



REPUBLIC OF KENYA



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**Wangui v Munyua & another (Environment and Land Appeal  
E031 of 2022) [2024] KEELC 4506 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4506 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E031 OF 2022**

**LA OMOLLO, J**

**JUNE 6, 2024**

**BETWEEN**

**SALOME WANGUI ..... APPELLANT**

**AND**

**PATRICK NDEGWA MUNYUA ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR- NAKURU COUNTY ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal arising from the judgement of Hon. R. KEFA  
delivered on 27th July, 2022 in Nakuru C.M ELC NO 240 OF 2018)*

**JUDGMENT**

**Introduction.**

1. By a Memorandum of Appeal dated 25<sup>th</sup> August, 2022 the Appellant appeals against the judgment of Hon. R. KEFA Principal Magistrate which was delivered on 27<sup>th</sup> July, 2022 in ELC No 240 of 2018, Nakuru.
2. The Memorandum of Appeal contains a whopping 21 grounds! They are as follows:
  1. That the Learned Trial Magistrate erred in law and in fact in failing to fully analyze and evaluate the evidence as the record thus reaching the wrong decision.
  2. That the Learned Trial Magistrate erred in law in her judgment delivered on 27<sup>th</sup> July, 2022 where she truly misapprehended the Appellant's pleadings, evidence and submissions, failing to fully analyze and evaluate the evidence as the record thus reaching the wrong decision.
  3. That the Learned Trial Magistrate fundamentally erred in law when the same (sic) failed to consider serious issues raised by the Appellant in her written submissions dated the 11<sup>th</sup> day of March, 2022.



4. That the Learned Trial Magistrate erred in law and in fact in failing to engage the rationale that fraud is a serious accusation which procedurally must be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.
5. That there exists no nexus between the Learned Principal Magistrate's finding of granting the prayers sought in the Plaint, the issues framed thereof and the evidence given:
  - a. On the issues as framed, the Learned Principal Magistrate did not frame an issue of fraud.
  - b. There was no evidence of fraud adduced.
  - c. The Learned Principal Magistrate ended up making a finding on fraud.
6. That the Learned Trial Magistrate erred in law and fact in failing to find that there is serious error apparent on the face of the Record which error goes to the substratum of the said suit thus causing a miscarriage of justice.
7. That the Learned Principal Magistrate erred in Law in making zero finding of fraud by failing to realize that the Plaintiff had an obligation to provide evidence that would best facilitate proof on a litigated factual issue.
8. That the Learned Trial Magistrate erred in fact and law in finding and holding that the execution of the purported Land Sale Agreement between the Appellant's deceased husband and the Respondent (which was disputed) without any further instruments of conveyance, was sufficient to confer upon the Respondent ownership rights over the suit property in violation of the principles of conveyance and the provisions of the *Land Registration Act*, No 3 of 2012 which denote the process and instruments of conveyance.
9. That the Learned Trial Magistrate erred in fact and law in finding and holding that the Respondent herein had proved his claim anchored on fraud as against the Appellant herein whereas the Respondent did not include instruments leading to being registered as the proprietor and/or owner of the suit property.
10. That in finding and holding that the Respondent had proved his case based on fraud as against the Appellant, the Learned Trial Magistrate misconceived the law pertaining to fraud and the requisite standard of proof, in respect of claims and/or allegations of fraud. Consequently, the finding and holding of the learned trial Magistrate on burden and standard of proof, was erroneous and/or misconceived.
11. That the Learned Trial Magistrate erred in fact and law, in paying undue premium to the evidence by the Appellant and in particular, the documents alluded to by the said witness, even though the suit property herein had lawfully been approved for registration to and/or in favor of the Appellant.
12. That the Learned Trial Magistrate erred in fact and law, in believing the evidence of the Respondent without subjecting the said evidence to suitable interrogation and/or analysis and thereby failed to discern the fraudulent conduct on the part of the said witness, who was hitherto party and/ or privy to the alienation of the suit property in favor of the Appellant.
13. That the Learned Trial Magistrate erred in law in finding and holding that the Respondent herein, whose purported rights and/or interests over and in respect of the suit property, could supersede and/or surpass the Appellant's herein, whose rights and/or interests over the suit



property had been duly registered and thereby issued with a title deed contrary to the provisions of the [Land Registration Act](#), No 3 of 2012 concerning priority of registrable interests over parcels of land. In this regard the learned trial magistrate, misconceived the import and law on registration.

14. That the Learned Trial Magistrate erred in fact and law, in finding and holding that the Respondent's suit in the (sic) was proven on a balance of probabilities, which was erroneous in so far as the standard of proof on a claim of fraud, surpasses the balance of probabilities. Consequently, the Learned Trial Magistrate failed to properly direct and/or address her judicial mind to the incidence and standard of proof.
  15. That the Learned Trial Magistrate failed and/or neglected to cumulatively and/or exhaustively evaluate the entire evidence (both oral and documentary) on record and hence arrived at an erroneous and slanted conclusion to and in contradiction of the evidence on record.
  16. That the Learned Trial Magistrate erred in law in disregarding and/or ignoring the submissions mounted and/or filed by the Appellant herein without assigning any plausible explanation and/or reason, whatsoever. Consequently, the Appellants herein have been subjected to unfair treatment and hence suffered a miscarriage of justice.
  17. That the judgment of the Learned Trial Magistrate is convoluted and the issues raised by the learned trial magistrate are slanted and thereby camouflaged the judicial mind of the trial court from appreciating, discerning and/or understanding the true nature of the dispute. Consequently, the judgment of the Learned Trial Magistrate is a nullity.
  18. That the Learned Trial Magistrate failed to itemize issues for determination and thus failed to address and /or analyze the issues for determination either seriatim or at all thus failed to render any determination on the required itemized issues and the reasons for (sic) such determination. Consequently, the judgment of the Learned Trial Magistrate contravenes the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010.
  19. That it is clear that the Learned Principle Magistrate erred in law and facts by misapprehending the evidence of the Appellant, and (with due respect) gave a judgment in favour of the Respondent attaching no conjunct evidence leading to her finding.
  20. That the Learned Principal Magistrate having not made any finding on fraud erred in law in granting prayer (a) and (b) of the Plaintiffs' *Plaint*. Her Honour's inevitable finding would have been to dismiss the Plaintiff's entire case.
  21. That the Learned Trial Magistrate erred in law by awarding the Plaintiff (now Respondent) costs of the case plus interest on such costs. There was no basis or some exceptional circumstance for the learned Principle Magistrate to award interests on costs.
3. The Appellant prays that the Honourable court:
- a. Upholds this Appeal and set aside or quash all the findings of the Learned Principal Magistrate contained in the Judgment delivered on 27<sup>th</sup> July, 2022 in Nakuru C.m Elc No 240 Of 2018 (patrick Ndegwa Munyua Vs Salome Wangui & The Land Registrar- Nakuru County).
  - b. Substitute the Judgment delivered on 27<sup>th</sup> July, 2022 by HON. RUTH KEFA (Principal Magistrate) in Nakuru C.m. Elc No 240 Of 2018 (patrick Ndegwa Munyua Vs Salome Wangui & The Land Registrar- Nakuru County) with an order dismissing the said suit with costs to the 1<sup>st</sup> Defendant therein.



