



**Patel & another v MJC & another (Suing as the guardians of PJP) (Civil Appeal 182 of 2019) [2022] KECA 364 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 364 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 182 OF 2019  
HM OKWENGU, W KARANJA & MSA MAKHANDIA, JJA  
FEBRUARY 4, 2022**

**BETWEEN**

**JITENDRAKUMAR C. PATEL ..... 1<sup>ST</sup> APPELLANT**

**JAISHRI JITENDRAKUMAR PATEL ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MJC ..... 1<sup>ST</sup> RESPONDENT**

**AJC ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE GUARDIANS OF PJP**

*(An appeal from the Judgment and Decree of the Environment and Land Court at Nairobi (K. Bor, J.) dated 14th March, 2019 in ELC Case No. 23 of 2012)*

**JUDGMENT**

1. This is an appeal from the Judgment and decree of the Environment and Land Court at Nairobi, (K. Bor, J.) delivered on 14<sup>th</sup> March, 2019. In the suit giving rise to this appeal the respondents had claimed against the appellants with regard to L.R. No. xxxx, General Mathenge Drive, Nairobi hereinafter, the “suit property” a permanent injunction to restrain the appellants from, evicting, being a nuisance and or interfering with PJP’s (“P”) peaceful enjoyment of the suit property; a declaration that the purported sale and transfer of the suit property to the appellants was void and of no legal effect, and an order to rectify the land register so as to revert title of the suit property to P and costs of the suit.
2. From the pleadings the respondents’ case appears to be that by an agreement for sale dated 19<sup>th</sup> October, 2005, P who was their mother allegedly sold and transferred the suit property to the appellants. Prior to the sale, the appellants had been P’s tenants occupying the main house whereas P occupied an extension of the main house. The appellants had allegedly paid a purchase price of Kshs. 17,000,000 whereupon a Certificate of Title was issued. The respondents challenged the whole transaction on the basis that P



at the time lacked mental capacity to enter into a valid sale agreement. In the alternative, it was their case that even if she had such capacity then the agreement was procured through undue influence, coercion and or fraud by the appellants. They therefore on 23<sup>rd</sup> December, 2011 obtained leave through Petition No. 133 of 2011 filed in the High court of Kenya at Nairobi under the [Mental Health Act](#) to act as P's guardians on the basis that she was mentally wanting. On 17<sup>th</sup> January, 2012 the respondents filed the suit, the subject of the present appeal seeking to reverse the sale on the aforesaid grounds.

3. In their evidence the respondents conceded that P had let the main house to the appellants and retreated to the extension. She used the rent she collected from the main house for her own upkeep. However, they were surprised to learn of the purported sale and transfer of the suit property to the appellants on 28<sup>th</sup> July, 2006. This was because P lacked the ability or mental acuity to negotiate any agreement having been diagnosed with chronic pain for years which compounded her depression and rendered her incapable of managing and administering the suit property or entering into legal transactions due to her diminished mental capacity. She also suffered from severe osteoporosis and rheumatoid arthritis which had rendered her immobile. After learning of the sale, they obtained a valuation report which showed that the estimated value of the suit property at the time of the purported sale was between Kshs. 36 and Kshs. 40 million which had since risen to Kshs. 100 million by January, 2012. They denied being in Kenya during negotiations between P and the appellants leading to the sale of the suit property as they were both overseas studying. The appellants were trusted guardians to them and P, they let them run all their affairs including taking care of P and paying her utility bills and had promised to take care of P while they studied abroad. They would purchase groceries for her and other items and would also settle her utility bills. These expenses would then be deducted from the rent and the balance thereof paid to P. However, the appellants abused and took advantage of the trust and mental status of P to cause her to sell and transfer the suit property to them. That the suit property was bought for Kshs. 6 million and renovated at a cost of Kshs. 10 million. They had filed the suit when they learned that their mother was almost being evicted from the suit property by the appellants. They challenged the demand by the appellants for Kshs 3,563,973.69 on account of rent arrears, electricity, water and security bills and Kshs. 65,500 per month as mesne profits for the extension which P occupied as they were not due on account of the foregoing. They therefore prayed the trial court to grant the prayers they had sought in the amended plaint and dismiss the appellants' counterclaim.
4. Dr. Nelly Aliviza Kitazi, a specialist psychiatrist working at the Aga Khan University Hospital testifying on behalf of the respondents stated that she first saw P on 28<sup>th</sup> August, 2011 when she was taken to her by the 2<sup>nd</sup> respondent. P had a long history of arthritis and psychiatric problems and had been treated in India by a doctor who prescribed anti-depressants. She stated that it was however difficult to tell how long P had suffered from psychiatric problems.
5. Dr. Nira Patel, a dental surgeon stated that she met P in 1978 through her husband when she was in good [health](#). They were family friends and she knew around 1984 that P suffered rheumatoid arthritis which caused her severe pain and led to her hands and toes being twisted. She stated further that from 2000, P could not move without assistance and that she had been in pain since then. She testified that she used to pick P from her house and then drop her back after her dental clinic. She confirmed that P had a house help for a long time. She concluded by stating that pain can incapacitate a person making it difficult for him to make a decision.
6. Manoj Shah had known P since 1995 when she was a member of the Lion's Club in which he too was a member. Due to her inability to drive a car, other club members used to pick and drop her from club events. He stated that P had to resign from the Lion's Club due to her progressive illness and it was his opinion that P lacked capacity to transact any dealings without assistance. He stated that mental capacity is not a requirement for membership to the Lion's Club and that all that is needed is that one



