



**Wanjohi v Wanjohi (Environment and Land Appeal E012 of 2023)
[2024] KEELC 5852 (KLR) (26 August 2024) (Judgment)**

Neutral citation: [2024] KEELC 5852 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E012 OF 2023
LN GACHERU, J
AUGUST 26, 2024**

BETWEEN

JOHN MWANGI WANJOHI APPELLANT

AND

PATRICK MACHARIA WANJOHI RESPONDENT

*(Being an Appeal against the Judgment of Hon. Susan Mwangi (S.R.M)
delivered on 29/03/2023 in Murang'a CMCC NO. E014 of 2022)*

JUDGMENT

1. The Appellant herein John Mwangi Wanjohi, filed this Appeal vide a Memorandum of Appeal dated 20th April, 2023, wherein he challenges the decision of the trial Court delivered on 29th March 2023, in ELC Case No. E014 OF 2022 (Murang'a Chief Magistrate's Court) on the following eight (8) grounds:
 - a. The trial Court erred in law and in fact in finding that the Appellant transferred the suit property after the death of its previous proprietor without evidence on record of such.
 - b. The trial Court erred in law and in fact in finding that the Respondent proved the element of fraud against the appellant to warrant the cancellation of the appellant's title.
 - c. The trial Court erred in law and in fact in by failing to appreciate that the allegations of fraud are serious and party that alleges fraud must and should prove the said allegation according to a standard which is higher than on a balance of probabilities.
 - d. The trial Court erred in law and in fact in shifting the burden of proving the fraud allegations by the respondent to the appellant.
 - e. The trial Court erred in law and in fact in its finding that the transfer from Wanjohi Kamengere (deceased) to Esther Njeri (deceased) was fraudulent without evidence of such fraud.



- f. The trial Court erred in law and in fact by issuing judgment in respect of prayers not prayed for in the pleadings.
 - g. The trial Court erred in law and in fact by finding that the plaintiff had capacity to bring the suit without first obtaining a legal representation instrument for the estate of the deceased.
 - h. The trial Court erred in law and in fact by finding at page 7 of the judgment that the transfers were subjected to the Land Control Board but going ahead and letters of consent issued but only again to find the transfers to be fraudulent.”
2. The suit before the trial Court was brought by the Respondent herein Patrick Macharia Wanjohi , wherein he had sought inter alia for an Order allowing and authorizing the Land Registrar, Murang’a to revert the ownership of land parcel number Loc.8/Ngerere/Thombotho/612, to the name of Wanjohi Kamengere (deceased), the father to the parties in the suit, on grounds that the Appellant fraudulently transferred the suit land to his name as there were no succession proceedings in respect of the estate of the decease; That the suit land is ancestral land and the deceased was succeeded by other beneficiaries in addition to the Defendant (now Appellant). The Plaintiff(Respondent) had also prayed for costs of the suit.
 3. The Appellant(Defendant) denied the Plaintiff’s(Respondent) claim vide his statement of Defence dated 27th June 2022, and averred that the suit land Loc 8/ Ngere/ Thombotho/ 612, was initially registered in the name of their father Wanjohi Kamengere(deceased) on 5th August 1988.
 4. However, their deceased father transferred the suit land to Esther Njeri Wanjohi, on 4th August 1995, during his lifetime. Later Esther Njeri Wanjohi, transferred the suit land to the Appellant(Defendant) on 23rd December 2010, during her lifetime. Consequently, he denied that the suit land was ever a part of succession, since it was transferred during the lifetime of the transferors. He also denied that his acquisition of the suit land was fraudulent, and urged the court to dismiss the entire suit for being fatally defective, incompetent and abuse of the court process.
 5. The suit proceeded for inter-parties hearing wherein, each of the parties herein gave evidence for themselves, and called no witness. Thereafter, the trial court entered judgement in favour of the Plaintiff(Respondent), which decision aggrieved the Defendant(Appellant), and thus this Appeal. In the instant Appeal, the Appellant has urged the court to set aside the judgement of the trial court, delivered on 29th March 2023, by dismissing the Respondent’s(Plaintiff) case with costs.
 6. After the filing of the Memo and Record of Appeal, the instant Appeal was admitted under Section 79(B) of the *Civil Procedure Act*, and the Court directed the same be canvassed by way of written submissions. The parties complied and filed their respective written submissions.