- c. That the Appellant be awarded costs of this Appeal.

### **Factual Background.**

4. The suit before the subordinate court was commenced vide a Complaint dated 13<sup>th</sup> August, 2015.
5. The Plaintiff (now 1<sup>st</sup> Respondent) averred that at all material times, he was the registered owner of all that parcel of land known as BAHATI/KABATINI BLOCK 1/1559 and he had been duly issued with a title deed. to the parcel of land herein.
6. He averred that on unknown dates the Defendant falsified document relating to the ownership of the parcel of land herein. He averred that the documents were later presented at the offices of the 2<sup>nd</sup> Defendant (now 2<sup>nd</sup> Respondent) and a conveyance was registered in the names of the 1<sup>st</sup> Defendant (now Appellant).
7. The Plaintiff (now 1<sup>st</sup> Respondent) averred that he never sold the interest in the land to the 1<sup>st</sup> Defendant (now Appellant) and he has never executed any disposition of his interest in the land in the names of the 1<sup>st</sup> Defendant or any other person. He averred that the registration of a disposition in the names of the 1<sup>st</sup> Defendant (now Appellant) by the 2<sup>nd</sup> Defendant (now 2<sup>nd</sup> Respondent) was done fraudulently with the active participation of the Principal land Registrar Nakuru county.
8. The Plaintiff (now 1<sup>st</sup> Respondent) set out the particulars of fraud as:
  - a. The 1<sup>st</sup> Defendant (now Appellant) was fraudulent in that she prepared and presented documents for the conveyance of the title herein while she had neither purchased the land or been gifted the same by the Plaintiff.
  - b. The 1<sup>st</sup> Defendant (now Appellant) was fraudulent in that she presented false transfer and/or documents for the transmission of the interest in land to the 2<sup>nd</sup> Defendant (now 2<sup>nd</sup> Respondent).
  - c. The 2<sup>nd</sup> Defendant (now 2<sup>nd</sup> Respondent) acted fraudulently in that it registered an interest in the parcel of land herein while title documents had been issued in the names of the plaintiff.
  - d. The 2<sup>nd</sup> Defendant (now 2<sup>nd</sup> Respondent) acted fraudulently in issuing two title documents.
  - e. The 2<sup>nd</sup> Defendant (now 2<sup>nd</sup> Respondent) acted fraudulently in registering a disposition against a title while there was no document to demonstrate there was an actual disposition by the plaintiff, the registered owner herein.
9. The Plaintiff (now 1<sup>st</sup> Respondent) averred that the entry against the register of the 1<sup>st</sup> Defendant (now Appellant) as the registered owner was tainted by fraud and the entry ought to be rectified and the title issued in favor of the 1<sup>st</sup> Defendant revoked by an order of the court.
10. The Plaintiff (now 1<sup>st</sup> Respondent) averred that before the presentation of this suit, relatives of the 1<sup>st</sup> Defendant (now Appellant) had invaded the parcel of land and the invasion precipitated the filing of civil case number 830 of 2008-Patrick Ndegwa Munyua vs Beth N Maina & Another. He averred that the matter was heard and the court declared that the Plaintiff is the registered owner of the land.
11. He averred that the 1<sup>st</sup> Defendant (now Appellant) is a co-perpetrator of fraud after her relatives failed to successfully claim the parcel of land belonging to the Plaintiff. The Plaintiff (now 1<sup>st</sup> Respondent) averred that this claim arose within the local limits of this court's jurisdiction and this court is competent to try and dispose off the matter.



12. The 1<sup>st</sup> Respondent sought the following orders against the Appellant and the 2<sup>nd</sup> Respondent:
  - a. Rectification of the register in respect of the parcel of land known as BAHATI/KABATINI BLOCK 1/1559 by removing the entry made in favour of the 1<sup>st</sup> Defendant and entering the names of the plaintiff as the registered owner.
  - b. An order that the title document issued in favor of the 1<sup>st</sup> Defendant be revoked.
  - c. Costs of the suit.
13. The 1<sup>st</sup> Defendant (now Appellant) filed her statement of defence and counterclaim dated 17<sup>th</sup> December, 2018. In the statement of defence, the 1<sup>st</sup> Defendant (now Appellant) denied the allegations in the plaint. In the counter-claim, she averred that she is the rightful owner of the suit land and has been BAHATI/KABATINI BLOCK 1/1559 dated 28<sup>th</sup> December, 2011 which is under her name and held by herself and that the said title is legal and valid.
14. The 1<sup>st</sup> Defendant (now Appellant) averred that she has lived and cultivated the land for over 40 years with her late husband Mr. Gabriel Kariuki Mathenge. She averred that the suit land was allotted to her late husband by NDEFO LIMITED by way of Certificate for Ordinary Shares dated 24<sup>th</sup> July, 1978 and he later on acquired a title for the suit land.
15. The 1<sup>st</sup> Defendant (now Appellant) averred that she is aware that the Plaintiff (now 1<sup>st</sup> Respondent) had a loan agreement with her late husband under which the Plaintiff was issued with the Original Title for the suit land which he was to return upon clearance of the said loan by her late husband.
16. The 1<sup>st</sup> Defendant (now Appellant) averred that she has never in all the years she has lived in the suit land transferred interest in the land to the Plaintiff (now 1<sup>st</sup> Respondent). She averred that the Plaintiff failed to return the original title issued to him upon clearance of the loan borrowed by her late husband and used the same title to acquire an illegal title.
17. The 1<sup>st</sup> Defendant (now Appellant) averred that in the years she has been in possession of the suit land, the Plaintiff (now 1<sup>st</sup> Respondent) has never cultivated or commenced any activities since he has never had any right over the suit land. The 1<sup>st</sup> Defendant humbly prays that she be allowed to retain the said possession.
18. The 1<sup>st</sup> Defendant (now Appellant) averred that the Plaintiff has no locus to challenge her with regard to the suit property as he is not the legal owner. She prayed that the Plaintiff's (now 1<sup>st</sup> Respondent) suit be dismissed with costs in her favor and that judgment be entered in terms of the counterclaim.
19. The hearing commenced on 26<sup>th</sup> January, 2022 and the Learned Trial Magistrate delivered judgement on 27<sup>th</sup> July, 2022 in the following terms:

Consequently, I hereby enter judgment in favour of the Plaintiff (now 1<sup>st</sup> Respondent) against the Defendants in the following terms:

- I. The title deed issued in respect of land parcel Bahati/Kabatini Block 1/1559 in favour of the 1<sup>st</sup> Defendant is hereby declared illegal, null and void and is hereby revoked.
- II. The Land Registrar Nakuru County is hereby ordered to rectify the register in respect of land parcel Bahati/Kabatini Block 1/1559 by removing the entry made in favour of the 1<sup>st</sup> Defendant and substituting the same in the names of the Plaintiff as the registered owner.



- III. The Plaintiff is also awarded costs of the suit plus interest at court rates from the time of delivery of judgment until payment in full.
- IV. Stay of execution 30 days.

### **The Appeal.**

20. On 18<sup>th</sup> October, 2023 this appeal was admitted to hearing and directions given that the appeal shall be heard by way of written submissions.
21. The Appeal was scheduled for mention on 4<sup>th</sup> December, 2023 to confirm filing of submissions.
22. On 4<sup>th</sup> December, 2023, counsel for the Appellant confirmed filing submissions while counsel for the 1<sup>st</sup> Respondent requested that he be given 21 days to file submissions. The court then rescheduled the matter to 20<sup>th</sup> December, 2023 to confirm filing of submissions.
23. On 20<sup>th</sup> December, 2023 counsel for the Appellant confirmed serving the Attorney General with submissions and adduced an affidavit sworn on 19<sup>th</sup> December, 2023. Counsel for the 1<sup>st</sup> Respondent confirmed filing of his submissions and the appeal was then reserved for judgement.

### **Appellant's Submissions.**

24. The Appellant filed submissions on 22<sup>nd</sup> November, 2023. She relies on the judicial authority of Peterson Ndung'u, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M Kyavi & James Kimani vs Kenya Power & Lighting Company Ltd [2018] eKLR. She identifies the following issues for determination:
  - a. Whether the Learned Trial Magistrate erred in law and in fact in failing to fully analyze and evaluate the evidence as recorded thus reaching the wrong decision?
  - b. Whether the Learned Trial Magistrate erred in law and in fact in failing to engage the rationale that fraud is a serious accusation which procedurally must be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt?
  - c. Whether Learned Trial Magistrate erred in fact and law, in finding and holding that the execution of the purported land sale agreement between the Appellant's deceased husband and the respondent (which was disputed) without any further instruments of conveyance, was sufficient to confer upon the respondent ownership rights over the suit property, in violation of the principles of conveyance and the provisions of the *Land Registration Act*, No 3 of 2012 which denote the process and instruments of conveyance?
  - d. Whether the Learned Trial Magistrate erred in fact and law, in believing the evidence of the Respondent without subjecting the said evidence of the Respondent to suitable interrogation and/or analysis and thereby failed to discern the fraudulent conduct on the part of the said witness, who was hitherto party and/or privy to the alienation of the suit property in favour of the Appellant?
  - e. Whether the Learned Trial Magistrate erred in law in finding and holding that the Respondent herein, whose purported rights and/or interests over and in respect of the suit property, could supersede and/or surpass the Appellant's herein whose rights and/or interests over the suit property had been duly registered and thereby issued with a title deed contrary to the provisions of the *Land Registration Act*, No 3 of 2012 concerning priority of registrable interests over



parcels of land in this regard, the Learned Trial Magistrate misconceived the import and law on registration?

- f. Whether the Learned Trial Magistrate erred in fact and law in finding and holding that the Respondent's suit in the (sic) was proven on a balance of probabilities, which was erroneous in so far as the standard of proof on a claim of fraud, surpasses the balance of probabilities, consequently, the Learned Trial Magistrate failed to properly direct and/or address her judicial mind to the incidence and standard of proof?
  - g. Whether the Learned Trial Magistrate failed and/or neglected to cumulatively and/or exhaustively evaluate the entire evidence (both oral and documentary) on record and hence arrived at an erroneous and slanted conclusion, contrary to and in contradiction of the evidence on record?
  - h. Whether the Learned Principal Magistrate erred in law and facts by misapprehending the evidence of the Appellant, and (with due respect) gave a judgment in favour of the Respondent attaching no conjunct evidence leading to her finding?
25. In her submissions, the grounds have been urged as follows
- a. Ground 1, 2 and 3 together,
  - b. Ground 4,5,6 and 7 together,
  - c. Ground 8, 9 10 and 11 together
  - d. Ground 12, 13, 14 independently.
  - e. Ground 15, 16, 17 and 18 together
  - f. Ground 19 independently
26. I shall presume that ground 20 and 21 have been abandoned.
27. On ground 1, 2 and 3, the Appellant submits that she testified that her deceased husband Gabriel Kariuki Mathenge was allotted the suit property by way of Certificate of Ordinary Shares by NDEFFO LIMITED and she produced a copy of the Ordinary Share certificate dated 24<sup>th</sup> July, 1978 as DEX B-1. The Appellant submits that she further testified that her late husband later acquired the Title Deed to Parcel NO BAHATI/KABATINI BLOCK 1.
28. The Appellant submits that she testified that she was aware that her deceased husband entered into a loan agreement with the 1<sup>st</sup> Respondent for a sum of Ksh 12,000/= (Twelve Thousand Kenya Shillings). She submits that the deceased Gabriel Kariuki Mathenge issued the original Title deed to the 1<sup>st</sup> Respondent herein as security for the loan advanced. She submits that the said title deed was to be returned back to the deceased upon clearance of the loan advanced.
29. The Appellant submits that she further testified that Gabriel Kariuki Mathenge (deceased) died on 8<sup>th</sup> December, 2003 and she produced a copy of the Death Certificate as DEXB-2. She submits that she further testified that upon the death of her husband, the Appellant visited the office of the 2<sup>nd</sup> Respondent and upon explaining her predicament, she was issued with a Title deed in the year 2011 which she produced as DEXB-3. She submits that the Title deed was issued on 28<sup>th</sup> December, 2011.
30. The Appellant submits that she stated that the 1<sup>st</sup> Respondent refused or failed to return the original Title Deed issued to him by the deceased despite the loan advanced having been cleared. The Appellant submits that she sought assistance from the Assistant Chief Kabatini who wrote a letter dated 30<sup>th</sup> May,



2017 confirming that the Appellant has been in possession of the suit property which was produced as DEXB-4.