- must be over 18 years old, pay subscription fees and be willing to serve the less fortunate and needy members of the society.
7. Aron Ogwago Musumba, a valuer testified that the open market value of the suit property was Kshs. 32 million as at 1<sup>st</sup> October, 2005. That to establish the retrospective value of a property, a valuer compares properties that were similar to the property at that time in order to ascertain that property's value back then and that is what he had done in arriving at the above figure.
  8. The appellants responded to the claim by an amended defence and counterclaim. They denied all the allegations levelled against them in the amended plaint. They maintained that P was a person of sound mind and leave granted to the respondents by Court for the respondents to act as her guardians was obtained surreptitiously and through concealment of material facts with the sole object of commencing the suit. That the transaction was lawfully effected in the full knowledge of the respondents and that due process was stringently observed throughout whereupon the transfer was registered in favour of the appellants as the sale was legal and between persons of sound mind contrary to the respondents' invalid allegations. The appellants also denied in entirety the allegations of undue influence, coercion and or fraud made against them by the respondents and reiterated that P was of sound mind and understanding and entered into the sale agreement on her own volition and when in full command of all her faculties. That in any event the respondents' claims based on the foregoing were time-barred by virtue of the *Limitation of Actions Act*. They also intimated that they were not willing to accept any sums of money as a refund of the purchase price as they would in the process be deprived of the suit property they had lawfully acquired. By way of the counterclaim the appellants averred that it was an express term of the agreement that upon completion of the sale, P was to give vacant possession of the suit property save for the extension which she was to occupy on a rent free basis for a period of 2 months. However, P upon effluxion of the 24 months failed, refused and or neglected to give vacant possession of the extension and or pay mesne profits of Kshs 66,500 per month from March 2008 until the date of vacant possession. The appellants further claimed Kshs 3,563,973/69 on account of rent arrears, electricity, water and security charges, incurred on behalf of P. They therefore prayed for the dismissal of the suit with costs and that the judgment be entered in their favour on the counterclaim.
  9. In their evidence, the appellants who are husband and wife testified that they were initially P's tenants on the suit property. In 2005, P informed them that she was looking for a buyer for the suit property as she wanted to relocate to the USA to join the 1<sup>st</sup> respondent who was in the process of settling there. P marketed the suit property for a long time without success and thereafter offered to sell it to them on condition that she would remain in the extension for a while before relocating to USA. They accepted the proposal and settled on the purchase price of Kshs. 15 million which was later renegotiated by the respondents to Kshs. 17 million. They were categorical that throughout the negotiations both respondents were present in Kenya and that P was fully in charge of her mental capacities during the negotiations and freely consented to the purchase price of Kshs. 17 million. That P lived alone and took good care of herself including driving to the market. They paid the purchase price in full to P and were thereafter registered as owners of the suit property. They also stated that P declined to give vacant possession of the suit property in February 2008 pleading for more time and also refused to pay rent while feigning sickness whenever rent was demanded from her. They claimed that as at 1<sup>st</sup> November, 2011 P was in arrears of Kshs. 3, 563,973.69 being the total amount due for unpaid bills and rent arrears. It was thus their prayer that the suit be dismissed with costs and judgment be entered in their favour on their counterclaim.
  10. Mr. A.B Shah, an advocate testified for the appellants that he was called by the 1<sup>st</sup> appellant sometime in 2008 to assist P claim her entitlements from Kenya General Industries Limited. They met at the 1<sup>st</sup> appellant's office and he took instructions from her. He stated that P consulted him over several other



legal matters and to his mind she was sane at the time he saw her as she was in full command of her faculties.