The Appellant’s Submissions

7. The Appellant filed written submissions on 27th February, 2024, through the Law Firm of Charles Mbugua & Co Advocates, and submitted that the Respondent lacked capacity to mount the suit before the trial Court on behalf of the estate of Wanjohi Kamengere (deceased), and that the trial Court disregarded his contention concerning the Respondent’s incapacity to file the suit before it.
8. For this submission, the Appellant relied on the case of Kipnetich Kalya Kones (suing as the administrator of the estate of Kipkalya Kones (deceased) V Wilson Kiplangat Kones (2021) eKLR, to buttress the argument that a suit mounted by a party lacking locus standi to initiate the same is fatally defective, incompetent and an abuse of the Court process.



9. Citing the provisions of Sections 109 and 112 of the *Evidence Act*, the Appellant also submitted that the Respondent failed to establish the existence of fraud in the registration of the suit land in the name of Esther Njeri Wanjohi, during the lifetime of Wanjohi Kamengere(deceased), and also failed to demonstrate that the subsequent transfer of the suit property from Esther Njeri Wanjohi, to the Appellant herein during her lifetime was fraudulent.
10. Further, the Appellant submitted that the Respondent failed to present evidence of forgery relating to the transfer documents vesting the ownership over the suit property in the names of the Esther Njeri Wanjohi, and the Appellant. Reliance was placed in the cases of *Vissay Morjuria V Nansingh Madhusingh Darbar & Another* (2000) eKLR; *Kinyanjui Kamau V George Kamau* (2015) eKLR and *Demutilla Nanyama Prurmu V Salim Mohamed Salim* (2021) eKLR.
11. It was the Appellant's further submission that the trial Court introduced and considered extraneous evidence not on record in arriving at the impugned decision, particularly, the issue of gift inter vivos which question was not mentioned in the proceedings before it.
12. The Appellant also submitted that the trial Court's judgment was contradictory and urged this court to set it aside, dismiss the Respondent's suit before the trial court with costs for this Appeal and the suit before the trial Court.

The Respondent's Submissions

13. The Respondent filed his written submissions in person on 22nd November, 2023, and submitted that in the proceedings before the trial Court, the Appellant was unable to demonstrate that the suit land had devolved to Esther Njeri Wanjohi ,from the original proprietor Wanjohi Kamengere (deceased) as a gift. Further, that the Appellant failed to present any consent from the Land Control Board in respect of the transfer of the suit property from the deceased.
14. The Respondent also submitted that he had filed Civil suit No. CMCC NO.196 OF 2018 ,wherein , he sought the revocation of the title over land parcel number Loc.8/Ngerere/Thombotho/616, and its reversion to the name of the original proprietor Wanjohi Kamengere (deceased), which suit was allowed and the said property is currently registered in the deceased's name
15. The Respondent reiterated the position subscribed at the trial Court that the suit land is ancestral land, and should be distributed to all beneficiaries of the deceased through a succession cause. He affirmed that both parties in the suit are siblings and the children of the deceased, Wanjohi Kamengere.
16. The Respondent laid emphasis on the submission that both the Appellant and Esther Njeri Wanjohi, were arrested in respect of the fraudulent transfer of the suit land, and a separate land parcel No. Loc.8/Ngerere/Thombotho/616, and the matter referred to the Directorate of Criminal Investigations(DCI) on 22nd June, 2015, for further investigations, the outcome of which was that both were responsible for fraud, and which led to the confiscation of the title deeds in respect of the two properties.
17. It was further submitted that the deceased original owner of the suit land died on 15th June 1998, while the Appellant procured registration of the suit land in his name on 5th January, 2010, in the absence of any succession proceedings being commenced and concluded in respect of deceased's estate.
18. The Appellant added that as there was no stay of execution granted in respect of the trial Court's decision dated 29th March, 2023, the said Judgment was operationalized and ownership over the suit land reverted to the name of the deceased Wanjohi Kamengere. He further submitted that he lodged



a separate lawsuit namely MCC ELC No.14 of 2022, seeking a declaration that the suit land belongs to the estate of the deceased.

19. He reiterated that the parties in the suit are now required to participate in the succession proceedings in respect of the estate of deceased who was their father.
20. The above are the Pleadings of the parties, evidence adduced before the trial court as contained in the Record of Appeal, the Memo of Appeal and the rival written submissions, which this court has carefully considered. The court finds the issue for determination are;-
 - I. Whether the Respondent possess the requisite locus standi to initiate the suit before the trial Court?
 - II. Whether the Judgment of the trial Court is contradictory and/or untenable?
 - III. Whether the instant Appeal merited?
 - IV. Who shall bear the costs of the Appeal?

i) Whether the Respondent possess the requisite locus standi to initiate the suit before the trial Court?

