of 2015 for the proposition that the trial court should have acted as a first appellate court and re-analysed the evidence adduced in the lower court, cannot assist them as the learned trial Judge sat as a trial court not an appeal court. The appellants chance to ventilate their appeal and challenge the entire decision of the lower court was lost when the appeal abated.
37. The argument of Mr. Ondieki and his colleague Ms. Kiteng'e that the appellants (and the deceased) were never heard before the lower court does not hold as they let the appeal slip and did not try to apply



for its revival which is an option they could have exercised. In that regard, we find that the grounds of appeal raised as numbers 2 to 6 and 8 have no relevance to this appeal.

38. Having said that we now turn to the appeal before us. The appeal is concerned with the decision of the Succession Cause cancelling the mode of distribution of land parcel Githunguri/Gathangari/2304 for reason the respondent had a beneficial interest in a portion of that land and had been excluded in the said distribution.
39. Ground 1 and 10 of the memorandum and grounds of appeal are exactly the same word for word. They form the basis of issue no. 1. Issue no. 2 is drawn from grounds 7 and 9. It is our view that the issues which fall for our determination are:
 1. whether the respondent was entitled to a share of 020 ha of the suit land and whether the learned trial Judge misapprehended the law and facts and drew wrong conclusions to the prejudice of the 1st appellant; and
 2. whether the learned trial Judge violated Article 10, 25(c), 50(1) of *the Constitution* and Articles 23, 24, 25, 26 of the Women's Protocol to the African Charter on Human and People's Right as read with Article 2(5) (6) of *the Constitution*.

Whether the respondent was entitled to a share of 020 ha of the suit land and whether the learned trial Judge misapprehended the law and facts and drew wrong conclusions to the prejudice of the 1st appellant.

40. We considered the submissions filed by Mr Ondieki in regard to this issue. His argument takes us back to what we have said regarding this appeal being a challenge of the findings and final order of the learned trial Judge. Counsel submitted that the respondent could not be the rightful owner on account of there being no written contract and no Land Control Board consent to support respondent's claim contrary to the provisions of section 3(3) and 6 (1)(a) of the *Law of Contract Act* respectively. He concludes that the respondent was not entitled to the suit land because she was not a beneficiary of the deceased, nor was she bequeathed nor a bona fide purchaser of the suit land.
41. Mr. Nyakiangana in his submissions urged that the learned trial Judge did not misapprehend the facts or the law. He urged that the respondent applied for revocation of the confirmed grant under rule 44 and section 76 of the LSA. He urged that the superior court had power to revoke a confirmed grant at any time. That the respondent's application was based on the ground the grant was obtained fraudulently by making of a false statement and by concealment of a material facts. Counsel urged that the learned trial Judge applied the provisions of section 76 of the LSA and considered the grounds upon which a grant could be revoked and found that the respondent was a registered owner of the suit land and was therefore an interested party to the same and failing to disclose her interest in the mode of distribution was a ground for the revocation of the grant.
42. We have considered the learned trial Judge's judgment and find that the court invoked section 76 of LSA and set aside the Mode of Distribution of the estate of the deceased on the basis of three grounds. The first was failure to disclose there was pending a suit over the ownership of the suit property, a fact which is material to this case, and that the appellant failed to make full and fair disclosure of this material fact; the second that the stay of execution of the orders of the lower court made on 21st January 2008 directing the deceased herein to sign all the relevant transfer forms in favour of the respondent lapsed once the ELC appeal abated as the orders of the lower court made on 23rd March 1997 and 21st January 2008 had not been set aside, respondent was entitled to ownership of the suit land and ought to have been enlisted as a beneficiary in the summons for confirmation of grant; and thirdly, that the appellants were overtly dishonest in their representation that the whole of the suit property



belonged solely to the deceased and the application for confirmation of grant was therefore based on nondisclosure of a material fact that the respondent had a beneficial interest as a purchaser of a portion of the suit land.

43. We have considered the submissions of counsel on this issue, and the judgment of the learned trial Judge. Section 76 of the LSA provides:

“ A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

- a. that the proceedings to obtain the grant were defective in substance;
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;...”

44. Under subsection 76 (b) the court is empowered to exercise its discretion to revoke or annul a grant where it is established that grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case. Having considered evidence presented before the court and the learned Judge’s evaluation and analyses of the evidence and the law, we agree with the Judge that the appellants were guilty of obtaining the grant fraudulently by making false statement and concealing facts material to the case.

45. We are satisfied that indeed the learned trial Judge came to the correct conclusion that the grant confirmed on 26th January 2016 was obtained fraudulently by making of a false statement and the concealment of material facts from the court. Nothing turns on this ground.

