



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MAKHANDIA, GATEMBU & MURGOR, JJA)**

**CIVIL APPEAL NO. 194 OF 2010**

**ROSE WAKUTHI MWANGI NJUNU.....APPELLANT**

*(Suing as Administrator of the Estate of the late JULIUS W. MWANGI NJUNU)*

**AND**

**EDWARD KITHINJI.....1<sup>ST</sup> RESPONDENT**

**HOUSING FINANCE COMPANY OF KENYA.....2<sup>ND</sup> RESPONDENT**

**ABDILLAHI WARSAME ALI T/A NADHIA AUCTIONEERS.....3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgment and Order of High Court of Kenya*

*at Milimani Commercial Court, Nairobi (Kimaru, J) made on 14<sup>th</sup> October, 2009*

**in**

**HCCC NO. 504 OF 2005)**

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**JUDGMENT OF THE COURT**

**Introduction**

1. This is an appeal from the judgment of the High Court (Kimaru, J) delivered on 14<sup>th</sup> October 2009 dismissing the appellant's suit for nullification of the 1<sup>st</sup> respondent's title to the property known as title number Nairobi/Block 99/244 Nairobi.
2. The suit giving rise to this appeal, was instituted by Rose Wakuthii Mwangi Njunu, the widow and one of the administrators of the estate of Julius W. Mwangi Njunu, deceased who died on 5<sup>th</sup> July 2005. Rose Wakuthii Mwangi Njunu died on 11<sup>th</sup> January 2016 during the pendency of this appeal. Robert Nguare Mwangi, who was administering the estate of Julius W. Mwangi Njunu jointly with Rose Wakuthii Mwangi Njunu, applied to the Court by an application filed on 26<sup>th</sup> September 2016, to be substituted as the appellant in place of Rose Wakuthii Mwangi and an order for substitution was duly granted by the Court. Consequently, for purposes of this judgment, "the appellant" refers to Robert Nguare Mwangi; "the deceased" refers to Julius W. Mwangi Njunu; and "the widow" refers to Rose Wakuthii Mwangi Njunu.

**The facts**

3. Until 12<sup>th</sup> May 2005, the property known as title number Nairobi/Block 99/244 situated in Runda Estate Nairobi (the suit property) was owned and registered in the name of the deceased. However, on that date, 12<sup>th</sup> May 2005, the ownership of the property changed when the deceased transferred it to Edward Kithinji, the 1<sup>st</sup> respondent pursuant to an agreement for sale entered into between the deceased, as vendor, and the 1<sup>st</sup> respondent, as the purchaser
4. Approximately two months after the property was transferred but before the 1<sup>st</sup> respondent could take possession of the property, the

deceased died on 5<sup>th</sup> July 2005. In a bid to have the transfer of the property in favour of the 1<sup>st</sup> respondent reversed, the widow (who was also a joint administrator of the estate of the deceased) commenced a suit before the High Court by a plaint dated 15<sup>th</sup> September 2005. In that suit the widow contended that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had conspired to “*fraudulently*” “*grab*” the suit property. She accordingly sought relief in her plaint from the court for: a declaration that the sale and transfer of the suit property to the 1<sup>st</sup> respondent was invalid; an injunction to restrain the respondents “*from trespassing, evicting or in any manner interfering*” with her possession of the suit property; and an order for the “*re-transfer*” of the suit property into her name.

5. But how did things get there? The evidence before the trial court shows that by an instrument of legal charge dated 2<sup>nd</sup> December 1988, the deceased charged the property to Housing Finance Company of Kenya, the 2<sup>nd</sup> respondent, to secure an advance of Kshs. 6,300,000.00 together with interest at the rate of 26% per annum to enable him complete construction of a house on the suit property. The deceased ran into financial difficulties, was unable to service the loan, and fell into arrears. As at May 2004, the outstanding debt had risen to Kshs. 19,390,386.60. Following negotiations between the deceased and the 2<sup>nd</sup> respondent sometime in November 2004, it was agreed that the suit property be put up for sale provided that a price of not less than Kshs. 12,000,000.00 would be obtained out of which Kshs.1,500,000.00 ( less any charges that would be incurred on the transfer of the property) was to be paid to the deceased and the balance applied towards payment of the loan with the 2<sup>nd</sup> respondent.

