



REPUBLIC OF KENYA



**Wanyoike v Kimani (Environment & Land Case E007 of 2023)
[2024] KEELC 5853 (KLR) (26 August 2024) (Judgment)**

Neutral citation: [2024] KEELC 5853 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E007 OF 2023
LN GACHERU, J
AUGUST 26, 2024**

BETWEEN

JANE NYAMBURA WANYOIKE APPELLANT

AND

DEDAN MUNGAI KIMANI RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. E. Muriuki Nyagah –
SPM delivered on 31st January 2023, in Muranga CMELC CASE No.75 of 2018)*

JUDGMENT

1. The Respondent herein Dedan Mungai Kimani, was the Plaintiff in Murang'a CMC ELC No. 75 of 2018, wherein he sued Racheal Waitherero K, as the Defendant thereon for the following prayers; -
 - a. That the Defendant be ordered to vacate the Plaintiff's land parcel No. LOC.11/Maragi/1304, and remove her structures from the said land, and give vacant possession thereof to the Plaintiff.
 - b. The Defendant be ordered to remove caution lodged on the title number LOC.11/Maragi/1304, failure of which the District Land Registrar Muranga, be authorized and empowered to remove the same.
 - c. That costs and interest of the suit.
 - d. Any other better relief.
 - e. Any other or better relief the Court may deem fit to grant
2. The Respondent herein as the Plaintiff had alleged that he is the legal owner of land parcel LOC.11/Maragi/1304, measuring 0.52 Hectares, and his right over the said land are exclusive, protected and guaranteed by the law.



3. He had alleged that the Defendant thereon, Racheal Waitherero K had implored him to allow her to remain on the suit land for some time as she prepared to relocate to her parcel of land being LOC.20/Kambirwa/1196. That the Plaintiff (Respondent herein), allowed her to remain on the suit land, but she has shown no intention to relocate to her parcel of land, and thus she is a trespasser on the suit land. Further that the said Racheal Waitherero K, has placed a caution on the suit land, which caution is unreasonable and unnecessary. He urged the Court to allow his claim.
4. The said Defendant Racheal Waitherero K, filed her statement of Defence on 27th August 2021, and denied all the allegations made in the Plaint.
5. She alleged that the Plaintiff (Respondent herein), was only appointed as a trustee for the property of Rutheta Wambui Mungai (now deceased), only to go behind every ones back and fraudulently transfer some of her property in his name, despite the fact that the said registered owner suffered from senile dementia.
6. The said Defendant also alleged that by the time the Plaintiff (Respondent) was acquiring the suit land LOC.11/Maragi/1304, its owner was seriously ill, and was not in a position to understand herself leave alone transferring the suit land to the Plaintiff (Respondent).
7. It was her claim that the suit land was acquired by the Plaintiff (Respondent) through fraud, which fraud is particularized in paragraph 6 of her Defence. She urged the Court to dismiss the Plaintiff's (Respondent's) suit with costs.
8. During the pendency of the suit, a Notice of Motion Application dated 16th March, 2022, was filed by the Defendant who sought for leave to substitute the witness statement of the Defendant (Racheal Waitherero K), with the witness statement of Jane Nyambura Wanyoike, on allegation that the Defendant was incapacitated, having been diagnosed with dementia, and was thus unable to stand trial in that condition. A copy of medical report dated 27th August 2021 from Aga Khan University Hospital was annexed as JNM1.
9. The said Application was not opposed, and from the Court record, the same was allowed on 9th June 2022. The effect of the said Application is that Racheal Waitherero K remained as the Defendant, but her witness statement was substituted with that of Jane Nyambura Wanyoike who is the Appellant herein.
10. However, even with the said substitution Jane Nyambura Wanyoike, was not made a Defendant nor was she given the Power of Attorney. She only remained as a witness, and the Defendant in Muranga CMC.ELC No.75 of 2018, was never substituted, and remains as Racheal Waitherero K.
11. After the said substitution of the witness statement, the matter proceeded for Pre-trial Conference(PTC), and on 22/11/2022, it proceeded for viva vice evidence wherein Dedan Mwangi Kimani as the Plaintiff and now Respondent in this Appeal, gave evidence and produced various exhibits.
12. On the part of the Defendant, Jane Nyambura Wanyoike gave evidence, adopted her witness statement as her evidence in chief and produced a list of documents as the Defence exhibits. Thereafter, parties filed their respective written submissions.
13. On 31st January 2023, the trial Court entered Judgment and found in favour of the Plaintiff – Dedan Mungai Kimani, the Respondent herein. The Appellant herein, though not a party to the suit before the trial Court, but who was called as witness for the Defendant was aggrieved by the said Judgment of the Court, and filed this instant Appeal dated 2nd March, 2023.