21. Before delving into the substantive issues, this court will take note of the fact that this Appeal being a first Appeal, the court is mandated to re-evaluate and re-analyze the evidence placed before the trial Court, as well as the judgment and arrive at its own independent conclusion, in regard to the dispute at hand. The mandate of a Court hearing a first Appeal was set out with clarity in the case of *Selle & Another v Associated Motor Boat Co. Ltd & others* {1968} EA 123, where the Court offered the following reasoning:

“An 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... In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

22. Further, Section 78 of the *Civil Procedure Act* empowers a Court of first appeal to appreciate the entire evidence and arrive at its own independent conclusion. In the case of *Peters v Sunday Post Limited* {1958} E.A. page 254., the Court of Appeal for East Africa held as follows:

“An 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... In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

23. In the case of *Bwire Vs Wayo and Saloki* (Civil Appeal 032 of 2021 [2022]), the Court set out the duties expected of a Court sitting on a first appeal as follows: Firstly, during the hearing of a first appeal, the whole case is open for rehearing both on questions of fact and law. Secondly, the judgment of the appellate Court must reflect its conscious application of mind and record its findings supported by



reasons on all the issues arising along with the contentions put forth by the parties. Thirdly, in revising a finding of fact, the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding.

24. In the instant suit, the issue of the Respondent's lack of locus standi to mount the suit before the trial Court was not raised in the Appellant's Defence dated 27th June, 2022 and witness statement of even date. Though in the filed defence the Appellant had alleged that the the suit and claim by the Plaintiff was fatally defective, incompetent and an abuse of the due process of law and court, the said averment did not amount to a claim that the Plaintiff(Respondent) did not have locus standi to file the said suit.
25. In the case of *Kihanya & 4 others v Gichuri & another (Civil Appeal 15 of 2019)* [2024] KECA 852 (KLR) (12 July 2024) (Judgment), the Court of Appeal held thus:

“It is settled law that an objection to jurisdiction can be raised at any stage. Nonetheless, such an objection should be raised at the earliest opportunity. The failure to raise the issue of locus standi before the trial court is not fatal nor is there a bar to the said issue being raised at this stage. Accordingly, we will first address the issue whether the respondents had the capacity to institute the impugned suit.”

26. The Respondent, in his Plaint dated 23rd February, 2022 , stated that he lodged the said suit in his capacity as a beneficiary of the estate of his late father. Further that at the time of filing the suit before the trial Court, no succession cause had been commenced in respect of his late father's estate.
27. It is trite that whereas a full grant of representation takes care of the entire administration of the estate of a deceased person, a limited grant, as the name suggests, is limited to a specific purpose in relation to the estate of a deceased person. The basis of a limited grant is found in Section 54 of the *Law of Succession Act*. See the Judgment of the Court in *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] eKLR.
28. What is the effect of failure by a litigant to obtain a grant of letters of administration or a limited grant in respect of the estate of a deceased person upon which his claim is founded? In the case of *Kihanya & 4 others v Gichuri & another (Civil Appeal 15 of 2019)* [2024] KECA 852 (KLR) (12 July 2024) (Judgment), the Court of Appeal declared as follows:

“As stated earlier the property in question belongs to a deceased person. Therefore, it was a prerequisite for the respondents to obtain a grant of letters of administration before instituting the said suit which involved properties registered in the deceased's name.”

29. Section 2 of the *Civil Procedure Act* defines a “legal representative” as follows:

“A person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”

30. In the above mentioned case of *Kihanya & 4 others v Gichuri & another (Supra)*, the Court appreciated the meaning and import of Section 82 of the *Law of Succession Act* as follows:

“Section 82 of the *Law of Succession Act* gives the personal representatives of a deceased person's estate the power to “enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death of his personal representative”. It is evident from the above provision that one can only institute or enforce a suit on behalf of the estate of a deceased person once they have been appointed personal



representatives to the estate. Such appointment under the Succession Act can only be by way of obtaining a full grant or a grant limited for purposes of instituting or defending a suit, which would in this case be ad-litem. Decided cases are in agreement that where a suit is filed relating to a deceased's estate without a grant of representation, the proceedings are null and void for want of locus standi. (See *Virginia Edith Wamboi v Joash Ochieng Ougo & Another* [1982-88] 1 KAR and *Teouistik Union International & Another vs Jane Mbeyu & Another*, Civil Appeal No. 145 of 1990). It follows that for a party to have locus standi to institute or defend a case for and on behalf of a deceased person, he or she must first obtain a grant of letters of administration empowering him or her to administer the deceased's estate or limited for the purpose of filing or defending the suit."