31. The Appellant submits that she further testified that the purported transaction between her deceased husband and the 1<sup>st</sup> Respondent never happened. She submits that she testified that her deceased husband had been mentally ill since the year 1970 and therefore could not be in a position to transact. She submits that she produced a copy of the letter from the doctor as DEXB-5 in support thereof.
32. The Appellant submits that she further testified that she has been paying the land rates and produced receipts to that effect marked as DEXB-7. She submits that she testified that she has been in possession and has been cultivating on the suit property for over 40 years. The Appellant submits that the 1<sup>st</sup> Respondent did not produce any evidence to show that he had been in any occupation/possession or ever having cultivated on the suit parcel.
33. The Appellant submits that she further denied that she acquired the suit parcel fraudulently. She submits that the 1<sup>st</sup> Respondent however did not adduce any evidence in support of his claims of fraud as per the law required.
34. The Appellant submits that despite this overwhelming evidence tendered by the Appellant, the trial court held at page 6 of the judgment as follows:

“The Plaintiff has proved on a balance of probabilities that fraud was committed in the transfer of the suit property from the Plaintiff to the 1<sup>st</sup> Defendant. The court has powers under Section 80 of the [Land Registration Act](#) to order rectification of a register by directing the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud...

The Title Deed issued in respect of Parcel Bahati/ Kabatini Block 1/1559 in favour of the 1<sup>st</sup> Defendant is hereby declared illegal, null and void and is hereby revoked.”

35. The Appellant submits that it is evident that whereas the burden of proof squarely rested on the shoulders of the Respondents, the Appellant adduced corroborated evidence and demonstrated to the court by herself that she indeed has been in actual possession of the suit property, has been paying the land rates and also demonstrated how her deceased husband acquired the said parcel. She submits that despite such overwhelming evidence, the trial court found that the Appellant acquired her title over the suit property fraudulently thereby arriving at an unfair determination.
36. She submits that the Trial Magistrate found that the Appellant did not explain to the satisfaction of the court how the suit property was registered in her name. She submits that there was no justification whatsoever that would persuade the learned magistrate to allow the 1<sup>st</sup> Respondent enjoy the benefit of doubt.
37. She submits that in the event the trial magistrate was persuaded that the Appellant did not fully explain how the land was registered in her name, it was in the interest of justice that the trial court ought to have ordered the 2<sup>nd</sup> Respondent being the custodian of titles to tender his evidence in court and produce evidence on how the suit property has two existing titles and not ordering the rectification of the register in respect of the suit parcel by removing the name of the Appellant who has been in possession for over 40 years and has developed a residential home.
38. On ground 4, 5, 6, 7, 9 and 10, the Appellant submits that the 1<sup>st</sup> Respondent’s testimony was full of half-truths and contradictions leaving many gaps unfilled. The Appellant submits that for instance it was alleged that she had her name registered in the record as the owner of the suit property fraudulently



but no evidence was produced in support of the said allegations. She submits that the 1<sup>st</sup> Respondent indicated during examination-in-chief that he purchased the suit property from Gabriel Kariuki in the year 1998 and was issued with a title deed in June, 2015.

39. The Appellant submits that upon cross-examination, the 1<sup>st</sup> Respondent stated that he acquired the title deed in the year 1998, thereafter the title deed got lost and he applied for another one having reported the incident to the police station. She submits that he did not produce any evidence to show that he had purchased the property from the deceased, neither did he produce any signed consent nor any evidence in support of the loss of the title issued to him in the year 1998.
40. The Appellant submits that the 1<sup>st</sup> Respondent failed to prove that she acquired the title fraudulently. The Appellant relies on the judicial decisions of Vijay Morjaria Vs Naansingh Madhusingh Darbar & Another [2000] eKLR and Kinyanjui Kamau vs George Kamau [2015] eKLR.
41. On Ground 8, 9, 10 and 11, the Appellant submits that it is evident on the face of the record that the 1<sup>st</sup> Respondent did not obtain consent as required under Section 6(1) of the Land Control Act. She submits that the 1<sup>st</sup> Respondent did not demonstrate how title passed to him and neither did he produce a consent as necessary conveyance document.
42. On ground 12, the Appellant submits that PW1 testified that he purchased the suit property from the deceased Gabriel Kariuki and he did not produce any other document apart from a draft agreement which the Appellant denied that the signature appended thereof belonged to her deceased husband.
43. The Appellant submits that the trial court on the contrary held at page 5 of the judgment that:

“The Plaintiff testified that the late Gabriel Kariuki Mathenge executed the transfer for sale, application for consent by the Land Control Board and handed over copies of his identity card, pin certificate and passport size photo which were submitted to the land Registrar after which he was registered as the proprietor of the land.”
44. The Appellant submits that the trial court failed to appreciate the presence of the 2<sup>nd</sup> Defendant being the custodian of the title and to have it tendered as evidence in court. She submits that the Land Registrar’s evidence would have cleared the issue as to the existence of two titles and whether the 1<sup>st</sup> Respondent acquired the parcel procedurally. The Appellant relies on the judicial decision of Hubert L. Martin & 2 others vs Margaret J. Kamar & 5 others [2016] eKLR.
45. The Appellant also relies on Section 107 (1) of the Evidence Act, (Cap 80 Laws of Kenya). She submits that the learned magistrate stated at page 5 her judgment that:

“The transfer documents supporting the transfer of title from the Plaintiff to the 1<sup>st</sup> Defendant are missing which is an indication of fraud. The corresponding entries in the green card which is done by officials of the land registry also point to a collusion between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant.”
46. The Appellant relies on the judicial decision of Kipkebe Limited vs Peterson Ondieki Tai [2016] eKLR. She submits that the trial magistrate’s finding that “The transfer documents supporting the transfer of title from the Plaintiff to the 1<sup>st</sup> Respondent are missing which is an indication of fraud.” not only shifted the burden of proof to the Appellant but also discharged the Respondent’s legal burden requiring him to prove his case on a balance of probability. The Appellant submits that the trial court only relied on the Appellant’s inability to recall all the transactions to grant the Respondent prayers in the Plaint without requiring him to prove his case to the required standard thus shifting the legal burden to the Appellant.