14. In the above Memo of Appeal, the Appellant sought for orders that; -
 - a. The Appeal be allowed.
 - b. The Judgment and Decree of Hon. E. Muriuki Nyagah delivered in Muranga CMC ELC N. 75 of 208, on 31st January, 2023, and all the consequential orders be set aside.
 - c. That the prayers in the Respondent's Complaint filed in Muranga MELC No. 75 of 2018, be dismissed with costs to the Appellant.
 - d. Any further or other award that this Court may deem fit to grant in the circumstances.
 - e. That costs of the Appeal and costs of trial Court to be awarded to the Appellant.
15. In the Memo of Appeal, the Appellant raised ten (10) grounds of Appeal, and the gist of the Appeal is that the trial court erred both in law and fact in failing to find that the Plaintiff/Respondent held the suit land in trust for himself, the Appellant, and the family of the late Rutheta Wangui Mungai.
16. Further that the trial court erred in law and in fact in failing to find that the Defendant(Appellant) herein, had proven that the Plaintiff (Respondent) acquired the suit land LOC.11/Maragi/1304, through fraud.
17. The Appeal is opposed by the Respondent, who through a Notice of Motion Application dated averred that the Appeal herein was filed by a non-party to the proceedings in the Lower Court, and thus the Appeal does not lie in law.
18. Further that the original Defendant, Racheal Waitherero K. died on 28th December 2022, and this Appeal was file in the year 2023, without substitution, and thus the instant Appeal is illegal, incompetent and frivolous as the person purporting to be the Appellant lacks locus standi, and has no capacity in this matter.
19. It was further averred that the Appeal has been filed by an advocate who is a stranger to the proceedings without leave of the Court, without Appointment Notice or Notice of Change of Advocate, and therefore this Appeal is incurably defective and does not lie in law, and no amendment can salvage it, as it is entirely misconceived and contemptuous of law, procedure and Court.
20. The Appeal was canvassed by way of written submissions. The Appellant herein, Jane Nyambura Wanyoike filed her written submissions on 6th November 2023, through the Law Firm of Karanja Kangiri & Co. Advocates.
21. The Respondent herein Dedan Mwangi Kimani, filed his submissions on 27th October, 2023, through the Law Firm of Kirubi Mwangi Ben & Co. Advocates.
22. In her submissions, the Appellant raised for issues for determination being:-
 - i. Whether there was fraud in the transfer of land parcel No. LOC.11/Maragi/1304, from Rutheta Wangui Mungai to the Respondent herein Dedan Mungai Kimani.
 - ii. Whether there exists a trust in favour of the Appellant, over the suit land.
 - iii. Whether the Respondent breached the trust bestowed upon him as a trustee of the property of Rutheta Wangui Mungai, and whether the late Rutheta Wangui Mungai, had proper mental capacity to transfer the suit land to the Respondent.
 - iv. Who should bear the costs of this Appeal.



23. On whether there was fraud in the transfer of the suit land from Rutheta Wangui Mungai, to the Respondent herein, it was submitted that though the Respondent alleged that Rutheta Wangui Mungai, gifted him the suit property, and then she gifted LOC.20/KAMBIRWA/1196, to the original Defendant(Racheal Waitherero K), the Respondent did not produce any records of the Land Control Board, which he alleged that he attended together with Rutheta Wangui Mungai and the Racheal Waitherero K, the original Defendant.
24. It was her further submissions that the registration of a person as a registered owner of a parcel of land and the certificate of title held by such a person as the proprietor of the said property are conclusive proof that such person is the owner of the said property. However, the said title can be impeached under certain circumstances as stated in section 26(1) (a) & (b) of the *Land Registration Act*.
25. For these submissions, the Appellant relied on the case of Kamau James Njendu Vs Serah Wanjiru & Another eKLR, which relied on the case of Munyu Maina Vs Hiram Gathiaha Maina (2013) eKLR, where the Court held: -

“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 including any and all interests which need not be noted on the register”.