31. This Court has re-evaluated and re-carefully considered the pleadings and evidence tendered before the trial Court as well as the rival written submissions of the parties in the present Appeal. The Court holds and finds that for the Respondent to legally institute the suit before the trial Court on behalf of the estate of the deceased, he needed to have sought and obtained a grant of letters of administration to enable him to bring the suit on behalf of the deceased's estate. The Respondent did not obtain the said grant, limited or full, and consequently, he lacked the capacity to institute the suit before the trial Court. He had no locus standi to file the suit.
32. It is trite that a suit instituted by a person without the legal capacity is nullity ab initio and, thus, unsustainable. In *Macfoy vs United Africa Co. Ltd* [1961] 3 ALL ER 1169, the Court held that if an act was void then in law it was a nullity and incurably bad; null and void, that one cannot put something on nothing and expect it to stay there since it will collapse.

ii) Whether the impugned Judgment of the trial Court, is contradictory and/or untenable?

33. The Appellant submitted that the trial Court's decision contradicted itself in its judgment rendered on 29th March, 2023 as follows:

"I find the plaintiff proved on a balance of probabilities that the deceased and the late Esther Njeri Wanjohi attended the Land Control Board in the year 2010, where they were issued with the letter of consent and another letter of consent to the said late Esther Njeri Wanjohi after she attended the Land Control Board with the defendant in 2010. Can the defendant be said to have fraudulently caused the suit land to be registered in his own names..." as per page 28 of the record.

34. The Appellant contrasted the above quotation from the decision of the trial Court dated 29th March, 2023 to page 29 of the record which states as follows:

"...As noted above, I find that the defendant was unable to prove how he had the land registered in his name from that of the late Esther Njeri Wanjohi and from the deceased to the said late Esther Njeri Wanjohi hence the suit cannot be said to have been a gift inter vivos".

35. This Court has considered the impugned Judgment of the trial Court, and the submissions by the Appellant while quoting the above excerpts of the said Judgment. It is evident that indeed contradictory findings were entered by the trial Court as attested to in the foregoing two quotations cited by the Appellant. This Court as an Appellate one, finds and holds that the said contradictions being of an evidential nature are, not minor or superficial. They go to the root of the impugned



Judgement, and thus the court finds that the body of the said Judgement and the final findings are contradictory.

iii). Whether this Appeal merited?

36. In its determination, the trial Court held and found that the Appellant failed to establish how he gained ownership of the suit land and whether that acquisition was lawfully. It is evident that the Appellant was registered as the owner of the suit land on 23rd December 2010, under the Registered [Land Act](#), Cap 300(Repealed).

37. As a registered owner of the said suit land, section 27(a) of said Cap 300(repealed) provided that he enjoys all rights and privileges appurtenant thereto, it reads as follows;

“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

38. Further section 28 of the said Cap 300(Repealed) provides that such rights of a registered proprietor can only be defeated as provided by the Act. See section 28 of Cap 300(Repealed).

“28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

39. These two provisions of the law are mirrored in sections 24 and 25 of the [Land Registration Act](#), 2012; Therefore, as the registered proprietor of the suit land, the Appellant herein is subject to the protection set out under Sections 24 and 26 of the [Land Registration Act](#), 2012.