6. On 8<sup>th</sup> February 2005, the deceased, with the approval of the 2<sup>nd</sup> respondent, entered into an agreement for sale of the property with the 1<sup>st</sup> respondent at the price of Kshs. 12,000,000.00. Under the agreement, Kshs. 10,500,000.00 was to be paid to the 2<sup>nd</sup> respondent in full satisfaction of the debt owed on the security of the suit property. The balance of Kshs.1,500,000.00 was to be paid to the deceased, as the vendor, upon registration of the transfer in favour of the 1<sup>st</sup> respondent. On the strength of a professional undertaking by the 1<sup>st</sup> respondent’s advocates, the 2<sup>nd</sup> respondent’s legal charge over the property was discharged and the transfer of the property in favour on the 1<sup>st</sup> respondent registered on 12<sup>th</sup> May 2005.

7. There was a tussle between the 1<sup>st</sup> and 2<sup>nd</sup> respondents as to whether the balance of the purchase price was payable to the 2<sup>nd</sup> respondent before or after delivery of vacant possession to the 1<sup>st</sup> respondent. Ultimately, the 2<sup>nd</sup> respondent agreed to pressurize the deceased and his family to vacate the suit property. It agreed to pay the deceased Kshs. 200,000.00 to facilitate his movement from the suit property and the deceased agreed to vacate by 18<sup>th</sup> July 2005. Unfortunately, and as already indicated, the deceased died on 5<sup>th</sup> July 2005.

8. Thereafter, the widow sought extension of time from the 2<sup>nd</sup> respondent to vacate the suit property. She was given until end of August 2005 to do so. Meanwhile, in a bid to secure vacant possession the 3<sup>rd</sup> respondent obtained a break in order from a subordinate court on the basis of which the widow and her family were temporarily evicted from the suit property before being restored into possession on 16<sup>th</sup> September 2005 through a court order.

9. On his part, the 1<sup>st</sup> respondent instituted suit in the High Court against the widow on 19<sup>th</sup> October 2005 being High Court Civil Case No. 610 of 2005 seeking an order of vacant possession. His interlocutory application to secure possession in that suit was not successful and an appeal to this Court was lodged. The current status regarding that suit or appeal is not clear.

10. Ultimately, the advocates for the 1<sup>st</sup> respondent paid the balance of the purchase price of Kshs. 8,500,000.00 to the 2<sup>nd</sup> respondent on 16<sup>th</sup> September 2008 during the pendency of the suit before the High Court. The 2<sup>nd</sup> respondent also received, upon the death of the deceased, an amount of Kshs.5,800,000.00 from an insurance company being payment of the proceeds of mortgage protection insurance policy.

11. Based on the foregoing, the trial court found as a fact that it was the deceased, as opposed to the 2<sup>nd</sup> respondent, who sold the property to the 1<sup>st</sup> respondent; and that there was no evidence to support the appellant’s claims that the suit property was sold by the 2<sup>nd</sup> respondent to 1<sup>st</sup> respondent in exercise of its statutory power of sale. The court also found: that the widow was required to give vacant possession of the suit property to the 1<sup>st</sup> respondent; that as the insurance premiums were paid by the 2<sup>nd</sup> respondent, it was entitled to receive the proceeds of mortgage protection insurance policy; that the transfer of the suit property to the 1<sup>st</sup> respondent resulted in the settlement of the debt to the 2<sup>nd</sup> respondent; that the 1<sup>st</sup> respondent as the registered owner of the suit property is the legal owner thereof entitled to possession and that the widow should vacate the suit property within 45 days from the date of the judgment failing which the 1<sup>st</sup> respondent would be at liberty to secure forceful and lawful eviction of the widow from the suit property. The trial court however declined to award damages to the 1<sup>st</sup> respondent on grounds that the 1<sup>st</sup> respondent had unlawfully sought to evict the widow from the suit property.

12. Aggrieved, the widow lodged the present appeal but regrettably died before it was concluded. The 1<sup>st</sup> respondent has cross appealed contending that the Judge erred in declining to award him damages against the widow for alleged unlawful occupation of the property.

