



**Muchai v Kinuthia (Environment and Land Appeal E017 of 2022)  
[2023] KEELC 19183 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19183 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL E017 OF 2022  
LN GACHERU, J  
JULY 27, 2023**

**BETWEEN**

**GRACE WANJA MUCHAI ..... APPELLANT**

**AND**

**EPHANTUS MUCHOKI KINUTHIA ..... RESPONDENT**

*(Being an Appeal against the entire Judgement of Hon. E. M Nyagah,  
(SPM) delivered on 4th August 2022, in Murang'a CMCC No.327 of 2015)*

**JUDGMENT**

1. The instant appeal emanates from the judgment of the trial Court in Murang'a CMCC No. 327 of 2015, where the Respondent had filed the said suit against the Appellant herein vide an amended Plaint dated 15th June, 2020. The Respondent had sought for Orders of cancellation of the Appellant's title issued over parcel No. Loc. 20/Kambirwa/2430, on the premise that the registration was obtained fraudulently.
2. The trial Court in its judgment of 4th August 2022, entered judgment in favour of the Respondent, the effect of which would resulted in cancellation of the Appellant's title over the suit land. Aggrieved by the judgment, the Appellant preferred this appeal on Seven Grounds set out in the Memorandum of Appeal dated 25th August 2022, and filed on the 25th August, 2022, for orders;
  - a. This Appeal be allowed.
  - b. The orders made on 4<sup>th</sup> August 2022, be vacated
  - c. The costs of this Appeal and the proceedings in the Chief Magistrate's Court Civil Case No. 327 of 2025 be awarded to the Appellant
3. It was the case in trial that the Appellant and the Respondent were jointly registered as proprietors of the suit property by dint of the registration of 21st December, 2010. The Respondent averred that the



- Appellant caused the suit land to be fraudulently registered in her name on 19th November 2014, at his exclusion.
4. The Appellant filed her Statement of Defence and narrated on how the suit land became jointly registered in their names. She averred that she sold her inheritance, Githunguri/ Githunguri/ T.192, and used the proceeds to acquire the suit property and caused it to be jointly registered in their names, even though the Defendant later agreed to transfer the land to her. She further averred that the Respondent had not contributed to the purchase of the suit land and denied the particulars of fraud levelled against her.
  5. The trial Court in its judgment found that the Respondent had proven his claim on a balance of probabilities and faulted the Appellant for not establishing how she became the sole registered proprietor of the suit property.
  6. The instant Appeal was dispensed with by way of written submissions. The Appellant filed her submissions on 25th May 2023, through the Law Firm of Mbue Ndegwa & Co. Advocates and submitted on the grounds of appeal.
  7. It was her submissions that the Respondent's suit was anchored on fraud and despite pleading fraud, the Respondent failed to prove it. She relied on the cases of *Emfil Limited v Registrar of Titles Mombasa & 2 Others*{2014} and *R. G Patel v Lalji Makanji*{1957} where the Courts observed that allegations of fraud must be strictly proved.
  8. The Appellant further submitted that she had lead evidence on how she acquired title of the suit land and maintained that she acquired title through a legal process. She submitted that the burden of proof rested with the Respondent as provided in Section 109 and 112 of the *Evidence Act* and it never shifted. In the end she faulted the judgment of the Court.
  9. The Respondent filed his submissions on 2nd June, 2023 through the Law Firm of Kirubi Mwangi Ben & Co. Advocates. It was his submissions that the joint registration was a controlled transaction within the provisions of Section 6(1) of the *Land Control Act* and any transfer required a consent from the Land Control Board. Reliance was placed on the case of *Hiram Ngaithe Gitbira v. Wanjiku Munge*{1979}KLR where the Court voided a transaction for want of consent.
  10. The Respondent further submitted that the Appellant having alleged that there was a consent to transfer, she ought to have lead evidence as required under Section 109-112 of the *Evidence Act*. That the green card corroborated his testimony and as such the Appellant ought to have adduced evidence on how the land came to be registered in her name solely.
  11. The Court has considered the Memorandum and Record of Appeal, together with rival written submissions and render itself as follows; -
  12. This is a first appeal and within the provisions of Section 65(b) of the *Civil Procedure Act*, this Court is allowed to determine the appeal on both law and facts. According to the Green Card which was adduced as evidence in the trial Court, the suit land was first registered in the name of Consolata Wanjiru Gitau, before being transferred to Gerald Wachira Chege. The Appellant and the Respondent became registered owners on the 21st December, 2010 and were issued a copy of Title Deed on 22nd December, 2010. Subsequently, on 19th November 2014, the suit land was transferred to the Appellant and a title deed issued to her on the same day.
  13. While the Respondent's case was that the Appellant acquired the Title fraudulently, the Appellant maintained that she acquired the land through a legal process and added that the Respondent consented to the transfer of the land in her name solely. This Court did not have the benefit of hearing