11. Also testifying for the appellants was, Mr. Mohammed Farouk Adam, an advocate who confirmed that he drew the sale agreement and the transfer in respect of the suit property. He acted for both the vendor and the purchaser in the transaction. That he exercised due diligence in drafting the sale agreement and getting the transfer registered with Lands Office on 28<sup>th</sup> July, 2006 after obtaining instructions from P. That he succinctly explained to her the contents of the sale agreement and she understood them before appending her signature. That at no given time did P exhibit any mental deficiency that would have hindered her from comprehending the sale agreement and that P's instructions were clear, unambiguous and from a sane person fully in charge of her faculties.
12. In his evidence in support of the appellants' case, Hudson Jananga Madanga stated that he had been employed by P between 2004 and 2005 as a housekeeper and would receive instructions from her on gardening, domestic work and the upkeep of the dogs. He stated that P used to drive her car personally and he would accompany her for shopping at City Park Market. That P advertised the suit property for sale between June and October 2005 and many people went to view it. The last witness for the appellants was Wilberforce Andatsi Asutsa who was employed by the 1<sup>st</sup> appellant as a night guard though he had previously worked for P. He stated that P drove her own car at all times and that she went shopping and ran errands on her own. He stated that she would cook her own food and at times she would invite visitors over for dinner. That a notice was placed for the sale of the suit property and many people came to view the suit property. He was employed by the 1<sup>st</sup> appellant when P migrated to USA and later returned after a number of years and occupied the extension.
13. By a judgment delivered on 14<sup>th</sup> March, 2019 the trial Court held that the respondents had proved on a balance of probabilities that P entered into the agreement for sale of the suit property by undue influence and therefore the transaction should be set aside. The respondents' claim was thus allowed, and the appellants' counterclaim was dismissed. The trial Court nonetheless directed the respondents to refund the sum of Kshs. 17 million paid to P by the appellants as the purchase price for the suit property within six months of the date of the judgment together with interest at court rates and Kshs. 850,000 to cover the respondents' share of the utility bills.
14. Aggrieved by the judgment and decree aforesaid, the appellants lodged the present appeal on 10 grounds to wit that the learned Judge erred in law and in fact in: failing to appreciate that the respondents' allegations of undue influence, coercion and fraud against the appellants were neither specifically pleaded nor strictly proved; holding that the appellants acquired title to the suit property by undue influence notwithstanding that no such evidence was presented; holding that P lacked capacity to enter into a sale agreement in respect of the suit property; not appreciating that the evidentiary burden of proof shifted to the respondents to establish that P did not have the capacity to contract as at 19<sup>th</sup> October, 2005; not appreciating that P's conduct immediately prior to and after execution and transfer of suit property depicted full mental capacity to contract; not appreciating that the respondents' offer to refund the consideration of Kshs. 17 million paid by the appellants for the purchase of the suit property was an acknowledgement and admission of the existence and validity of the agreement; not appreciating that the respondents' suit was in essence an attempt to resile from a valid agreement; sustaining a challenge on the title over the suit property against the weight of the evidence and in violation of the appellants' proprietary rights as enshrined in Article 40 of the Constitution; unlawfully disregarding the evidence by the appellants in violation of Article 50(1) of the Constitution; and dismissing the appellants' counterclaim.
15. The appeal was canvassed by way of written submissions with limited oral highlights. However, on the eve of the plenary hearing of the appeal, the respondents filed Notice of Grounds For Affirming



Decision pursuant to rule 94 (1) of the *Court of Appeal Rules*. This move was successfully objected to by the appellant on account of non-compliance with the timelines set by the said rule. In other words, the notice was filed out of time and without leave of court. Accordingly, we ruled that in considering this appeal we shall pay no regard to the said notice.

16. In their written as well as oral submissions through Mr. Ngatia teaming up with Mr. Omwanza, learned counsel for the appellants argued that the respondents had failed to discharge the burden of proof as regards the contention that P lacked capacity to enter into the agreement. That though in the amended plaint, the respondents pleaded that at the time of the agreement, P was unwell, immobile and mentally challenged as to be unable to covenant, they did not lead evidence to that effect. That though the respondents argued that P was adjudged to be a person suffering from a mental disorder under Section 26 of the *Mental Health Act*, they did not lead evidence to that effect as well. That Dr. Nelly Kitazi only saw P for the first time in 2011 long after she had executed the sale agreement. Thus, it was difficult to tell how long she had suffered from psychiatric problems. Dr. Kitazi did not confirm that as at the time when P executed the agreement she was of unsound mind.
17. The appellants relied on Sections 107 and 109 of the *Evidence Act* and the case of *Grace Wanjiru Munyinyi & Another Vs. Gedion Waweru Githunguri & 5 Others [2011] eKLR* in submitting that it was evident that the respondents did not discharge the burden of proof as regards the allegation that P was mentally unable to enter such an agreement. That the trial Court had rightly held that it was difficult to tell whether or not P was of sound mind between October 2005 when the sale agreement was executed and 2011 when the respondents applied to court and obtained an order to manage her affairs. That the finding by the trial Court was proof enough that the respondents did not establish that P was of unsound mind at the time of entering into the agreement. In view of the foregoing they faulted the trial court for making a contradictory finding that no evidence was adduced to show that P was in good *health* in 2006. That the trial court had no factual, legal or evidential basis to make the finding that it was not in dispute that P suffered acute rheumatoid arthritis which made her hands deformed and that naturally a person with severely deformed hands would find some difficulty in executing documents. The appellants further submitted that the respondents pleaded undue influence, coercion and fraud as an alternative prayer in the event P was found to have had capacity to contract. They urged that once the court embarked on considering the respondents' allegations of undue influence, coercion and fraud and made a finding to that effect the trial court in a way conceded that P had capacity to contract.
18. As to whether the allegations of undue influence, coercion and fraud were proved, the appellants submitted that the respondents did not plead initially that, the sale was procured through undue influence, coercion or fraud in their plaint and it was only after they had testified that they amended their plaint and pleaded undue influence, coercion and fraud and set out the particulars thereof. The appellants emphasized that parties are bound by pleadings and must lead evidence to establish their claims. That upon amendment of the plaint the respondents did not adduce evidence in support of the amendments and without such evidence. To buttress their submissions, the appellants relied on Sections 3 and 107 to 109 of the *Evidence Act* and the following authorities; *Independent Electoral and Boundaries Commission & Another Vs. Stephen Mutinda Mule & 3 Others [2014] eKLR*, *Charterhouse Bank Limited (Under Statutory Management) Vs. Frank N. Kamau [2016] eKLR*, *Kenya Power & Lighting Company Limited Vs. Pamela Awino Ogunyo [2015] eKLR*, *Janet Kaphiphe Ouma & Another Vs. Marie Stopes International Kenya Kisumu HCCC No. 68 of 2007* and *Margaret Nieri Muiruri (Being the Administratrix of the Estate of the late Joseph Muiruri Gachora (deceased!) vs. Bank of Baroda (Kenya) Limited [2014] eKLR*.