40. Section 24(a) of the [Land Registration Act](#), 2012 provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

41. Further, Section 26 (1) of the [Land Registration Act](#), 2012, states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –



- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
42. The Respondent had alleged that the Appellant acquired the suit land through fraud, and he particularized the said fraud in para 4 of his Plaint. Therefore, the Respondent had a duty to prove how the Appellant committed the alleged fraud, and thus acquired the suit land fraudulently, so that the same can be impeached as provided by section 26(1) a&b above of the *Land Registration Act*.
43. The Appellant’s instrument of title having been brought under challenge in the proceedings before the trial Court, he was required to adduce evidence demonstrating that his acquisition of the suit property was procedural and not tainted with illegality. In the case of *Munyua Maina v Hiram Gathiba Maina, COA Civil Appeal NO. 239 of 2009*, the court held as follows:
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances....”.
44. Further, in the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR, the Court held that:
- “It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”
45. In the case of *Elizabeth Wanjiru Githinji and 29 Others V Kenya Urban Roads Authority* [2019] eKLR, Court Of Appeal held as hereunder:
- “I am convinced and persuaded by the merits and reasoning in the local and comparative jurisprudence that a title under the Torrens system is defeasible on account of mistake, misrepresentation, fraud and illegality. For this reason, it is not sufficient for the appellants to wave an RLA or RTA title and assert indefeasibility.
- If a mistake is proved or total failure of consideration or other vitiating constitutional or statutory factors, an RLA or RTA title is defeasible.”
46. Again in the case of *Kuria Kiarie & 2 Others V Sammy Magera* (2018) eKLR, the Court held as follows:
- “The next and only other issue is fraud. The law is clear and we take from the case of *Vijay Morjaria V Nansingh Madhusingh Darbar & Another* [2000] eKLR where Tunoi (J) as he then was, states as follows:
- It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must,



of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

47. It is evident from the above decisions of the courts that a registered proprietors title is protected by the law. However, once evidence of fraud in the said acquisition is proved, then the courts will have no options but to impeach the said certificate of title. Further, the burden of proof is always on the person alleging fraud. It is not sufficient to allege fraud, but sufficient evidence must be called to prove the said allegation on the required standard.

48. Section 80 (1) of the *Land Registration Act*, 2012, provides for instances when the Court can make orders for rectification of title or register, as follows-

“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

49. In this case, the trial Court held that the Appellant did not produce the consent of the Land Control Board in respect of his acquisition of the suit land from Esther Njeri Wanjohi, which omission was so serious that in the judgment of the trial Court, it resulted in the cancellation of the Appellant’s title. Does the absence of the Land Control Board’s consent, have the effect of invalidating a registered owner’s title to land?

50. In the case of *Jeremiah Kiilu Maitha v Agnes Ngeki Mutie* [2018] eKLR , the Court stated that in a situation where a Sale Agreement is null and void for want of the consent of the Board, a purchaser can still succeed to have such land registered in his favour if he proves that he took possession of the land, and has been in such possession continuously, exclusively, peacefully and with the knowledge of the registered owner for a period of twelve (12) years.

51. Further, in the case of *William Odongo Guya v George Otiato Mbaye & another* [2021] eKLR, the Court reasoned as follows:

“However, it is my view that the property would not have been registered in the 1st Respondent’s name if the relevant registering authorities were not satisfied that the relevant consents had been obtained... Based on the above I find that even if the Land Control Board Consent was not issued as alleged, the 1st respondent had a valid title on the basis that he has stayed on the suit property for 26 years without any interruption and also holds a valid title to the property.”

52. Before the trial Court and in the current proceedings, the Appellant explained that he acquired the suit land as a gift from the registered owner Esther Njeri Wanjohi, who acquired the same from her father as a gift in similar fashion. The Appellant argued in his Defence that the donors of the suit property in both instances, that is, his father and step-sister, demised the suit land during their lifetime, and therefore no succession proceedings were required to transfer the property.

53. The Court has perused the Green Card in respect of the suit land appearing on page 13 of the Record of Appeal. Entries No.1 and 2 thereon indicate that the deceased, Wanjohi Kamengere, was registered as proprietor of the suit property on 5th August, 1988. Entry number 3 indicate that Esther Njeri Wanjohi, was registered as the owner of the said parcel on 4th August, 1995, against the description “Gift”, and that she was issued with a title thereof.