the testimonies of parties as the trial Court did. The trial Court exercised its discretion and this Court cannot simply interfere with that discretion simply because it has been moved on appeal. The Supreme Court when moved on appeal in the case of *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR, had this to say about interfering with the appellate powers

“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.”

14. Further in *Mbogo & Another v Shah*, [1968] EA, p.15;

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

15. Thus, the Appellant must sufficiently guide this Court within the aforementioned parameters in order for this Court to interfere with the discretion of the trial Court.

16. This Court, is alive to its role on appeal as laid out in Section 78 of the *Civil Procedure Act* which is to re-evaluate, re-assess and re-analyze the evidence as contained in the record of appeal. This was echoed by the Court in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR, where the Court held:

“We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”

17. The Supreme Court in the case of *Sonko v County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022) had this to say:

“A first appellate court should accord deference to the trial court’s conclusions of fact and only interfere with those conclusions if it appeared to it, either that the trial court had failed to take into account any relevant facts or circumstances or based the conclusions on no evidence at all, or misapprehended the evidence, or acted on wrong principles in reaching the conclusions.”

18. With this in mind and having perused the Record of Appeal and read through the rival written submissions by parties and considered the authorities cited, the issues for determination are:

- i. Whether the Respondent discharged his burden of proof
- ii. Whether the burden of proof shifted to the Appellant
- iii. Whether Trial Court erred in entering judgment in favour of the Respondent



- iv. Whether this Court should disturb the judgment of the Trial Court
- v. Who should pay costs for the Appeal

### **I. Whether the Respondent discharged his burden of proof?**

- 19. The Respondent filed the suit against the Appellant and it was his statutory duty to lead evidence to support his assertions. The Evidence Act makes provisions for the legal and evidential burden and it is trite law that the legal burden rests with the person alleging certain facts and the same never shifts.
- 20. Section 107 of the Evidence Act provides:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”
- 21. While Sections 109 and 112 provides:
  - 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
  - 112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.
- 22. The Respondent’s case was that the suit land was jointly registered in his name and that of the Appellant and at no point did he consent to the land being transfer to the Appellant solely. It was the Respondent’s testimony in trial that they had jointly purchased the suit property and had been “jointly registered” as proprietors of the suit land, he produced a green card to support his claim. There was no copy of a title deed that was placed before the trial Court to show that the parties herein were ever issued with title. But logically if any cancellation ever occurred, it would be just to conclude that the same was surrendered.
- 23. He alleged that the Appellant had acquired her title deed fraudulently as per the particulars enumerated in paragraph 6 of the amended Plaintiff. Allegations of fraud are serious in nature and it required that a party alleging fraud must strictly plead and prove fraud by production of evidence. This was the position the case of *R. G. Patel v. Lalji Makani* (1957) EA 314, as quoted by the Court in the case of *Gladys Wanjiru Ngacha v Treresa Chepsaat & 4 others* [2013] eKLR the Court held:

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In *Mutsonga v. Nyati* (1984) KLR 425, at pg 439, this Court held:

“Whether there is any evidence to support an allegation of fraud is a question of fact”. (emphasis added)



24. The allegations of fraud referenced in the Plaint were that the Appellant had caused the land to be registered in her name solely and that she had unlawfully caused the joint title to be cancelled. Fraud is defined under the *Black's Law Dictionary* 10th Edition as

“A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment”.

25. From the record herein, there seem to have been a mutual consensus that both parties herein were at some point jointly registered as proprietors of the suit land. This consensus is corroborated by entries 4 and 5 of the Green Card, which was produced in the trial Court as evidence by the Respondent. The search certificate produced by the Respondent was a reflection of the contents of the green card.