26. It was her submission that it was not enough for the Respondent herein to dangle the instrument of title as prove of ownership, after the Appellant had challenged his title. That the Appellant ought to have gone beyond to show how he legally acquired the said certificate of title, by producing the records of the alleged Land Control Board meetings, attended, the consents of the said Land Control Board, and/or the transfer forms.
27. On the issue of gift inter-vivo, she relied on the case of the Estate of M’Raiji Kathiano (Deceased) eKLR being Meru HCC No. 419 of 2006 which was also discussed in the case of Buigut & Another (Suing as the Representative of the estate of the Late Joel Kiprono Kipkoti V Komen, where the court held; -

“A gift inter vivos should be complete in order to be valid. Ordinarily, a gift in land should be effected through written memoranda or transfer on a declaration in trust in writing, showing that the land was gifted (emphasis ours). But, if a gift rests merely on promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the Court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstance where the donor’s subsequent conduct gives the donee a right to enforce the promise”

And in the case of Estate of the late Gedion Manthi Nzioka (deceased) (2015) eKLR, the court stated as follows concerning gifts inter vivos;

“... Gifts of land must be by way of registered transfer or if the land is not registered, it must be in writing or by a declaration of trust in writing”.

28. It was her further submissions that though the Respondent alleged that the Appellant attended the Land Control Board, the Respondent did not produce any transfer documents which showed the gifting of the land by the deceased to the Respondent, which could have shown the process in which



he legally acquired the title of the suit land. She also submitted that she was able to prove fraud by the Respondent in the acquisition of the suit land.

29. On the issue of whether there exists a trust in favour of the Appellant over the suit property, the Appellant submitted that from the testimony of the witnesses, it was clear indication that a trust exists in favour of the Appellant, and that the suit property is a trust land. Further that the Respondent did not dispute that the Appellant and her family live on the suit property, and that the Appellants relatives were buried thereon. Further that there was no evidence from the Respondent that he had even attempted to evict the Appellant and her relatives from the suit property since 2004, and while the deceased was alive. Therefore, it was submitted that the Appellant had established a customary trust in respect of the suit property, wherein, she had lived thereon and buried her relatives.
30. On whether the Respondent breached the trust bestowed upon him as a trustee of the property of Rutheta Wangui Mungai, and whether the late Rutheta Wangui Mungai had a proper mental capacity to transfer the suit land to the Respondent, the Appellant submitted that since the late Rutheta Wangui Mungai suffered from senile dementia, she lacked the necessary mental capacity to enter into any transaction over her land parcels including the transfer of the suit land herein.
31. For this submissions, she relied on the case of *Gitau & Another Vs LN alias LNM & Another (ELC No. 347 of 2017)* (2022) (KEEKC13560) (KLR) (13th Oct 2022) Judgment, where the court held;-
- “It is a very serious thing to say of, and concerning a person, that such person is a person of unsound mind, or suffers mental disorder. The law presumes that every person is mentally sound, unless and until he is proved unsound mind always bear in mind that the degrees of mental disorder are widely variable, and incompetence to do any legal act or inability to protect one’s own interests, must not be inferred from a mere name assigned to the malady form which a person may be suffering”.
32. It was also her submissions that since the onus was on the Appellant to avail evidence to prove that late Rutheta Wangui Mungai lacked mental capacity, to transfer her properties, that the Appellant produced a letter from Dr. M. Wangari Kuria, which showed that the deceased (Rutheta Wangui Mungai), had been treated for senile dementia; which illness caused the said Rutheta Wangui Mungai, to have memory loss and also deterioration in mental function. That though the Respondent had acknowledged that the deceased suffered from dementia, he did not call any evidence to rebut or controvert the fact that the said Ruth Wangui Mungai lacked capacity to transact.
33. Reliance was placed in an Article written by Dr. K. I. Laibuta which was quoted in the case of *Gitau & Another Vs LN alias LNM & Another* (supra);

“The Law of Contract;

Nature of contracts in Kenya: The test of capacity in relation to insane and drunken person is whether, at time of contracting the party was suffering a degree of mental disability that he was incapable of knowing or understanding the nature of the contract. The contract is voidable at the instance or option of the disabled party. However, it must be proved that the fact of mental disability was or ought to have been known by the other contradicting party (emphasis ours). On the other hand, a contract made during his lucid interval is binding notwithstanding knowledge by the other party of his mental order”