19. The appellants went on to submit that Black's Law Dictionary, defines the term 'undue influence as "the improper use of power or trust in a way that deprives a person of free will and substitutes another's objective. That pursuant to the aforesaid definition and the holding in the case of *LTI Kisii Safari Inns Ltd & 2 Others Vs. Deutsche Investitions- Und Entwicklungsgellschaft (Deg) & Others [2011] eKLR*, evidence should have been adduced by the respondents to prove the particulars set out in the amended plaint. The onus was upon the respondents to prove that the appellants had power over P or that P trusted them and that they improperly used the power or trust in a way that deprived P of her free will and that such evidence could neither be inferred from facts nor adduced by way of written submissions as it happened here. To advance their argument, they relied on the case of *Daniel Toroitich Arap Moi Vs. Mwangi Stephen Muriithi & Another [2014] eKLR* where the court held that submissions cannot take the place of evidence. The appellants maintained that reposing trust and confidence in a person is a matter of fact which the respondents should have proved by leading evidence. By holding that the transaction was procured by undue influence, without evidence having been led by the respondents, the trial court occasioned a miscarriage of justice. The appellants in the alternative submitted that even if evidence was adduced by the respondents in support of the particulars of undue influence, coercion and fraud such evidence fell short of the required standard of proof.
20. The appellants faulted the finding by the trial court that there existed a special relationship between P and the appellants that gave rise to a presumption of undue influence, coercion and fraud. There was no evidence presented in the trial Court to form the basis for such findings. That though the appellants stated that they had been P's tenants between the years 2000 to 2005 and that they would pay P's utility expenses and her travels out of the country which expenses would be deducted from rent, that alone could not lead to a presumption of undue influence. Further, the respondents testified that they had a caretaker, relatives and family friends taking care of P. That the trial court failed to appreciate that taking into account the foregoing the appellants' humane assistance to P did not demonstrate existence of a special relationship which could be construed to lead to undue influence. That even though the respondents did not adduce evidence to demonstrate that P reposed trust and confidence in the appellants, the trial court nonetheless held that the appellants did not lead evidence disapproving undue influence over P. By shifting the burden of proof to the appellants the trial court erred in law and fact. They faulted the trial court for directing that the sale transaction be set aside on the ground that the respondents had proved that P entered into the sale transaction whilst under the 1<sup>st</sup> appellant's undue influence. The appellants relied on the following cases, *CIBC Mortgages PLC Vs. Pitt [1993] 4 ALL ER 433*, *Kinyanjui Kamau Vs. George Kamau [2015] eKLR*, *Ndolo Vs. Ndolo [2008] 1 KLR*, *Shri Kirpal Singh vs. Shri V.V. Giri (1970) INSC 191. AIR 1970 SC 2097; 1971(2) SCR 197; 1970(2) SCC 567*, and *Kuria Kiarie & 2 Others Vs. Sammy Magera [2018] eKLR* to buttress their arguments. It was further submitted by the appellants that despite the respondents' stance that P never entered into a sale agreement over the suit property and that no consideration was paid and the trial Court upholding the averments, it was lost to the trial Court that, the respondents had nonetheless offered to refund the purchase price in respect of the suit property. That despite making a finding that no evidence was adduced to prove that the appellants paid the purchase price, the court directed the respondents to refund the appellants the sum of Kshs. 17 million within six months of the judgment. It is inconceivable how the respondents would be directed to refund the purchase price to the appellants in respect of a payment that was never made. They submitted that by making an offer to refund the sum of Kshs. 17 million to the appellants, the respondents acknowledged and admitted the existence and validity of the agreement for sale and payments made in respect thereof. It was thus quite clear that the respondents' claim was a veiled attempt to resile from a valid sale agreement with the sole aim of re-selling the suit property at the current enhanced market value. See: *Kenya Commercial Bank Limited & Another Vs. Samuel Kamau Macharia & 2 Others [2008] eKLR*.