47. The Appellant submits that in the event the evidential burden shifted to the Appellant, the same was successfully discharged by way of oral and documentary evidence tendered before the trial court. The Appellant submits that the Respondent having alleged fraud by the Appellant was under a duty to prove the said allegations to the required legal standards save for mere denials, the claim of fraud was however not proved leaving the Appellant's evidence uncontroverted.
48. The Appellant submits that the Respondent failed to prove his case on a balance of probability as required by law.
- The Appellant also submits that she adduced sufficient evidence and proved her counter-claim to the required standard hence entitled to the prayers sought therein.
49. On ground 13, the Appellant submits that the Trial Magistrate failed to appreciate that there were two titles presented before the Honourable Court by the Appellant and the other by the 1<sup>st</sup> Respondent. She submits that the title deed presented by the Appellant was issued in December, 2011 while the one presented by the 1<sup>st</sup> Respondent was issued in June, 2015. The Appellant submits that it is trite that when there are two competing titles, the first in time will prevail. Reliance is placed on the judicial decision of *Wreck Motors Enterprises vs The Commissioner of Lands and Others Civil Appeal No 71 of 1997*. The Appellant submits that her title having been issued before the 1<sup>st</sup> Respondent's title superseded the 1<sup>st</sup> Respondent's title.
50. The Appellant submits that by finding the 1<sup>st</sup> Respondent had proved fraud against the Appellant, the Trial Court misconceived the law pertaining to fraud and the requisite standard of proof in respect to claims of fraud.
51. On ground 14, The Appellant submits that the Learned Magistrate at page 6 of her judgment stated as follows:
- “The Plaintiff has proved on a balance of probabilities that fraud was committed in the transfer of the suit property from the Plaintiff to the 1<sup>st</sup> Defendant.”
52. The Appellant submits that she tendered sufficient evidence to prove that the parcel belonged to her deceased husband and passed to her. The Appellant submits that the Learned Trial Magistrate ought to have subjected their evidence to interrogation to discern the fraudulent conduct on the part of those who were party to the alienation of the suit property in favour of the 1<sup>st</sup> Respondent. The Appellant relies on the judicial decision of *Samuel Ndegwa Waithaka Vs Agnes Wangui Mathenge & 2 others [2017] eKLR Civil Appeal 15 of 2016*.
53. The Appellant submits that the trial court erred in fact and in law, in finding and holding that the Respondent's suit was proven on a balance of probabilities which was erroneous in so far as the standard of proof on a claim of fraud, surpasses the balance of probabilities. She submits that consequently, the learned Trial Magistrate failed to properly direct and/or address her judicial mind to the incidence and standard of proof.
54. On ground 15, 16, 17 and 18, the Appellant submits that she adduced evidence detailing how and in what manner the said suit property was registered in her name. She submits that although the Respondent claimed fraud, he did not adduce any evidence in support of such claims to the required standards which is slightly above the balance of probability. The Appellant submits that her evidence remained uncontroverted.



55. The Appellant submits that having proved that she holds a good title and the Respondent having failed to prove fraud, the Trial Magistrate erred in law and in fact in holding that the Respondent had good title despite failure to procure the consent of the land control board.
56. On ground 19, the Appellant relies on the judicial decision of *Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri* [2014]. She submits that it was not disputed that she had been in physical possession and occupation of the suit land for more than twenty years and had extensively developed the said land where she cultivates. The Appellant submits that the Learned Trial Magistrate failed to appreciate that an order of rectification of the suit parcel would greatly prejudice the Appellant who holds a title to her name and which title has not been proved to have been acquired fraudulently.
57. The Appellant submits that the Learned Magistrate in her entire judgment disregarded the circumstances of this matter and in so doing, failed to protect and promote equity as a principle of justice espoused under Article 10 (2) (b) of *the Constitution* of Kenya, (2010).

### **1<sup>st</sup> Respondent's Submissions.**

58. The 1<sup>st</sup> Respondent filed submissions on 16<sup>th</sup> December, 2023. He identifies the following issues for determination:
  - a. Whether the appellant obtained title in her name fraudulently?
  - b. Whether the 1<sup>st</sup> Respondent is the legal owner of the suit parcel of land?
  - c. Whether the appeal is merited.
59. The 1<sup>st</sup> Respondent submits that he testified that he had the original title of the suit parcel of land in his name and at no time did he transfer the land to the Appellant. He submits that the registration of interest in the suit land to the Appellant was done fraudulently with the active participation of the 2<sup>nd</sup> Respondent.
60. He submits that his evidence was corroborated by the Appellants evidence and the Appellant testified that he had the original title to the suit parcel of land. He submits that the Appellant however armed with her husband's death certificate went to the offices of the 2<sup>nd</sup> Respondent and she was issued with a title deed in her name.
61. The 1<sup>st</sup> Respondent submits that the procedure in which the Appellant obtained title in her name was fraudulent and there was no evidence placed before the court that the legal steps necessary for the transfer of land from his name to the Appellants name was followed as provided by Section 37 of the *Land Registration Act* and its predecessor Section 28 and 85 of the Registered *Land Act* (Repealed). He submits that the unchallenged evidence on record is that at no time did he transfer his interest in the land to the Appellant or to anyone else.
62. The 1<sup>st</sup> Respondent submits that the Appellant was an active participant in the fraud as she is the one who presented herself at the 2<sup>nd</sup> Respondent's office for her to be registered as the owner of the suit land. He submits that the Appellants title was obtained illegally, procedurally and through a corrupt scheme. He submits that the trial court correctly revoked the same and ordered the 2<sup>nd</sup> Respondent to rectify the register by removing the entry in favour of the Appellant.
63. The 1<sup>st</sup> Respondent submits that he produced the title deed, sale agreement, copies of transfer forms, photos, ID copies and KRA PIN copy which the Appellant disowned without producing any evidence. The 1<sup>st</sup> Respondent submits that the Appellant filed a counter claim that did not seek any prayers challenging the 1<sup>st</sup> Respondents title to the suit property and ownership.