34. On who should bear the costs of this Appeal, the Appellant submitted that costs should be awarded to the successful party, and since the Appellant has proved her Appeal, she is entitled to costs of the Appeal as well as costs of the lower court case.
35. The Appellant urged the Court to find and hold that this Appeal is merited, allow it, and proceed to set aside the Judgment of the trial Court, and further grant the prayers sought in the Appeal.
36. In his submissions, the Respondent herein reiterated the evidence adduced at the lower court, and further submitted that the Respondent had acquired the suit land legally on 16th December 2004, after being gifted the same by his aunt Rutheta Wangui Mungai (deceased), as a gift inter-vivos.
37. Further that the said deceased also bequeathed land parcel No. LOC.20/Kambirwa/1190, to the Defendant at the trial Court's matter (Racheal Waitherero K). That the parties consents were produced, and the transfers were done legally and above board.
38. It was his further submissions that no party raised a finger about the division and transfers that was carried by the deceased(Rutheta Wangui Mungai) owner, of the suit property in 2004. That no issue can be raised now after about 20 years after the said transfer and only after the death of the owner.
39. The Respondent also submitted that an owner of a property has the right and discretion to share out and bequeath his/her property inter-vivos as she/he wishes. That the deceased owner took a conscious decision to as to how she would distribute her property to her niece and nephew, as she had no family of her own. He claimed that at the time the donor made the transfer, she had no dementia in the year 2004.
40. He further submitted that the trial Court found in favour of the Plaintiff(Respondent herein), and its findings and reasoning are legally sound and in accordance with the law. Further that the Defendant before the trial court Racheal Waitherero K, did not give evidence, but one Jane Nyambura Wanyoike(Appellant now), gave evidence, and she was not a party to the suit. That the said witness did not have the Power or Attorney or authority to represent the Defendant, and she was just a mere witness.
41. It was also submitted that the Appellant herein is the said witness Jane Nyambura Wanyoike, who is a stranger to the suit, and that the law is very clear that an Appeal is by an aggrieved party, and a party that participated either as a Plaintiff or Defendant, at the trial court. Therefore, there is no competent Appeal before this Court.
42. The Respondent also submitted that Racheal Waitherero K, the Defendant before the trial Court died on 28th December 2022, and that position was confirmed by the Chief's letter of 9th October, 2023, and the Appellant has not disclosed that material fact. The Appellant has not obtained Grant of Representation or Letters of Administration of the estate of the deceased Defendant, Racheal Waitherero K, and she has not made the necessary application for substitution. Therefore, the Appeal herein is by a stranger, and busy body, and thus it is incompetent.
43. Further, the Respondent submitted that the advocate at the trial court is different from the advocate who has filed this Appeal. That the current advocate filed the Appeal without the leave of Court; with no Notice of Appointment, and there was no notification to the first advocate of this change. That this position is frowned upon by the law, and thus the Appeal is incompetent.
44. On the substantive Appeal, the Respondent submitted that the trial Court appreciated the dispute before it and the applicable law, and the said court did analyze the evidence at length, and made a legal and informed finding on all issued before it.



45. Therefore, the grounds of Appeal raised are speculative and are raised in ignorance of and/or misapprehension of the law and evidence on record. That none of the grounds are sustainable and the Respondent urged the Court to find that this Appeal is incompetent, frivolous, vexatious and an abuse of the due process of law and the court, was urged this court to dismiss the instant Appeal entirely with costs to the Respondent.
46. The above is the summary of the Memo of Appeal, the evidence as contained in the Record of Appeal, the rival written submissions and cited authorities, which this court has carefully read and considered, together with the relevant provisions of law and finds the issues for determination are; -
- i. Whether the Appeal herein is incompetent, frivolous and an abuse of the due process of law?
 - ii. Whether the Appeal herein is merited?
47. This is a first Appeal and as provided by Section 65 of the *Civil Procedure Act*, the Court has a duty to consider both the law and facts. Further Section 78 of the same Act mandates the Court to re-evaluate, re-examine and re-consider the evidence adduced before the trial Court, and then arrive at its own independent conclusion. See the case of *In Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:
- “...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect...”
48. Further, the Court will consider that it never saw nor heard the witnesses, and so will give deference to the trial Court’s findings. This Court as an Appellate Court will not set aside the trial Court’s findings just because this is an Appeal. The trial Court has a constitutional and statutory discretion to make its findings, just like this Court. See the case of *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR,
- “In reiterating the above position, we affirm that we would only interfere with the Appellate Court’s exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court’s exercise of discretion.”
49. Further, this court appreciates that as an appellate Court, it will not ordinarily interfere with findings of fact by the trial Court unless the said findings were based on no evidence at all, or on a misapprehension of it, or it is shown that the trial Court acted on wrong principles in arriving at the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga – versus- Kiruga & Another* (1988) KLR 348.
50. On whether the Appeal herein is incompetent, frivolous and abuse of the due process of law, the Respondent herein opposed this Appeal and in its Notice of Motion Application dated 13th October, 2023, he urged the Court to dismiss the Appeal on the ground that it is incompetent, frivolous and an abuse of the due process of law, on the ground that it is filed by a party who was not a party in the