### **The appeal and submission**

13. There is a disconnect between the widow’s case as pleaded before the trial court; the complaints set out in the memorandum of appeal; and the arguments advanced in the appellant’s written submissions. The widow’s case as pleaded in the plaint and as amended on 24<sup>th</sup> November 2005 was that: the deceased obtained a loan from the 2<sup>nd</sup> respondent on the strength of a legal charge over the suit property; that the deceased fell sick and started experiencing financial problems; that the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent’s then conspired to fraudulently “*grab*” the suit property; that the 2<sup>nd</sup> respondent fraudulently sold the suit property to the 1<sup>st</sup> respondent; that the 2<sup>nd</sup> respondent could not as a mortgagor illegally sell the suit property; that the 2<sup>nd</sup> respondent never served statutory notices under the Registered Land Act; that the sale agreement entered into with the 1<sup>st</sup> respondent is not binding; that the discharge of charge and transfer were fraudulently done in breach of the provisions of the Registered Land Act; that the interest charged under the facility is excessive punitive and unconscionable; and that all

transactions are tainted with illegality and fraud.

14. In the memorandum of appeal however the complaints are that the Judge failed to appreciate the import of Section 4 of the Registered Land Act; that the transfer was executed in breach of Section 110 of the Registered Land Act as the respondent's identity card numbers were inserted in their absence; that the legal charge was similarly invalid; that the Judge unfairly declined an application for adjournment; that the Judge failed to appreciate that under the agreement for sale time was of the essence and there was accordingly breach of the agreement by the respondents; that the Judge failed to appreciate that the 2<sup>nd</sup> respondent only advanced Kshs. 5.8 million as opposed to Kshs. 6.3 million as set out in the charge.

15. Urging the appeal before us, Mr. P. N. Mugo learned counsel for the appellant relied on the written submissions and argued that under the agreement for sale between the deceased and the 1<sup>st</sup> respondent, completion should have been within 90 days; that time was of the essence to the contract; that the amount that was to be paid to the deceased by the 1<sup>st</sup> respondent was wrongly paid to the 2<sup>nd</sup> respondent in breach of the agreement, and the family of the deceased did not therefore receive any payment; that in the circumstances the widow could not be blamed for refusing to vacate the suit property; that in addition, the 2<sup>nd</sup> respondent also received payment from the insurance company and the purchase price paid by the 1<sup>st</sup> respondent should therefore be refunded to him and the transfer of the suit property reversed.

16. In opposing the appeal, Ms. Osoro learned counsel for the 1<sup>st</sup> respondent relied on the written submissions which she briefly highlighted. It was submitted that the trial Judge appreciated the dispute between the parties and properly evaluated and analyzed the evidence and arrived at the correct conclusion that the widow had not established her case to the required standard; that fraud, on which the case was founded was not proved. It was submitted that it was clear from the evidence that the contract of sale between the deceased and the 1<sup>st</sup> respondent was entered into during the lifetime of the deceased; that the parties were represented by advocates in the transaction who had oversight over the drawing and execution of the agreement and the transfer forms; that the complaints that the agreement for sale and the transfer were not properly executed are an afterthought and have no merit; that the widow admitted in the course of her testimony that the deceased, her late husband, took advances from the 2<sup>nd</sup> respondent and negotiated and entered into the sale agreement with the 1<sup>st</sup> respondent; and that in the circumstances the complaint that the transaction was fraudulent has no basis.

17. Adverting to the cross-appeal, counsel for the 1<sup>st</sup> respondent faulted the Judge for not awarding the 1<sup>st</sup> respondent damages for trespass. It was submitted that the widow admitted having sought an extension of time to stay in the suit property; that she stayed on the suit property well beyond the agreed time; that she thereby became a trespasser liable to pay rent; and that the Judge should therefore have awarded damages proposed at Kshs. 40,000 per month with effect from the date of the transfer until the time she vacated.

18. Ms. Osoro holding brief for Mr. Paul Ogunde for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents relied on their written submissions in which they urged that there is no dispute that the deceased charged the suit property to the 2<sup>nd</sup> respondent; that the deceased defaulted in the payment of the loan; that the deceased agreed to sell the property to the 1<sup>st</sup> respondent in order to settle the indebtedness to the 2<sup>nd</sup> respondent; that the allegations of fraud or wrongful or irregular transfer of the suite property are wholly unfounded and that the Judge was right in dismissing the suit.