54. Further below on Entry number 4, it is stated that title to the suit property was issued on 14th December, 2010, to Esther Njeri Wanjohi. Entry No. 5 shows that the Appellant was registered as the owner of the suit land on 23rd December, 2010, while entry number 6, shows that the Appellant was issued with a title deed in respect of the suit land on 5th January, 2010; which was an anomaly as the issuance of title preceded the registration of the property in the Appellant's name by more than eleven (11) months.
55. Be that as it may, the said anomaly is not fatal and does not have the effect of invalidating the Appellant's title. Although the trial Court did not pronounce itself on the incongruity noted in the Green Card of the suit land in the entries numbered 5 and 6, it determined that the Defendant (now Appellant) procured the registration of the suit land first in the name of Esther Njeri Wanjohi in year 1995, and subsequently in his own name in year 2010, through fraud.
56. According to the extract of the Green Card to the suit land on page 13 of the record, transfer of title from the deceased to Esther Njeri Wanjohi, who was the deceased's daughter is expressed to have been through a gift and took place some three years before the death of the deceased. The capacity of the deceased original owner of the suit property to demise the suit land to Esther Njeri Wanjohi, was not challenged in the proceedings before the trial Court.
57. Upon a careful re-evaluation of the totality of the evidence tendered before the trial Court, it is the finding and holding of this Court that there exists insufficient basis to support the trial Court's conclusion that the Appellant caused the registration of the suit land in the name of his step-sister Esther Njeri Wanjohi on 4th August, 1995.
58. The Respondent, as the Plaintiff is the one who had alleged, and the burden of proof was upon him. However, the trial court shifted the burden of proof to the Appellant herein, without any tangible evidence being adduced by the Respondent to warrant such shift of burden of proof. See the case of *Mbuthia Macharia V Annah Mutua Ndwiga & another* [2017] eKLR, the Court held;
- “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty to adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”
59. The trial court relied heavily on the issue of gift inter vivos, which was a none issue, as the suit property was not subject of succession, but the challenge herein was on the issue of fraud. Gift inter vivos are provided for under Section 42 of the *Law of Succession Act* which stipulates as follows:
- “Where-
- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
 - (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”



60. In the case of *Micheni Aphaxard Nyaga & 2 others v Robert Njue & 2 others* [2021] eKLR, the Court held as follows:

“The characteristics of the gifts inter vivos are that they are made and settled during the lifetime of the deceased and have been identified, awarded and settled for the person to whom it has been given. It is a gift made to a beneficiary when the deceased was alive and is considered when distributing the net intestate estate so that person who received it may be considered as having received his share and may reduce or diminish any entitlement to the net intestate estate. The gift which is transferred and settled for the beneficiary during the life-time of the deceased, will not form part of his estate but it will be taken into account in determining the share of the net intestate estate finally accruing to that beneficiary.

The concept of gifts is divided into two categories. First gifts *intervivos* and gifts *causa mortis*. Gifts *intervivos* as contemplated in the Law of Succession are such that the owner of the property or asset donates it to another without expectation of death.

In any event the person who makes such a gift must have the capacity and competency to gift the property and the gift must be perfected. In the case of *inter vivos* the gift must go to the donee absolutely during the lifetime of the donor. It is also well established that where the gift has been made, delivery to the beneficiary is necessary to consummate the gifts.”

61. Further, Odunga’s *Digest on Civil Case Law and Procedure Vol (III) Page 2417* at paragraph 5484 (d) e – 1, states as follows:

“Generally speaking the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. ... If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from equity and the gift is complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the donee has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor.”

62. It is not in dispute that the original registered owner of the suit land, one Wanjohi Kamengere was father to Esther Njeri Wanjohi, whom he demised the suit land in year 1995. It is noteworthy that the said transfer of the suit land was not challenged in the intervening three (3) years from the date of the transfer up to the death of Wanjohi Kamengere.
63. The Appellant contended and submitted at the trial Court and in this Appeal that his step-sister Esther Njeri Wanjohi,, after acquiring the suit land from their father Wanjohi Kamengere, subsequently transferred the said property to himself in year 2010 prior to her demise.
64. The suit before the trial Court was originated by the Plaintiff (now Respondent), and the onus of proof was upon him. There is no doubt that in the proceedings before the trial Court, it was the Plaintiff’s (now Respondent) obligation to prove that the Appellant assumed ownership of the suit property



through fraud or the same was part of a fraudulent scheme. Section 107 of the *Evidence Act* provides as follows:

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person.”

65. Further, Sections 109 and 112 of the *Evidence Act*, state:

S.109. “The burden of proof as to any particular fact lies on the person who wishes the court to believe in the existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

S.112 “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

66. Although the Respondent herein disputed that the Appellant’s title deed was acquired genuinely, he did not call sufficient evidence before the trial Court to prove that the said title deed was acquired corruptly and warranted to be cancelled and/or rectified. In the case of *Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another* (2013) eKLR, the Court set out the import of Section 26 (1) of the *Land Registration Act*, 2012 in the following terms:

“ the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme. ”

67. After a thorough re-evaluation and re-analysis of the evidence tendered before the trial court, and bearing in mind that the burden of proof lies on he who alleges, this court holds and finds that the original registered owner Wanjohi Kamengere (deceased), possessed the requisite capacity to demise the suit property to his daughter Esther Njeri Wanjohi.