lower Court case; that the Defendant at the trial Court Racheal Waitherero K, is now deceased, and is not substituted, and the present advocate who filed this Appeal, came on record at the Appeal stage and has not complied with Order 9 Rule 9 of the Civil Procedure Rules.

51. The Court directed that the said Application would be considered alongside this Appeal. The Appellant in her submissions did not oppose the above allegations and averments and also did not submit on whether the Appeal is incompetent or not. The Appellant submitted on the merit of the Appeal and relied on various decided cases to support her argument that the Respondent is holding the suit land in trust for the Appellant, and their entire family and thus the trial Court's findings should be set aside and/or overturned and the Respondent's claim before the trial court be dismissed with costs.

52. Is the Appeal herein incompetent for having been filed by a party who was not a party before the trial Court?

It is very clear that the Civil Procedure Act provides that any aggrieved party may file an Appeal from a decision of the subordinate Court to the High Court, which in this instance mean the Environment and Land Court, since the ELC has equal status as the High Court (See Article 162 (2) (b) of the Constitution). Therefore, on Appeal can only be filed by an aggrieved party.

53. Who is a party to the suit? A party to the suit is one who is impleaded in the suit and qualified the threshold of a Plaintiff or Defendant under Order 1 Rule 1 & 2 of the Civil Procedure Rules, respectively or a Third Party or as an Interested Party, and whose presence is necessary or relevant for the determination of the real matter or issues in dispute or to enable the Court effectively and competently adjudicate upon, and settle all questions involved in the suit. See the case of *Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Maztagaro & Ezekiel Misango Mutisya* [2014] eKLR, the Court held that: -

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”

54. Therefore, from the above description of a party, the aggrieved party who qualifies to file an Appeal is a party who participated in the trial as either a Plaintiff, Defendant, Third Party or Interested Party after joinder to the suit. A person who was not a party to the suit cannot bring an Appeal, and if such a situation happens, then the Appellate Court will not have Jurisdiction to determine such an Appeal. The Supreme Court of Kenya had an occasion to determine such a situation in the case of Law Society of Kenya Vs Communication Authority of Kenya & 10 Others (Petition No. 8 of 2020) (2023) KESC 27(KLR) (CW)(21April 2023) Judgment, where the Court held:-

“The definition of a person to file an Appeal only extended to a party who was aggrieved by a decision issued against him by the Court of Appeal, and wished to prefer an appeal to the Supreme Court. The determination did not open the door to any passer-by who was disgruntled with the decision delivered by the appellate Court to approach this Court”.