### **Analysis and determination**

19. We have considered the appeal and the submissions by counsel. Although the memorandum of appeal contains 23 grounds of appeal, the main issue in our view is whether the learned trial Judge erred in concluding that the widow had failed to prove her case to the required standard bearing in mind that the principal complaint before the High Court was that the sale and transfer of the property to the 1<sup>st</sup> respondent was fraudulent.

20. The standard of proof where a party alleges fraud is high. In *Vinesh Emporium Gudka vs Keshavji Jivraj Dodhia [1982] eKLR* Law JA stated that, "allegations of fraud must be strictly proved, more than a mere balance of probabilities is required, see *RG Patel v Lalji Makanji [1957] EA 314.*" See also the recent case of *Denis Noel Mukhulo Ochwada & another vs Elizabeth Murungari Njoroge & another [2018] eKLR*. And in *Nancy Kahoya Amadiva vs Expert Credit Ltd & another [2015] eKLR* where, as in this case, allegation of fraud was made, the Court expressed itself thus:

***"As they are serious allegations, the onus is on the party alleging fraud to provide evidence to the court that rises to the standard of proof which was underscored by this Court in Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR as being beyond that of a balance of probabilities. In that appeal, the court rendered itself as follows:***

***"The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case."***

21. In addressing the question whether the appellant's case was proved to the required standard we are entitled, this being a first appeal, to review the evidence and to draw our own conclusions. [See *Selle v. Associated Motor Boat Company [1968] E.A. 123*]. The widow's case before the trial court rested entirely on the foundation that the 2<sup>nd</sup> respondent, as chargee, conspired with, and sold the suit property to the 1<sup>st</sup> respondent. The widow pleaded that the sale of the suit property and the eventual transfer of the same to the 1<sup>st</sup> respondent was fraudulent and that the same should therefore be nullified and the suit property re-transferred to her. What then was the evidence that was presented before the trial court to support the claim?

22. An agreed bundle of documents was submitted before the trial court to which witnesses referred in the course of their testimony. Included in the agreed bundle of documents were: an application by the deceased to the 2<sup>nd</sup> respondent dated 16<sup>th</sup> April 1998 as well as a mortgage application form applying for mortgage facilities; an offer by the 2<sup>nd</sup> respondent to the deceased to advance a loan of Kshs. 6,300,000.00; an

instrument of legal charge over the suit property in favour of the 2<sup>nd</sup> respondent registered on 2<sup>nd</sup> December 1998; extensive correspondence exchanged between the 2<sup>nd</sup> respondent's advocates and the deceased between November 2001 and December 2004 concerning default by the deceased to make payments under the charge and containing proposals by the deceased for regularizing the account; agreement for sale between the deceased and the 1<sup>st</sup> respondent dated 8<sup>th</sup> February 2005 ( erroneously indicated as 2004-an obvious error based on the antecedent correspondence); Certificate of Insurance dated 14<sup>th</sup> July 2004 issued to the 2<sup>nd</sup> respondent by The Heritage A.I.I Insurance as lead insurer; correspondence between the advocates for the parties in connection with payment of the purchase price and completion formalities; the Discharge of charge dated 7<sup>th</sup> April 2005 over the suit property executed by the 2<sup>nd</sup> respondent and registered on 12<sup>th</sup> May 2005; the Transfer of lease in favour of the 1<sup>st</sup> respondent dated 7<sup>th</sup> April 2005 duly executed by the deceased and registered on 12<sup>th</sup> May 2005; Certificate of Lease in respect of the suit property issued to the 1<sup>st</sup> respondent on 12<sup>th</sup> May 2005; correspondence between advocates for the parties spanning the period June 2005 and August 2005 concerning the delivery of vacant possession of the property to the 1<sup>st</sup> respondent and the release of the purchase price; agreement dated 23<sup>rd</sup> June 2005 between the deceased and the 2<sup>nd</sup> respondent in which the 2<sup>nd</sup> respondent agreed to release Kshs. 200,000.00 to the deceased "to facilitate his moving from the property" and to vacate the "premises by the 18<sup>th</sup> of July 2005"; a hand written letter by the widow dated 25<sup>th</sup> July 2005 addressed to the 2<sup>nd</sup> respondent seeking extension of time to vacate "from the agreed 30<sup>th</sup> July 2005 to September 2005"; undated agreement between the widow and the 2<sup>nd</sup> respondent in which the widow agreed to "vacate the premises without fail on or before 30<sup>th</sup> August 2005."