64. He submits that the Appellant in her evidence admitted that he was registered as the owner of the suit parcel of land. He submits that the Appellant stated that he advanced her late husband a loan and the title was used as security. He submits that the loan statement was never produced as evidence. He submits that the other defence of the Appellant was that her late husband had been suffering from a psychiatric illness, as per defence Exhibit 1, the share certificate from Ndeffo Limited was issued on 24<sup>th</sup> July, 1978. He submits that he was equally a secretary at the said company and one is left to wonder how he was able to transact over the affairs of the company yet he was schizophrenic.
65. The 1<sup>st</sup> Respondent submits that in her examination in chief, the Appellant stated that she was not present when the sale agreement was executed. The 1<sup>st</sup> Respondent submits that she further stated that the signature appearing on the sale agreement and the copy of the identity card produced did not belong to her late husband. The 1<sup>st</sup> Respondent submits that she however did not produce any evidence challenging this. He submits that a handwriting experts report and verification from the registrar of persons would have verified her assertions but she did not produce any of those and her evidence remained mere allegations.
66. The 1<sup>st</sup> Respondent submits that in any event, the Appellant during cross-examination admitted that she was aware that her mother in law had been sued in CMCC NO 830 of 2008 over the ownership of the suit parcel of land and still she did not see the need to challenge his title.
67. The 1<sup>st</sup> Respondent submits that the Appellant equally stated that she has been paying the rates for the suit parcel of land yet she only did in 2018. He submits that the payment of rates does not confer ownership on a person and this cannot challenge his title to the land.
68. He submits that it is evident that the Appellant and her family members are on a mission to acquire the 1<sup>st</sup> Respondents title through all means possible and at all times he has proved his ownership to the same is legal and was acquired procedurally.
69. The 1<sup>st</sup> Respondent submits that in her examination in chief, the Appellant stated
- “...My late husband tried to persuade the Plaintiff to return the title deed to his names but he decline (sic)...”
- He submits that this was an admission by the Appellant that she was aware and her late husband was equally aware that he had transferred the suit parcel of land in his name. He submits that however, from when he obtained title in his name to 2003 when the Appellants husband passed away, no one had legally challenged his title.
70. He submits that under provisions of Section 26 of the *Land Registration Act*, 2012 his title following his registration as the owner is absolute and indefeasible and the same can only be impugned if the title was acquired fraudulently through misrepresentation, illegally or through a corrupt scheme. He submits that none of this was pleaded or proved by the Appellant and he is therefore the legal owner of the suit parcel of land.
71. The 1<sup>st</sup> Respondent submits that the Appellants appeal is not merited and in any event, the Appellant introduced new issues challenging his title which were never pleaded or proved in the trial court and the same are not available to be determined on appeal. He submits that no party should take it for granted that just because they have a title deed, they have a right over the property.
72. He submits that the Appellant obtained her title deed fraudulently. He submits that this court is empowered under Section 80 (1) of the *Land Registration Act*, 2012 to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that the same was



obtained, made or omitted by fraud or mistake and this is what the trial court correctly did and the judgment should be upheld. He submits that the Appellants appeal is unmerited and it should be dismissed with costs.

73. The 2<sup>nd</sup> Respondent did not file any submissions.

#### **Analysis And Determination.**

74. The Appellant raised twenty-one grounds of appeal. In order to determine if the appeal has merit, the following issues in my view arise for determination:

- a. Whether a finding of fraudulent conduct on the part of the Appellant by the trial court was erroneous.
- b. Whether there was a valid transfer of the suit property from the Appellant's deceased husband to the 1<sup>st</sup> Respondent?
- c. Whether the acquisition of title to the suit property by the Appellant was unprocedural and therefore null and void.
- d. Who should bear the costs of the Appeal?

#### **A. Whether a finding of fraudulent conduct on the part of the Appellant by the trial court was erroneous.**

75. As I consider this appeal, I am reminded of the duty of this court as a first appellate court. This duty has been set out and reiterated in numerous decisions. I sample some of them as hereunder;

In *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”

In *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, the court held that;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

76. The Appellant filed a written statement of defence and counterclaim. I have noted that the counterclaim has no prayers but in the concluding paragraphs, the Appellant prayed that the Plaintiff's



(now 1<sup>st</sup> Respondent) suit be dismissed with costs in her favour and that judgment be entered in terms of the counterclaim.

77. The Appellant's case before the trial court was that her deceased husband Gabriel Kariuki Mathenge was allotted the suit property by way of Certificate of Ordinary Shares by NDEFFO LIMITED and her late husband later acquired the Title Deed to Parcel NO BAHATI/KABATINI BLOCK 1. It is the Appellant's case that she was aware that her deceased husband entered into a loan agreement with the 1<sup>st</sup> Respondent for a sum of Ksh 12,000/= (Twelve Thousand Kenya Shillings) and that the deceased Gabriel Kariuki Mathenge issued the original Title deed to the 1<sup>st</sup> Respondent herein as security for the loan advanced. It is the Appellant's case that the said title deed was to be returned back to the deceased upon clearance of the loan advanced.

78. It is also the Appellant's case that Gabriel Kariuki Mathenge (deceased) died on 8<sup>th</sup> December, 2003. It is her case that upon the death of her husband, the Appellant visited the office of the 2<sup>nd</sup> Respondent and upon explaining her predicament, she was issued with a Title deed on 28<sup>th</sup> December, 2011. The Appellant stated that the 1<sup>st</sup> Respondent refused or failed to return the original Title Deed issued to him by the deceased despite the loan advanced having been cleared.

79. The Appellant states that she further testified that the purported transaction between her deceased husband and the 1<sup>st</sup> Respondent never happened. It is her case that she testified that her deceased husband had been mentally ill since the year 1970 and therefore could not be in a position to transact.

80. The documents produced by the Appellant in support of her case are;

- a. Share certificate as evidence of the fact that her husband acquired the suit parcel by virtue of his membership with Ndeffo
- b. A copy of her deceased's husband's death certificate
- c. A letter from a doctor speaking to her deceased husband's mental illness since 1970
- d. Evidence of rates payment for the year 2018

These documents are in the supplementary record of appeal.