68. It is the further holding of this Court that at the trial Court, the Plaintiff (Respondent), failed to demonstrate that the transfer of the suit property in favour of Esther Njeri Wanjohi (deceased), was shrouded by fraud, illegality or lack of capacity on the part of the donor. Consequently, this Court holds and finds that the original registered owner Wanjohi Kamengere (deceased), rendered a valid transfer of the suit land in favour of Esther Njeri Wanjohi, as shown on the Green Card on page 13 of the Record. Of Appeal.

69. For, the above reasons, the suit land did not form part of the property of deceased original owner, which needed to be considered in a succession cause , as he had transferred to Esther Njeri Wanjohi, his daughter during his life time, and the same was registered in her name during his lifetime.

70. It is also significant to note that from year 1995 to year 2010, when the Appellant, assumed ownership over the suit land, no challenge was presented to Esther Njeri Wanjohi’s ownership of the said land. Further, from 2010, when the Appellant assumed ownership of the suit land, there was no evidence of challenge of the same, until 2022, when the suit was filed before the Chief Magistrates Court at Murang’a.



71. Though the Respondent had alleged that he had filed another suit before the Chief Magistrates Court over land parcel No 616 and the suit land, wherein the trial court had also directed that the title revert to the original owner Wanjohi Kamengere, for having been acquired through fraud, those proceedings were not produced in court as exhibits to support his claim.
72. Therefore, it is the further holding of the Court that the Respondent herein failed to supply sufficient evidence at the trial Court to prove his claim that the suit property devolved to the Appellant from the registered owner Wanjohi Kamengere, and later to Esther Njeri Wanjohi, and finally to the Appellant herein through fraud.
73. Having addressed and dealt with the issues set out for determination, and having considered the available evidence as contained in the Record of Appeal, the written submissions, cited authorities and the relevant provisions of law, this court has come to its independent conclusion that firstly the Respondent had no locus standi to institute the suit on behalf of the estate of Wanjohi Kamengere(deceased). Secondly, the available evidence was not sufficient to proof that the Respondent's case on the required standard of balance of probabilities. Thirdly the trial court erred in shifting the burden of proof to the Appellant to prove how he acquired the suit land. Fourthly, there was contradiction in the body of the impugned Judgement and the final findings of the trial court.
74. For the above reason, this court finds and holds that the instant Appeal is merited. Accordingly, the Judgement of the trial Court dated 29th March, 2023, be and is hereby set aside, and the (Plaintiff's)Respondent's suit at the trial court as per the Plaint dated 23rd February 2022, is dismissed entirely with costs to the Appellant(Defendant).
75. Further, the Respondent herein had submitted that the suit land has reverted to the name of the original registered proprietor, in line with the said impugned Judgement of the trial Court. In exercise of the powers conferred upon this Court by Section 80 (1) of the *Land Registration Act*, the court directs that in the event the title has reverted to Wanjohi Kamengere then the said title issued in the name of the deceased original owner Wanjohi Kamengere, be and is hereby cancelled and/or rectified, and the said title is substituted with the name of the Appellant herein, as per the earlier registration.

iv) Who should bear costs of this Appeal?

76. As provided by section 27 of the *Civil Procedure Act*, costs are awarded at the discretion of the court. Further, costs ordinarily follow the event and are awarded to the successful litigants, unless there are circumstances warranting the court to depart from this position. This court finds no reasons not to award costs to the successful litigant. The Appellant is the successful party and is thus entitled to costs of this Appeal and the suit before the trial court. Consequently, the Respondent shall bear costs of this Appeal and the suit before the trial Court.
77. In a nutshell, this Appeal succeeds, and the Judgement of the trial court dated 29th March 2023, is set aside, and the suit before the trial court is dismissed entirely with costs to the Appellant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A, THIS 26TH DAY OF AUGUST 2024.

L. GACHERU

JUDGE.

26/8/2024



Delivered online in the presence of;

Joel Njonjo - Court Assistant.

Mr Mbugua for the Appellant

Respondent – Absent

L. GACHERU

JUDGE.

26/08/2024