26. The Appellant produced a bundle of documents detailing how she acquired ownership of the land. Relevantly, was a copy of a Sale Agreement between one Gerald Wachira Chege, who was referred to as the vendor and the parties to the appeal herein were referred to as “the purchasers”. A literal and plain reading of the agreement therein informs this Court that the parties herein jointly bought a property known as Loc. 20/ Kambirwa .... The details of the property being sold were incomplete, but the property belonged to one Gerald Wachira Chege whom this Court noted that his name appeared as entry 2 in the green card. It is also evident that the said Gerald was issued with a title deed in 28th November, 1994. Thus there was evidence that the Appellant and the Respondent jointly bought the suit property.

27. This Court has perused the acknowledgement agreements produced before the trial Court and it notes that monies were paid to the vendor. Alive to the Sale Agreement, the land was thereafter transferred from Gerald to the parties herein and a title deed issued in their favour on 22<sup>nd</sup> December, 2010. All the foregoing corroborates the Respondent’s evidence that he jointly acquired title with the Appellant and were jointly registered as proprietors.

28. The vendor had at the signing of the sale agreement acknowledged receiving monies from the parties herein. There are two acknowledgments over the suit property, one jointly signed by the parties herein dated 13<sup>th</sup> December 2007, and the other signed by the Respondent dated 25<sup>th</sup> February, 2008. The Appellant averred in her Defence that she had sold her inheritance in order to buy the suit land. She attached two copies of correspondence to show that she received monies. This did not take away the fact that there was evidence that the Respondent had contributed towards purchase of the suit property. As a matter of evidence, his registration as a joint proprietor supported his involvement in the transaction.

29. Section 2 of the *Land Act* defines “joint tenancy” as a

“form of concurrent ownership of land where two or more persons each possess the land simultaneously and have undivided interest in the land under which upon the death of one owner it is transferred to the surviving owner or owners”

30. Also, Section 91(4) of the *Land Registration Act*, No. 3 of 2012 provides:

- “(4) If land is occupied jointly, no tenant is entitled to any separate share in the land, and consequently,
- a. Disposition may be made only by all the joint tenants.
  - b. On the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; and



- c. Each joint tenant may transfer their interest *inter vivos* to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void”.

31. There seem to have been an agreement that the parties herein were and/ or are husband and wife and within the meaning of Section 6 of the *Matrimonial Property Act*, the suit land was a joint property hence the parties herein had equal and undivided rights and shares over the suit land. This Court agrees with the expression of the Court in the case of *Isabel Chelangat v Samuel Tiro Rotich & 5 others* [2012] eKLR where the Court held:

The four unities that must be present in a joint tenancy are

- (i) The unity of possession.
- (ii) The unity of interest.
- (iii) The unity of title.
- (iv) The unity of time.

On unity of possession, each co-owner is entitled to possession of any part of the land as the other/s. One co-owner cannot point to any part of the land as his own to the exclusion of the other/s. If he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other/s, so that an action for trespass cannot lie against another co-owner. Unity of interest means that the interest of each joint tenant is the same in extent, nature and duration, for in theory of law, they hold just one estate. Unity of title means that each joint tenant must claim his title to the land under the same act or document.

32. The Appellant and the Respondent having been jointly registered as proprietors of the suit land, they bought enjoyed the indefeasible rights over the suit land and none could dispossess the other. The Respondent did demonstrate to the trial Court vide the Green Card, that he was jointly registered as a proprietor of land. His evidence was aided by the Appellant who went ahead to produce documents that provided the trial Court a better history of the matter. Even so, there was an admission by the Appellant in paragraph 5 that the suit land was jointly registered.
33. The Respondent maintained throughout the trial that he did not transfer any property, and in deed there was nothing showing that he transferred the land to the Appellant solely. It is curious that the rights over the suit property were disregarded and issued in favour of one. With no document that gave rise to the transfer being adduced, it could only be concluded that the Respondent did not surrender his interest and doubt was raised as to how the Appellant acquired the said title as a Sole Proprietor.
34. Furthermore, the Respondent produced a copy of Green Card to prove his ownership which was adequate. The Court is guided in holding so by decision in the case of *Noah Onyango Amwayo v Sylvanus O Otumba & another* [2013] eKLR, where it was held;

“In the case before us, the appellant testified at the trial before the High Court that he had misplaced his title deed in respect of the disputed land. He however produced the green card and a certificate of official search in respect of the same parcel of land. The two documents, in our view, constituted what we may refer to as extracts of title and were better evidence of his title than a title deed would have been, because they contained all the entries on the



register in respect of the disputed title and carried current information relating to the parcel of land.”