81. The 1<sup>st</sup> Respondent's case was that he purchased the suit parcel for the Appellant's husband in 1998. That they entered into a sale agreement and that subsequently he submitted certain documents to the Lands Registry and was issued with a title deed in June, 2015. His evidence is that he was issued with a title in 1998 and he lost it and applied for a re-issue which was done in June, 2015.

82. His case is that after sometime, one Salome Wangui and Beth Njoki claimed that the suit land belonged to them and he filed a suit being CMCC No. 830 of 2008 and judgment was entered in his favour.

83. He produced the following documents

- a. a copy of the title deed for the suit parcel
- b. Judgment in CMCC No. 830 of 2008
- c. Decree in CMCC No. 830 of 2008

84. The 1<sup>st</sup> Respondent case is that he had the original title of the suit parcel of land in his name and at no time did he transfer the land to the Appellant. It is the 1<sup>st</sup> Respondent's further case that the registration of his interest in the land to the Appellant was done fraudulently with the active participation of the 2<sup>nd</sup> Respondent.



85. It is also the 1<sup>st</sup> Respondent's case that he produced the sale agreement signed by the Appellant's husband and that the Appellant disputed that that was her husband's signature but did not subject the said signature to forensic examination.
86. One of the issues for determination before the Learned Trial Magistrate was the question of fraud. It was framed thus;

**Whether Fraud was committed during the transfer of land parcel Bahati/ Kabatini Block1/1559 into the names of the 1<sup>st</sup> Defendant.**

87. It is therefore not true that the question of fraud was not framed. The question that follows is whether there was any evidence of fraud adduced. The Appellant in the Memorandum of Appeal states that there no evidence of fraud was adduced.
88. In my reevaluation I have found that the Learned Trial Magistrate at paragraphs 11, 12, 13,14 and 16 of her judgement speaks to the evidence tendered, the gaps in the evidence and gives reasons for her finding that the transfer from the 1<sup>st</sup> Respondent to the Appellant was fraudulent. I reproduce the said paragraphs as hereunder
  12. Transfer of land at the land registry requires submission of several documents for the transfer to be effected. These documents include copies of identity card, pin certificates, original title deed, payment of stamp duty. The Plaintiff produced a sale agreement between him and the late Gabriel Kariuki Mathenge executed between him and the late Gabriel Kariuki Mathenge for the purchase of the suit property (Emphasis mine). The Plaintiff testified that the late Gabriel Kariuki Mathenge executed the transfer for sale, application for consent by the Land Control Board and handed over copies of his identity card, pin certificate and passport size photo which were submitted to the Land Registrar after which he was registered as the proprietor of the land.
  13. The 1<sup>st</sup> Defendant does not contest the fact that the land was registered in the names of the Plaintiff before it was changed into her names. She has failed to explain to the satisfaction of this court how she acquired the title deed. She did not produce any documents to support the transfer of the land from the names of the Plaintiff into her names. She argued that the Plaintiff loaned her late husband Ksh 12,000 and used the title deed as security on the agreement that the same would revert once the loan is repaid. However, she failed to produce any documents to support her claim. (Emphasis mine)
  14. The transfer documents supporting the transfer of title from the Plaintiff to the 1<sup>st</sup> Defendant are missing which is an indication of fraud. The corresponding entries in the green card which is done by the officials of the Land Registry also point to a collusion between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant. The entry produced by the Plaintiff show the same was registered in the names of the Plaintiff on 19<sup>th</sup> February, 1998 whereas the one by the Defendant shows the registration was done on 28<sup>th</sup> December, 2011.
  16. The Plaintiff has proved on a balance of probabilities that fraud was committed in the transfer of the suit property from the Plaintiff to the 1<sup>st</sup> Defendant. The court has powers under Section 80 of the [Land Registration Act](#) to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake hence the Plaintiff is entitled to the prayers sought in the plaint.



89. This court notes that the Trial Magistrate at paragraph 16 states that the Plaintiff (now 1<sup>st</sup> Respondent) had proved fraud on the part of the 1<sup>st</sup> Defendant (now Appellant) on a balance of probability. In my view this is a question of semantics. What matters is that the Trial Magistrate analysed the evidence and found that the Appellant committed fraud for the reason that she failed to explain how she removed the name of the 1<sup>st</sup> Respondent from the register and had herself registered as the owner of the suit parcel.
90. The procedure through which the Appellant obtained title in her name has not been explained by her. No evidence was placed before the court that the legal steps necessary for the transfer of land from the 1<sup>st</sup> Respondents name to that of the Appellants was followed. This procedure is laid out in Section 37 of the Land Registration Act and its predecessor Section 28 and 85 of the Registered Land Act (Repealed).
91. The fact that the word “balance of probabilities” was used in the judgment, in my view, does not mean that it was the standard of proof actually employed. As I have explained and I do again, the Learned Magistrate observed that no explanation was offered by the Appellant on how she removed the 1<sup>st</sup> Respondent’s name (she admitted that he was indeed registered as owner of the suit parcel) from the register and replaced it with hers. There is no doubt in my mind that such a finding was not a question of probability. The finding was based on failure by the Appellant to adduce evidence to exonerate herself from what, without evidence, looks like a fraudulent transfer.
92. Fraud has been defined in Black’s Law Dictionary 11<sup>th</sup> Edition as;
- “A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”
93. The Appellant in her testimony confirmed that the 1<sup>st</sup> Respondent had the original title to the suit parcel of land. The Appellant further confirmed that she presented herself at the 2<sup>nd</sup> Respondents office and presented a copy of her husband’s death certificate and she was issued with a title deed in her name. There is an obvious procedure problem. What did the 2<sup>nd</sup> Respondent do with the name of the 1<sup>st</sup> Respondent which existed in its register as early as 1998?
94. Court of Appeal in *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another* [2000] eKLR held that:
- “It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act 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.”
95. The 1<sup>st</sup> Respondent particularized fraud of the part of the Appellant and 2<sup>nd</sup> Respondent. Particular (a) and (c) of fraud is
- a. The 1<sup>st</sup> Defendant was fraudulent in that she prepared and presented documents for the conveyance of the title herein while she had neither purchased the land or been gifted the same by the Plaintiff.
- c. The 2<sup>nd</sup> Defendant acted fraudulently in that it registered an interest in the parcel of land herein while title document had been issued in the name of the Plaintiff.
96. I note that the 1<sup>st</sup> respondent asked that witness statement dated 10<sup>th</sup> August, 2015 be adopted as part of his evidence. This witness statement does not form part of the record of Appeal. I am unable



to determine whether or not his witness statement sets out why he believed that the Appellant was fraudulent. I however confirm that the evidence adduced speaks to fraudulent transfer from the 1<sup>st</sup> Respondent to the Appellant. At paragraph 14, the Learned Trial Magistrate observes as follows;

“... The entry produced by the Plaintiff shows the same was registered in the names of the Plaintiff on 19<sup>th</sup> February 1998 whereas the one by the Defendant shows the registration was done on 28<sup>th</sup> December 2011.”