55. The above position would also apply to other courts too. In the instant matter, the parties before the trial Court were Dedan Mungai Kimani Vs Racheal Waitherero K. However, on 16/3/2022, the Defendant applied to substitute her statement with that of Jane Nyambura Wanyoike.
56. Though the said Application was allowed, the Defendant was not substituted. Further, no Power of Attorney was filed to allow Jane Nyambura Wanyoike act for the Defendant. The Defendant before the trial Court remained as Racheal Waitherero K, and not Jane Nyambura Wanyoike the Appellant.
57. Jane Nyambura Wanyoike remained as a witness, and being a witness for the Defendant did not qualify her to be a Defendant and therefore, she was not a party to the suit. Consequently, this Appeal having been filed by a person who was not a party to the proceedings before the trial Court means that the Court has no Jurisdiction, and thus this the Appeal is incompetent.
58. Since the Appellant herein was not a party to the suit before the trial Court, she has no capacity to bring this Appeal, and the Court has no Jurisdiction to hear this Appeal. Without jurisdiction, the Court has no options but to down its tools. See the Case of Owners of Motor Vessel ‘Lilian S’...Vs... Caltex Oil (Kenya) LTD (1989) 1 KLR, where the Court held that: -
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no Jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction.”
59. It was further alleged that the Defendant at the trial Court Racheal Waitherero K, is now deceased and died on 28th December 2022, as per the Chief’s letter dated 9th October 2023. This allegation was not disputed, by the Appellant herein. If the Defendant is deceased, having died before the Appeal was filed, then the Appeal cannot stand. However, the Appeal herein is not by Racheal Waitherero K. but by Jane Nyambura Wanyoike, who is not the legal Representative of the estate of Racheal Waitherero K. Consequently, Jane Nyambura Wanyoike, has no capacity to file the Appeal on behalf of Racheal Waitherero K who is now allegedly deceased.
60. In the case of Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, the court held as follows:-
- “Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others -Vs- City Council of Nairobi [1982] KAR 229, the Court also held that:-
- “the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.
61. Further in the case of Julian Adoyo & Another vs Francis Kiberenge Bondeva([2016] Eklr), the court held;
- “a party without locus standi in a civil suit lacks the right to institute and/ or maintain a suit. Further that a party cannot commence a civil suit on behalf of the estate of a deceased person without letters of administration, and any suit so initiated is null and void ab initio.”
62. The Appellant herein was not the Defendant at the trial court. It is evident the Defendant at the trial court is deceased, and the Appellant herein has not taken letters of administration on behalf of her



estate. Therefore, the Appellant herein has filed this Appeal without authority, and thus the Appeal is null and void ab initio.

63. Further, it was clear that in the suit before the trial court, the Defendant thereon was represented by the Law Firm of J. Ngumo Mbogo & Co. Advocates. However, this Appeal is filed by Karanja Kangiri & Co Advocates, without any leave of the Court as provided by Order 9 Rule 9 of the Civil Procedure Rules.

64. The purpose of Order 9 Rule 9 of Civil Procedure Rules was spelt out in the case of Serah Wanjiru Kungu Vs Peter Munyua Kimani (2021 eKLR where the court held: -

“The above frame work was introduced in the Civil Procedure Rule to deal with disruptive changes that litigants and advocates used to effect, often for purposes of unfairly dislodging previous advocates without settling their costs.”

65. Further in the case of Jackline Wakesho Vs Aroma Café (2014) eKLR, the Court held:-

“...Although the foregoing objection appears like a technical procedural issue, ...the default by the applicant goes to the jurisdiction of the court to entertain the motion. The reason for the foregoing reasoning is that the court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack locus standi. The court has been asked to invoke the oxygen principle under Section 1A and 1B of the Civil Procure Act and entertain the Motion. The court will not however not do that...the courts have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9...”

66. It is not in doubt that the advocate on record for the Defendant at the trial Court was J. Ngumo Mbogo & Co. Advocates. There is no evidence of any consent from the said Firm of Advocates to allow the current Law Firm to come on record for the alleged Appellant herein. Consequently, this Court finds that Order 9 Rule 9 of the Civil Procedure Rules, was not complied with and for that reason, this Appeal is found to be incompetent.

67. Having now carefully analyzed the available evidence, the Notice of Motion Application dated 13th October, 2023, the written submissions by the respective parties herein, and the relevant provisions of law, this court finds and holds that the instant Appeal is incompetent and is an abuse of the due process of the law, and court. Therefore, this Court has no jurisdiction to hear and determine the said Appeal, and it has no option, but to down its tools.

68. On the second issue of whether the Appeal is merited, this Court finds that it has no Jurisdiction to hear and determines this appeal which is incompetent and is an abuse of the due process of law. Having found that the Court has no Jurisdiction, then it has no option but to down its tools, and having downed its tools, this Court cannot determine the merit and demerit of this Appeal.

69. For the above reasons, the court finds no reasons to set aside the lower Court findings and holdings in its Judgement dated 31st January 2023, as the Appeal before this court is incompetent and is an abuse of the due process of law. Consequently, this Appeal is dismissed entirely with cost to the Respondent.

It is so ordered

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

L. GACHERU



JUDGE

26/8/2024

Delivered online in the presence of;

Joel Njonjo-Court Assistant

M/s Mugo H/B for Karanja Kangiri for Appellant

N/A for Respondent, though served with Notice for Judgment.

L. GACHERU

JUDGE

26/8/2024