35. With the above pronouncement and noting the mutuality of evidence as to the joint registration, it would be prudent to come to a conclusion that the Respondent had registerable rights over the land. It is trite law that parties are bound by their pleadings and gleaned from the Record of Appeal, it appears to this Court that the Respondent adduced evidence to support his claim. The Appellant raised the issue of transfer by the Respondent, those were facts raised by her and which needed evidence after all the evidential burden of proof will often times shift in the course of trial. Had the Appellant adduced evidence, the Respondent would have been duty bound to also produce evidence in rebuttal. To this end, it is the findings of this Court that the Respondent discharged his burden of proof.

## II. Whether the burden of proof shifted to the Appellant?

36. The Appellant was the Defendant in the trial and she had the burden of adducing evidence to support her title deed. This Court has perused a copy of a search certificate which shows that the Appellant was issued with a title Deed on 19th November, 2014.

37. The registration of the Appellant as the proprietor of land vested on her the rights thereon within the meaning of Section 24 of the Land Registration Act which provides

“24. Subject to this Act—

- 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; and
- b. ....”

38. The effect of her registration is supported by Section 26 of the Land Registration Act which provides:

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.”

39. This means therefore that the Appellant despite acquiring indefeasible rights by dint of registration could have her title cancelled as demonstrated above. Her title was under challenge and even though the Respondent was required to discredit her title by production of evidence, she was also required to protect her title by adducing evidence on how she acquired it. This position was stated in the case of Munyu Maina v Hiram Gathiba Maina [2013] eKLR where 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. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony."

40. As noted earlier, the legal burden of proof remains constant throughout trial what shifts is the evidentiary burden. The Respondent had a legal burden to prove his case and as already established above, she discharged this burden. The Appellant in paragraph 5 of the Statement of Defence averred that the Respondent had consented to transfer the land to her. During trial she testified on cross-examination that they went to the Board for purposes of transfer. This were issues raised by herself and she needed to adduce evidence to support her acquisition of title. In the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR The election Court held:

"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. "The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)].

41. The initial burden having been discharged by the Respondent, the Appellant had the burden of adducing evidence in support of her claim. Additionally, the Appellant raised a claim that she acquired the title deed by consent and being the originator of this, she had the burden to ascertain it.
42. This Court is alive to the pronouncement of the Court in the case of Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR, where the Court expressed itself as follows on when the burden of proof may shift:

"(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of 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 adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?"

43. The Appellant has cautioned that the trial Court shifted the burden of proof oblivious of the fact that the Respondent did not discharge his burden. Respectfully, this Court disagrees with the said submissions. As pointed out in the Munyu Case above, it was not enough for the Appellant to flaunt her title when the root of her title was under challenge.
44. Moreover, the Appellant had raised the fact that they went to the Land Control Board and she had followed the legal process to acquire her title, all she needed to do was adduce evidence to support her case and to rebut the Respondent's testimony that he never consented to the transfer. While the Appellant might have sold her entitlements, which as a matter of perusal of record, those not facts were not within the mind of the trial Court since no record from the proceedings intimate so. It was not demonstrated that the proceeds were used to purchase the suit property.





45. Unless evidence was called, it would be a triviality to assume such. By dint of registration, there is was established a common intention to own the property and flowing from the case of Isabel Jelagat, supra, joint tenancy befits the four unities explained by the learned judge. Issues of occupation and whatever is contained on the suit property had nothing to do with the Respondent's ownership, unless the Respondent had challenged his inability to use the land as a result of the developments. As a matter of record, the Appellant conceded on cross-examination that she is utilizing the suit land for farming. The trial Court in its judgment concluded that the Appellant had not adduced any evidence to show how she became a sole proprietor. As a matter of fact, and as observed above, she was bound to adduce evidence to protect the sanctity of her title by sanctifying the root of her title.
46. To this end, it is the findings of this Court that the evidential burden of proof did shift to the Appellant, but which burden she did not discharge as required by law.