21. The appellants further submitted that the sanctity of title is protected by dint of Article 40 of the Constitution and Section 26 of the *Land Registration Act*. The latter provides that a certificate of title may be cancelled if it was obtained on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. They argued that the respondents did not prove any of the above. As the respondents failed to discharge that burden, deprivation of the appellants' rights over the suit was a gross violation of their proprietary rights guaranteed by Article 40.
22. Regarding the counterclaim, it was submitted that, the appellants sought a sum of Kshs. 3,563,973.69 on account of rent arrears, electricity bills; water bills; and security bills for the period March 2006 to September 2011. They also sought payment of mesne profits from October 2012 until the date of judgment. Though the trial Court dismissed the substantive portion of the counterclaim it nonetheless awarded the sum of Kshs. 850,000 to cover the respondents' share of the aforesaid Bills. Arising from the evidence tendered in the trial court the appellants reiterated P was to occupy the extension without paying rent for a period of 2 years. However, upon lapse of the rent free period, P stopped paying rent in 2011. In 2012 they instructed auctioneers to levy distress for rent from P and it is the aforesaid action that prompted the filing of the suit giving rise to this appeal. The appellants therefore sought payment of the arrears of rent as detailed in the defence and counterclaim. That P had been in wrongful possession of the suit property from October 2012 to date. That arising therefrom the appellant was entitled to mesne profits as from that date at the rate of Kshs. 66,500 per month. The appellants had led cogent evidence in support of the entire counterclaim but the trial court could hear none of it. To the appellants therefore the trial court erred in holding that they had failed to prove that they were entitled to mesne profits. That by holding that a sum of Kshs. 850,000 was payable by P in respect of the utility bills, the trial court did find that P was liable in respect of utility bills. That it was clear that the trial court disregarded the evidence tendered by the appellants and as a consequence dismissed the appellants' counterclaim. In the penultimate they prayed that the appeal be allowed.
23. In opposition to the appeal, the respondents through Mr. Mwangi and Mr. Kounah learned counsel, submitted that P entered into a tenancy agreement with the appellants sometime in the year 2000 necessitated by the fact that the respondents were going overseas for further studies and as such P wished to move into the extension of the main house and collect rent from the main house for her sustenance. That the appellants undertook to take care of P who suffered from severe degenerative disease and clinical depression. However, the appellants took advantage of her condition and procured the suit property for themselves. The respondents could not have participated in the negotiations leading to the purchase of the suit property since they were out of country then. It was submitted that the appellants did not rebut evidence tendered during the trial that P was of unsound mind. They maintained that the evidence adduced before the trial court demonstrated that P had been mentally incapacitated from early 2000. Further, the evidence showed that P was suffering from rheumatoid arthritis since 1984 that causes pain and can affect mental capacity and that she could not take major decisions without involving family members. They maintained that although it was general knowledge that P did not have the mental faculties of an average person, the appellants executed a sale and transfer agreement of the suit property without involving her immediate family. They submitted that the evidence they tendered proved on a balance of probabilities that P had no mental and medical capacity to enter into any legally binding transaction. To buttress their submissions, they relied on the case of *Grace Wanjiru Munyinyi & Another Vs. Gedion Waweru Githunguri & 5 Others [2011] eKLR*.
24. The respondents further submitted that the trial court was made aware of the trust relationship between the appellants and P. That instead of paying rent in advance the 1st appellant would pay for P's requirements and ultimately offset the same with rent due to her. They contended that the advocate



- who drew the sale agreement did not receive any instructions from P, but, the instructions were given by the appellants and the advocate only met P at the time of the signing of the agreement. The trial Court was therefore right in negating the agreement.
25. The respondents further submitted that common law dictates that where a contract is unconscionable or made under undue influence, then courts have the power to vitiate the same in order to protect vulnerable persons. They argued that no person in their right senses would sell her property for less than half its market price only to be rendered homeless. That fraud is not confined to deceit and it means an unconscientious use or the power arising out of these circumstances and conditions of contracting parties. That the appellants were fraudulent by undervaluing the suit property. Evidence showed that the suit property was valued at Kshs. 36,000,000/= at the time of sale yet it was sold at Kshs. 17,000,000/= which evidence was not controverted. The respondents contended that they were not duty bound to call evidence in support of the claim of undue influence, coercion and fraud since they had pleaded the same and filed witness statements which were adopted as evidence by Court. That further evidence was adduced during the cross examination of the appellants. The respondents further submitted that it was unsound of the appellants to conclude that the offer to refund the purchase price was an admission of the existence of a valid sale agreement. They maintained that the offer to refund the purchase price was not an admission of the validity of the agreement but rather a willingness to rectify an unjust transaction. That in the case of rescission of a contract, the law requires the vendor to return the deposit to the purchaser. (See: *Ayub Ndung'u Vs. Marion Waitthera Gacher* [2006] eKLR.
  26. Lastly, the respondents submitted that the counterclaim was an afterthought calculated to divert the trial Court's attention from the issue of undue influence, coercion and fraud. The appellants were in charge of all the affairs of P including accounts and payment of utility bills hence it was unjust for the appellants to claim utility bills and rent arrears after they clandestinely made it a clause in the agreement for sale. There was in any event no evidence in support of the assertion that P was a tenant hence the appellants failed to prove that P was in occupation of the suit property unlawfully and was therefore obligated to pay mesne profits. We were thus urged to dismiss the appeal with costs.
  27. This being a first appeal we are reminded under Rule 29 of the Court of Appeal Rules of our primary role as a first appellate court to analyze and re-evaluate the facts and the evidence placed before the trial court, consider the application of law on to those facts and evidence by the trial court and then determine whether the conclusions reached by the trial court are to stand or not but always bearing in mind that the trial court had the distinct advantage of seeing and hearing the witnesses and give allowance for the same. See *Peters Vs. Sunday Post Ltd* [1958] EA 424 and *Mwanasokoni vs. Kenya Bus Services Ltd* [1985] eKLR.
  28. We have carefully considered the record, oral and written submissions by counsel and the law. The main issues for determination in this appeal are whether: P had the mental capacity to enter into an agreement of sale with the appellants in respect of the suit property; the agreement for sale was obtained by way of undue influence, coercion and fraud; the sale and transfer of the suit property should be voided and finally is the question of the counterclaim.
  29. It is common ground that the parties to this appeal knew each other prior to the suit leading to this appeal. The appellants were P's tenants while the respondents are P's children. It is also common ground that sometime in the year 2005-2006 the suit property was transferred from P to the appellants for a consideration of Kshs. 17,000,000/= What is in dispute is the manner in which the transaction was executed. The respondents' claim was that the transaction was null and void as P had no mental capacity to transact any dealings with regard to the suit property. In the alternative they impugned the transaction on account of undue influence coercion and fraud exercised over P by the appellants. On the other hand, the appellants took the view that P freely and voluntarily sold and transferred to them