97. Taking onto consideration the pleadings, the fact that the Learned Trial Magistrate framed the question of fraud as an issue for determination and also taking into consideration her analysis of the evidence and documents produced, I find that the Learned Trial Magistrate made no error in finding that the 1<sup>st</sup> Respondent had proved that fraud was committed in the transfer of the suit parcel from the 1<sup>st</sup> Respondent to the Appellant her use of the word “proof on a balance of probabilities” notwithstanding.

**B. Whether there was a valid transfer of the suit property from the Appellant’s deceased husband to the 1<sup>st</sup> Respondent?**

98. The Appellant faults the trial court for finding that the sale agreement as between the Appellant’s deceased husband and the 1<sup>st</sup> Respondent was valid without taking into consideration the fact that no further instruments of conveyance was presented in evidence.
99. The Learned Trial Magistrate in her judgment dated 27<sup>th</sup> July, 2022 framed the second issue for determination as follows;

Who is the proprietor of the suit property Bahati/Kabatini Block 1/1559?

100. In analyzing the issue, the trial court noted that both the Plaintiff (now 1<sup>st</sup> Respondent) and the 1<sup>st</sup> Defendant (now Appellant) hold title documents to the suit property. The trial court found that the transfer documents supporting the transfer of title from the Plaintiff to the 1<sup>st</sup> Defendant were missing which, according to her, inferred collusion and fraud between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant.
101. The issue in contention is whether the Appellant’s deceased (formerly 1<sup>st</sup> Defendant) husband transferred the suit property to the Plaintiff (now 1<sup>st</sup> Respondent). The 1<sup>st</sup> respondent’s case is that after execution of the agreement in 1988, he presented other documents to the Lands office and was issued with a title.
102. The Appellant’s case is that the title to the suit property was handed to the 1<sup>st</sup> Respondent as security for a loan of Kshs. 12,000 advanced to her deceased Husband by the 1<sup>st</sup> Respondent.
103. I note that the Appellant disputed the signature appearing on the sale agreement as belonging to her husband. This agreement was admitted in evidence and there is nothing to show that the assertions by the Appellant are correct. There is no evidence from a forensic document examiner to show that the signature does not belong to the Appellant’s deceased Husband.
104. Secondly, the learned Magistrate at paragraph 12, 11 and 12 of her judgment (there is an error in the numbering of the paragraphs starts by setting out the law in section 26 of the [Land Registration Act](#). The said section provides that a certificate of title issued by the registrar upon registration, transfer of transmissions shall be taken by all courts as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner and that the said title can only be impeached for reason of fraud, misrepresentation, that it was acquired illegally, unprocedurally or through a corrupt scheme.



105. The Learned Magistrate goes on to state that the Plaintiff produced a sale agreement and also testified that the deceased executed the transfer for sale, application for consent by the Land Control Board and handed over copies of his Identity card, PIN certificate and passport sized photo which were submitted to the land Registrar after which he was registered as proprietor.

106. In *Daudi Kiptugen Vs Commissioner of Lands Nairobi Lands & 4 others* [2015] eKLR, the Learned Judge speaks to the process culminating to the issuance of documents of title to land and stated thus;

“The acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein...”

107. The Land Registrar is the 2<sup>nd</sup> Respondent. He/she did not adduce any evidence at the trial but was present and participated by cross-examination of witnesses. In the decision of *Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007*, the Learned Judge citing with approval the decision in *Edward Muriga through Stanely Muriga –vs- Nathaniel D. Schuler, Civil Appeal No. 23 of 1997* held as follows:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.”

108. It is clear therefore that the evidence of the 1<sup>st</sup> Respondent as pertains to submission to the 2<sup>nd</sup> Respondent documents necessary for registration of the suit parcel to his name remains uncontroverted and hence true.

109. In *Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others* [2012] eKLR it was held as follows:-

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”

110. Against the backdrop of this uncontroverted evidence by the 1<sup>st</sup> Respondent, I find that the Learned Magistrate made no mistake in finding that the Appellant’s deceased husband did in fact transfer of the suit property to the 1<sup>st</sup> Respondent.

### **C. Whether the procedure followed by the Appellant to acquire the subsequent title to the suit property was procedural?**

111. The Appellant’s testimony before the trial court was that her husband died on 8<sup>th</sup> December, 2003 and that subsequent to his death, she visited the office of the 2<sup>nd</sup> Respondent and upon explaining her predicament, she was issued with a Title deed on 28<sup>th</sup> December, 2011.

112. The Appellant’s title deed is issued under The Registered *Land Act* (Chapter 300) which is repealed by the *Land Registration Act, 2012*.



113. Section 119 of the repealed statute provides as follows:

1. If a sole proprietor or a proprietor in common dies, his personal representative, on application to the Registrar in the prescribed form and on production to him of the grant, shall be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after his name of the words “as executor of the will of ..... deceased” or “as administrator of the estate of ..... deceased”, as the case may be.
2. Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission:
  - a. any transfer by the personal representative;
  - b. any surrender of a lease or discharge of a charge by the personal representative;
3. In this section, “grant” means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.

114. There is no evidence that the Appellant produced to the office of the 2<sup>nd</sup> Respondent a grant of probate of the deceased’s husbands will or a grant of letters of administration of the estate of her deceased husband. It therefore follows that the registration of the Appellant as the proprietor of the suit parcel was unprocedural therefore null and void.

#### **D. Who should bear the cost of the Appeal?**

115. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

#### **Disposition.**

116. In the result, I find that this Appeal has no merit and it is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

117. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 6<sup>TH</sup> DAY OF JUNE, 2024.**

**L. A. OMOLLO**

**JUDGE**

In the presence of: -

Miss Karuga for the Appellant.

Mr. Gethui for the 1<sup>st</sup> Respondent.

No appearance for the 2<sup>nd</sup> Respondent.

Court Assistant; Mr. Joseph Makori.