23. The widow testified as PW1. She stated that her late husband, the deceased, applied for, and was granted a loan facility by the 2<sup>nd</sup> respondent that was secured by a legal charge registered over the suit property on 2<sup>nd</sup> December 1998; that the deceased defaulted in the repayment of the loan whereupon the 2<sup>nd</sup> respondent threatened to exercise its power of sale; that in order to forestall a forced sale by the 2<sup>nd</sup> respondent, the deceased undertook to look for a buyer for the suit property; that having found a buyer, the deceased entered into an agreement for sale with the 1<sup>st</sup> respondent dated 8<sup>th</sup> February 2005( wrongly indicated as 2004) with the approval of the 2<sup>nd</sup> respondent in which the deceased agreed to sell the suit property to the 1<sup>st</sup> respondent for Kshs. 12,000,000.00 on terms that Kshs. 10,500,000.00 was to be paid to the 2<sup>nd</sup> respondent in satisfaction of the debt owed to the 2<sup>nd</sup> respondent and the balance of Kshs. 1,500,000.00 to be paid to the deceased upon registration of the transfer in favour of the 1<sup>st</sup> respondent. She testified that the suit property was transferred to the 1<sup>st</sup> respondent before the consideration was paid; that under the agreement for sale, vacant possession was to be given upon payment of the purchase price in full; that she could not give vacant possession because the buyer had not completed paying the purchase price.

24. The widow testified further that upon the death of her husband, Insurance companies paid Kshs. 8,500,000.00 to the 2<sup>nd</sup> respondent; that she filed suit because the agreement for sale was not completed and that she was ready to pay the debt owing in order to retain the suit property.

25. Joseph Kamau Kania, the legal services manager testified on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. He stated that the 2<sup>nd</sup> respondent extended a construction loan facility of Kshs. 6,300,000.00 to the deceased that was secured by a legal charge over the suit property; that the loan was repayable by monthly instalments but the deceased defaulted in repayment and ran into arrears; that the 2<sup>nd</sup> respondent then instructed its advocates to recover the outstanding amount; that the deceased made proposals for the repayment of the debt but did not honor the proposals; that the 2<sup>nd</sup> respondent then served a statutory notice on the deceased intending to exercise its power of sale under the legal charge; that the deceased then approached the 2<sup>nd</sup> respondent with a proposal to sell the suit property privately to which request the 2<sup>nd</sup> respondent acceded; that with the approval of the 2<sup>nd</sup> respondent, the deceased entered into an agreement for sale with the 1<sup>st</sup> respondent on the terms already mentioned.

26. According to Mr. Kania, the purchase price under the agreement for sale was to be paid upon successful registration of the transfer in favour of the 1<sup>st</sup> respondent and on that basis, the 2<sup>nd</sup> respondent executed a discharge of charge based on a professional undertaking given by the advocates for the 1<sup>st</sup> respondent to pay the purchase price upon registration of the transfer; that upon registration of the transfer of the suit property in favour of the 1<sup>st</sup> respondent, the advocates for the latter insisted on vacant possession of the suit property before releasing the purchase price; that the deceased did not move out of the suit property; that the 2<sup>nd</sup> respondent entered into an agreement with the deceased to vacate the suit property by 18<sup>th</sup> July 2005 but unfortunately the deceased died before then; that upon the death of the deceased, his widow applied for extension of time within which to vacate the suit property which was granted on humanitarian grounds and the widow given up 30<sup>th</sup> August 2005 to vacate but she did not do so.