the suit property; she was lucid mentally and no undue influence, coercion or fraud was brought to bear on her during the transaction. Although the trial court appears to have discounted the issue of P's mental capacity in its judgment, the two issues, are so intertwined such that they must be considered together.

30. The law of contract recognizes and respects the freedom of parties to enter into agreements setting out the parameters within which they are to be governed. In the case of *Abdul Jalil Yafai vs. Farid Jalil Mohammed [2015] eKLR*, this Court stated that the law equally places a high value on ensuring parties have truly consented to the terms that bind them. In *Wiltshire Vs. Cain [1958-60] 2 Barb. L. R149*, the Supreme Court of Barbados noted that the contention made by the defendants in that case that the seller who was 83 years, for at least one year prior to the signing of the contract, suffering from loss of memory, mental debility and senile decay, and was incapable of understanding the meaning and effect of the agreement as at the time.”

The court held that:

“... for the defence to succeed it must show (a) the incapacity of the defendant due to mental illness in one form or another, and (b) that the plaintiff knew of the condition of the defendant. The burden in respect of both of these matters rests on the defence – see *Imperial Loan Co. v. Stone* Lord Eastern [1892] IQB 599. The fact that the plaintiff had knowledge of the defendant's condition must be brought home to entitle the defendant to succeed. In that case Lord Justice Lopes stated that: “a defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed.”

31. In the present case, the respondents obtained the guardianship of P under the *Mental Health Act* in 2011 and used the same to sue and prove that P was mentally incapacitated and therefore unable to transact. They also called two doctors in that regard. These witnesses mentioned the likelihood of P's rheumatoid arthritis resulting in PP's mental *health* problems but none of them stated with conviction and certainty that P suffered mental incapacity at the time she entered into the sale transaction. It is on record that none of these doctors examined P around October 2005 when she executed the agreement. We also note that one of the doctors (Dr. Nira Patel) was a dentist and owned up in evidence that she was not a medical doctor and could not therefore testify as to P's mental condition then. The evidence by Manoj Shah with regard to P's activities with Lion's Club does not at all advance the respondents' case either. Indeed the trial court held and rightly so in our view that it was difficult to tell whether or not P was of sound mind between 2005 when the sale was executed and 2011 when the respondents applied to court and obtained an order to manage her affairs based on her mental incapacity. That said we also note that no evidence was led to show that the appellants were aware of P's incapacity. It was merely assumed that since the appellants undertook P's financial audits and ran errands for her then they must have known she was incapacitated mentally. These undertakings on the part of the appellants was not out of the ordinary. From the evidence on record it does appear that the relationship between P, the appellants and the respondents was very close transcending the normal landlord tenant relationship. It was built on mutual trust and confidence, the respondents and P looking up to the appellants as their guardians. It cannot therefore be said that by the appellants merely running errands and doing her accounts, P was thereby mentally incapacitated. It follows therefore that the respondents failed to discharge the burden of proof regarding P's mental incapacity as set out in *Wiltshire vs. Cain* (supra).