Whether the learned trial Judge violated Article 10, 25(c), 50(1) of *the Constitution* and Articles 23, 24, 25, 26 of the Women’s Protocol to the African Charter on Human and People’s Right as read with Article 2(5) (6) of *the Constitution*.

46. We have considered the submissions of Mr. Ondieki for the appellants. He urged that the constitutional basis of the case were the various provisions he set out in his submissions. He listed some not listed in the grounds of appeal. He set out Articles 10, 25(c) and 50(1) in his grounds of appeal. However in his submissions he lists Articles 10, 40(1), 21(3), and 57 of *the Constitution*. These provisions, except Article 10, none of the rest had been pleaded. Counsel urged that Article 10 binds all State Officer, public servants etc. whenever they apply or interpret *the Constitution* or implement public policy decisions are bound by National Values and Principles. Article 40 protects the right to own property; Article 21(3) on duty of public Officers to address the needs of the vulnerable in society including women; Article 57 on protection of older members of the society. The learned counsel for the appellant then concluded that the respondent took advantage of the old age of the deceased and abused the trust bestowed upon her as a house girl. He made no mention of the Articles 23, 24, 25, 26 of the Women’s Protocol to the African Charter on Human and People’s Right.

47. Mr. Nyagiangana submitted that in his view as the learned trial Judge was not sitting in a constitutional court but a Succession Cause, he was at a loss to see how the provisions cited apply.

48. We have considered the submissions of counsel for the appellants in support of these grounds. We find that counsel did not substantiate any of his complaints in relation to the constitutional provisions he



cited. Further, in his closing remarks, counsel appeared to give evidence from the bar where he claims that the respondent was a house maid who took advantage of the deceased due to her old age. That argument is out of order. First, the grounds of appeal relied upon were directed at the learned trial Judge. Second, an appellant cannot amend his grounds of appeal through final submissions. We are not surprised that learned counsel for the respondent's response to these grounds were that he was at a loss to understand the relevance of them. Thirdly, these issues were not raised before the trial Judge and are being argued at the appeal stage for the first time.

49. There are a plethora of cases which provide that a party cannot be allowed to raise a new ground for the first time on appeal that was not canvassed before the trial court. See *Mary Kitsao Ngowa & 36 Others v Krystalline Limited* [2015] eKLR.

50. There are exceptions to this general rule. To mention a few:

1. In the Court of Appeal case of *Visram & Karsan v Bhatt* [1965] EA 789, in which the former Court of Appeal held that where an issue which has not been pleaded or canvassed is raised for the first time on appeal, it should not be allowed to be argued unless the evidence establishes beyond doubt that the facts, if fully investigated, would have supported the plea of the party seeking to raise the new issue.
2. *Alwi A Saggaf v Abed A Algeredi* [1961] EA 767, in which it was held that a new point which had not been pleaded or canvassed should not be allowed to be taken on appeal, unless the facts, if fully investigated, would have supported it.

51. The burden of proof lies with the appellants to establish that the grounds raised for the first time on appeal before us fall within the exception principle. Section 107(2) of the *Evidence Act* prescribes thus:

“ 107. Burden of proof.

(1) ...

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

52. It is clear to us that counsel did not make any attempt to establish this. Even if counsel was able to bring his appeal within the exception principle, it may not help the appellants' case. This is because most importantly none of the alleged violations of *the Constitution* were substantiated to demonstrate how they apply to the case and in what manner the learned Judge fell afoul of them. That being the case, these grounds of appeal also fail.

53. We have come to the conclusion that this appeal lacks in merit. The result of the appeal is therefore as follows:

1. The judgment of the Succession Cause No. 2462 of 2019, Achode, J. dated 14th of May 2019 be and is hereby upheld. For avoidance of doubt the judgment is upheld in the following terms:
 - a. The sale and transfer of all the property known as Githunguri/Gathangari/2304 to third parties namely Stephen Chege Kiarie and Teresia Wanjiku Ndungu be and is hereby revoked and the Title Deed pursuant to the said sale be and is hereby revoked and cancelled.
 - b. The administrators to file a fresh mode of distribution which incorporates the respondent within 60 days of today's date.



- c. A conservatory order be and is hereby issued barring any sale, transfer or alienation of all the property known as Githunguri/Gathangari/2304 pending distribution.
2. The appellants appeal is dismissed in its entirety.
3. The Costs of the appeal and of the case before the Succession court are awarded to the respondent.
4. The Deputy Registrar of this Court to place the file before the Deputy Registrar of the Family Division, Nairobi with 7 days of today's date for completion of the pending processes by that court.

DATED AND DELIVERED IN NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

S. GATEMBU KAIRU FCIArb.,

.....

JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