27. The witness further testified that the property was insured for Kshs. 12,000,000.00 and that upon the death of the deceased, the 2<sup>nd</sup> respondent received Kshs. 5,819,625.00 from the insurer which amount was credited to the mortgage account; that the payment from the insurer did not cover arrears; that the purchase price was not released to the 2<sup>nd</sup> respondent until 16<sup>th</sup> September 2008 when the 2<sup>nd</sup> respondent threatened to enforce the professional undertaking given by the advocates for the 1<sup>st</sup> respondent. He stated that the 2<sup>nd</sup> respondent was prepared to pay to the widow of the deceased the amount of Kshs. 1,500,000.00 in accordance with the sale agreement less expenses of Kshs. 560,431.00 provided the widow surrendered possession of the suit property; that under the terms of the agreement for sale, vacant possession could only be given when the full purchase price was paid.

28. In his view, and contrary to claims by the widow, the agreement for sale between the deceased and the 1<sup>st</sup> respondent was properly executed; the deceased was under an obligation to pay insurance premiums but did not pay any of the insurance premium; that the family of the deceased may have been entitled to the insurance money if the deceased had paid the insurance premiums.

29. On his part, Edward Githinji Rintagu, the 1<sup>st</sup> respondent testified that he was looking for a suit property to purchase in 2004 upon his return to Kenya; that he became aware that the property was up for sale through an estate agent; that he went to view the suit property and deceased and the widow gave him a tour of the property; that he made an offer to the deceased to purchase the property and after negotiations a price of Kshs. 12,000,000.00 was agreed upon; that he entered into a sale agreement with the deceased and the suit property was subsequently transferred to him and a title deed issued in his favour; that after the transfer, the deceased asked for time to move out and through the 2<sup>nd</sup> respondent was given up to 18<sup>th</sup> July 2005 to do so; that he was then informed by the 2<sup>nd</sup> respondent that the deceased had

passed away and the widow requested for time to move out and was given up to 30<sup>th</sup> August 2005. He stated that he did not agree that the widow would remain in possession beyond that time; that he was forced to pay monthly rent of Kshs. 40,000.00 elsewhere and prayed for an order of vacant possession and general damages.

30. Based on those testimonies and the documents produced before the trial court, there can be no doubt that the deceased was granted a construction facility by the 2<sup>nd</sup> respondent that was secured by a legal charge over the suit property; that the deceased defaulted in the repayment of the loan whereupon the 2<sup>nd</sup> respondent instructed its advocates to realize the security; that to avoid a forced sale of the suit property, the deceased sought the approval of the 2<sup>nd</sup> respondent to sell the suit property; that on 8<sup>th</sup> February 2005 the deceased entered into the agreement for sale with the 1<sup>st</sup> respondent whereby the deceased agreed to sell the suit property for a consideration of Kshs.12,000,000.00 on the terms and conditions set out in that agreement; that although the 2<sup>nd</sup> respondent was not privy to the agreement for sale, it did as chargee, give its approval to the sale.

31. In light of that evidence, the pleas by the widow of the deceased in the amended plaint that the 2<sup>nd</sup> respondent and the 1<sup>st</sup> respondent “conspired to grab [the suit property] fraudulently”; that the 2<sup>nd</sup> respondent “sold the house” to the 1<sup>st</sup> respondent; and that the transactions were tainted with illegalities and fraud are not supported by any evidence whatsoever. Accordingly, we are entirely in agreement with finding by the learned trial Judge that there was no evidence to support the claim.

32. Upon establishment of the fact that the deceased freely entered into the agreement for sale with the 1<sup>st</sup> respondent, the substratum of the widow’s case collapsed. The result is that the appeal is devoid of any merit and the same is dismissed.

33. Adverting to the 1<sup>st</sup> respondent’s cross appeal, there is, as already pointed out, a separate suit that the 1<sup>st</sup> respondent instituted against the widow, namely High Court Civil Case No. 610 of 2005, where in addition to seeking an order for possession of the suit property he also seeks mesne profits against the appellant. It would appear that suit is pending determination in the lower court and we must refrain from saying more on the matter save to state that the trial Judge gave sound reasons for rejecting the claim that have not been impeached. Accordingly, the cross appeal fails and is dismissed.

34. To recap, the conclusion is that the appeal fails and is hereby dismissed. The cross appeal also fails and is hereby dismissed. Alive to the fact that the widow died during the pendency of the appeal, we order that each party shall bear its own costs of the suit in the High Court and the costs of this appeal and of the cross appeal.

Orders accordingly,

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of February, 2019.**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*Copy of the original.*

**DEPUTY REGISTRAR**