32. In the case of *Grace Wanjiru Munyinyi & Another Vs. Gedion Waweru Githunguri & 5 Others [2011] eKLR* this court observed as follows:

“The starting point is the presumption that must always exist, until it is proved otherwise, that every person is of sound mind. It is a logical presumption otherwise no one would be held responsible for their actions. It is also the position in law, and we find persuasive authority for it in the Wiltshire Case (supra), that the burden of proof lies on the person who asserts the incapacity. In the Wiltshire Case, those who were asserting mental incapacity as cited in paragraph (6) above, called a medical practitioner who had been attending to the defendant for forty years, and testified that he examined the defendant three months after the sale agreement and “found symptoms of senile degeneration in that he was delusional, confused, and incoherent” and in his opinion the defendant was “incapable of managing his own affairs by reason of mental infirmity”. A neighbour of the defendant was also called to testify that she saw him “doing stupid things”, while the defendant’s married daughter also testified that “he stayed away from home one full day,” “talked and walked about and loosed other peoples animals” and “tore up dollar bills”. All that evidence was rejected by the court as insufficient to avoid the transaction. The Supreme Court stated: “A person may be or become of sound mind because he has lost the ability to reason by disease, grief or other accident. Where a person in such condition can be shown not to have understood because of his mental condition, what he was doing and further that the other party was aware of this incapacity, then any contract, other than a contract for necessities, made by such a person is not binding on him.”\*

The court proceeded to hold that:

“...it was not sufficient to establish the mental incapacity of Mbogo or the knowledge of such incapacity by the appellants when the power of attorney was executed. Both required proof but there was none. The presumption is therefore that Mbogo was in control of his faculties when he appeared before an Advocate & Commissioner for oaths, one Githiru N.M. on 22<sup>nd</sup> February, 2002 and executed the Power of Attorney”.

33. As already noted, the respondents were unable to bring the complaint regarding P’s mental illness within the above strictures and parameters. We may add that the issue of P’s mental incapacity first surfaced in 2011 when the respondents allegedly became aware of the sale transaction as a result of the appellants seeking to levy rent distress for rent on P. We say allegedly because there is evidence that the respondents despite their halfhearted denials were present and took part in the negotiations leading to the sale and transfer of the suit property. It was not enough that the respondents were able to prove that P was mentally incapacitated in 2011, they had to prove that at the time of the transaction she was mentally incapacitated as well. No such evidence as already stated was led before the trial court and as such the presumption is that P was in full control of her faculties when she signed the agreement for sale and transfer documents in the presence of an advocate. Indeed, this conclusion receives overwhelming support from the evidence of Hudson John Mandanga and Wilberforce Andatsi Asutsa who were both employees of P at the material time. They all attested to the mental fitness of P as she was able to give instructions, drive herself around and even host parties. There is also uncontroverted evidence that around about that time P also travelled in and out of the country, if the tickets purchased from the travel agent by the appellants on her behalf is anything to go by. Would a person with mental infirmity make such trips without any assistance or being accompanied? It is also hard for us to believe that the respondents would not have for over 6 years have been aware of the sale and transfer of the suit property



unless the respondents had abandoned their mother to her own devices. These strands of evidence were not seriously challenged by the respondents.

In any event, and assuming that indeed P suffered from mental infirmity, there is no evidence that the condition was permanent and continuous and or that the appellants were aware. There could as well have been lucid and transient moments making her competent to transact as at that time. It follows therefore that the respondents failed to prove P's mental incapacity at the time she entered the transaction and the appellants' knowledge of the same. Black's Law Dictionary defines undue influence as follows:

“persuasion, pressure or influence, short of actual force, but stronger than mere advice, that so overpowers the dominated party's free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or purposes of the dominating party.”

34. In the case of *Royal Bank of Scotland Vs. Etridge (No.2) [2002] A.C. 773* undue influence was defined as “the taking of unfair advantage, misuse of influence, abuse of trust and confidence and a connotation of impropriety.” The court held that:

“The law will investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was produced', in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (*Huguenin v Basely* (1807) 14 Ves Jun 273 at 300, [1803– 13] All ER Rep 1 at 13). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will.”

35. In the case of *Mombasa Bricks & Tiles Ltd & 5 Others Vs. Arvind Shah & 7 Others [2019] eKLR* the court stated that: Whether or not a transaction is the end result of undue influence is a matter of fact. The general rule is that he who asserts the wrong, bear the burden of proving the same.”

36. This Court in *Nabro Properties Limited Vs. Sky Structures Limited (Z.R. Shah) South fork Investments Limited ) [1986] eKLR* quoting from the decision in *All Card v Skinner [1887] 36 Ch D 145* held that undue influence can be classified into two groups; the first group being cases in which there has been some unfair and improper conduct, some coercion from outside, some form of cheating and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor. The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him-thus a person abusing his position. See also *Bank of Credit and Commerce International SA Vs. Aboody [1992] 4 All ER 955*.

37. The evidence led by the respondents seem to suggest the first group of the types of undue influence. It is common ground that the respondents in their amended plaint pleaded in the alternative undue influence, coercion and fraud against the appellants in their acquisition of the suit property and provided the particulars of the same. When a document containing contractual terms is signed, then, in the absence of undue influence, coercion, fraud, misrepresentation or non est factum, the party signing it is bound, and it is wholly immaterial whether he has read the document or not. (See: *L'Estrange vs. F Graucob Ltd [1934] 2 KB 394*). There is no doubt that P executed the agreement and the transfer save that now the respondents argue that such execution was obtained by way of undue influence, coercion and fraud.



38. The respondents testified that the appellants had been tenants and auditors of P for a long time and used to pay P's utilities from the rent before submitting the balance to her hence, a special relationship had developed between them. The appellants refuted this claim and stated that they were only doing their duty which did not amount to a special relationship. The question then arises as to whether a fiduciary relationship existed between the appellants and P. It is trite that in instances where a fiduciary relationship exists between parties a presumption of undue influence and coercion arises, (See: Trietel on the Law of Contracts 13<sup>th</sup> Edition, pg. 450 and the burden of rebutting such a presumption lies with the appellants. (See: *Burrell Vs. Burrell [1991] 106 N.S.R. (2d)*).
39. In the present case, we have not found any evidence contrary to the finding of the trial court to suggest that the appellants brought pressure to bear on the P in their bid to purchase the suit property from her. It was uncontroverted that P had put up the suit property for sale for a while without finding a suitable buyer before the appellants decided to enter the fray. We doubt that if indeed the appellants were exercising undue influence, coercion and fraud over P, they would have allowed her to advertise the suit property for sale for that long. The transaction was thereafter handled by a lawyer. We doubt that had there been any element of impropriety such as undue influence, coercion or fraud, we doubt that the lawyer would have carried on with the instructions. There is also evidence on record that A. B Shah an advocate had previously acted for her in other matters and if there had been undue influence, coercion or fraud could P not have mentioned it to him? It is also instructive to note that despite their allegations of undue influence, coercion and fraud, the respondents did not bother to join the lawyers involved in the suit despite the serious allegations they made against them. Yes, P may have relied on the appellants for carrying out some transactions on her behalf. However, that per se, did not mean that the appellants would unduly and fraudulently influence or coerce her decisions. As evidence of undue influence and fraud, the respondents claimed that the appellants purchased the suit property at gross under value. However, this fact is countered by the fact that P had put the suit property on sale for a long time without attracting any buyers until the appellants stepped in. That can only mean that the evidence led by the respondents as to the value of the suit property then was but a mere mirage.

Order 2 Rule 10(1) provides:

“Subject to sub rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing-

- (a) Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and
- (b) Where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.”

40. From the foregoing it is trite that undue influence, coercion and fraud has to be specifically pleaded. It also follows that such averments must be specifically proved by cogent evidence. We appreciate that the respondents indeed specifically pleaded those allegations. However, did they specifically prove them? It should be noted that in the initial plaint, the respondents had not made those allegations as the basis of annulling the transaction. However, after they had testified, they successfully made an application to amend the plaint to bring on board the above causes of action. It is instructive to note that upon such an amendment no evidence was called in support thereof. One would have expected that the respondents or any witness would be recalled to testify in support of the averments. But this was not



to be. In the absence of such evidence and as correctly observed by counsel for the appellants, those pleadings merely remained mere statements with no probative value. See *Daniel Toroitich Arap Moi Vs. Mwangi Mureithi & Another* (*supra*).

The argument by the respondents that those fresh causes of action were augmented by way of written witness statements and written submissions filed in court does not advance their case at all. Further evidence cannot be substituted by either averments in pleadings or submissions be they oral or written. It should also be appreciated that apart from specifically pleading undue influence, coercion and fraud, the same has to specifically proved by cogent evidence and not on the balance of probabilities as wrongly held by the trial court. Prove has to be higher than on the balance of probabilities but slightly lower than prove beyond reasonable doubt. In the case of *Vijay Morjaria Vs. Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. 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\*.” (Emphasis ours)

Regarding, the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows: -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (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 that 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; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.” (Emphasis ours)

In the absence of the evidence by any of the witnesses with regard to the aforesaid causes of action, we cannot hold that the respondents proved their case as required.

41. In the penultimate, we do not discern any element of undue influence, coercion or fraud in the manner in which the appellants transacted with P contrary to the finding by the trial court. Having returned the verdict that P was in good stead of mental *health*, and that no undue influence, coercion or fraud was perpetrated on her by the appellants at the time of sale and transfer of the suit property, the transaction cannot be voided on those grounds. On the counterclaim, it was conceded that the appellants incurred expenses on behalf of P. The appellants offered unchallenged evidence in support of the counterclaim. Indeed, it is also common ground that the appellants kept meticulous records of those expenses. There is also evidence that P defaulted in the payment of the rent. Infact, it was this state of affairs that was the harbinger to the suit. Attempts by the appellants to levy distress for rent for the amounts outstanding were thereby thwarted. We therefore have no hesitation whatsoever in finding that the counterclaim was proved as required. We would accordingly enter judgment for the appellants on the counterclaim as prayed in their defence and counterclaim.
42. In conclusion we allow the appeal, set aside the judgment and decree of the Environment and Land Court dated 14<sup>th</sup> March, 2019 in its entirety. In lieu thereof we order the dismissal of the suit and enter judgment for the appellants for Kshs. 3,563,973/69, being rent arrears, electricity, security and water charges and mesne profits at the rate of Kshs, 66,500 per month from October 2011 until vacant



possession is delivered. The appellants shall have the costs of the main suit in the court below as well as on the counterclaim. The appellants too shall have the costs of this appeal.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