### III. Whether trial Court erred in entering judgment in favour of the Respondent?

47. The trial Court in entering judgment for the Respondent considered among other issues that there was no consent from the Land Control Board as required by Section 6 of the Land Control Act. The trial Court was guided by the pronouncement in the case of Hirani Ngaithe Githire v Wanjiku Munge [1979] where it came to a conclusion that the Appellant had not proven how she became the sole proprietor of the suit land.
48. The Appellant submitted that the foregoing pronouncement shifted the burden of proof to the Appellant notwithstanding the provisions of Sections 109 and 112 of the Evidence Act. It cannot be rephrased any further by this Court that the burden of proof shifts during trial depending on the facts asserted and by which party. Even then, the same Section 109 as quoted by the Appellant in her submissions required of the Appellant to adduce evidence as to the legality of her acquisition of the title. She averred the transactions to effect transfer was above board. It appeared to the Court that she was well acquainted as to the process of transfer and her title being under scrutiny the only fair duty she would have protected her title, and she would have done so, based on section 112 and given evidence on facts within her knowledge.
49. The Respondent has heavily relied on the issue of controlled transactions in his submissions on appeal. The issue of consent arose from the Defence and formed part of the testimony of the Appellant herein. The Appellant did not address this issue in their submissions at trial. Validity of transfer without consent has been a subject of several pronouncements.
50. This Court finds interest in the pronouncement of the Court in the case of David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR where the Court held:

“Fourthly, we are not convinced that there can be an estoppel against the provisions of a statute. The Land Control Act requires consent to be obtained from the relevant land control board if the transaction involves agricultural land and failure to do so renders the transaction void for all purposes and in addition any occupation of the land pursuant to such a void transaction is declared to be a criminal offence. We are firmly of the opinion that no estoppel can arise under the Land Control Act to render valid and lawful conduct, which is otherwise declared by the Act to be void for all purposes and also a criminal offence.”
51. The trial Court in considering issues of consent was well within the parameters of the pleadings and even though the Appellant has anchored his appeal on *inter alia* considering the Respondent's submissions, it should be remembered that the Court had a discretion to be guided by the submissions.



52. Alive to the above, and having found that the Respondent discharged his burden of proof, and having found that the burden shifted to the Appellant, and who failed to discharge the same, this Court arrive at the conclusion that the Trial Court did not err in entering judgment in favour of the Respondent.

#### **IV. Whether this Court should disturb the judgment of the Trial Court?**

53. This Court elaborated above the circumstances when it will interfere with the discretion of the trial Court. The Appellant grounded his submissions on inter alia that the Court considered procedural technicalities and that it arrived at a biased decision. This Court has found that the judgment of the trial Court was arrived at by considering the available evidence within the legal principles and parameters. It was thus cast on the Appellant to demonstrate how this discretion was not exercised judiciously and capriciously.
54. Being alive to the pronouncement in the Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others, *supra*, as cited above, this Court arrives at a firm decision that the Appellant has not on a balance of probability demonstrated to this Court why it should interfere with the judgment of the trial Court. It proceeds therefore and affirms the judgment of the said trial Court.
55. This Court empathizes with the Appellant and while it could be far from it, it appears to this Court that the parties herein are husband and wife, and the Appellant seem to be protecting their “matrimonial properties” from sale by the Respondent. After all there is a consensus that the Respondent had sold some of their properties.
56. However, this does not take away her statutory obligations on joint tenancy and she has recourse within the law to protect her interest. If she maintains that she exclusively contributed to the acquisition of the property, she has recourse in the Matrimonial Property Act, and she should be guided on what is expected of her by her counsel. This is no way validating her action, but cautioning her action of causing land jointly registered to be registered in her name.
57. The Court finds the Appeal is not merited and the same fails on the above stated reasons.

#### **V. Who should pay costs for the Appeal?**

58. It is trite law that costs shall follow the events and a successful party is entitled to cost. This Court enjoys the discretion donated by Section 27 of the Civil Procedure Act to make such orders as to costs as it deems fit. There is evidence that the parties herein are husband and wife and whether living together or not they are husband and wife, for purposes and intent. This Court shall exercise the discretion by directing each party to bear their own costs.
59. Having carefully analysed the Memorandum of Appeal, the Record of Appeal, and the available written submissions, together with the cited authorities and provisions of law, the Court finds and holds that the finding of the trial court in its Judgement of 4th August 2022, was sound. This Court finds no reasons to disturb or upset the said Judgement and it is thus upheld.
60. The instant Appeal is consequently dismissed entirely with an order that each party to bear its own costs.
61. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 27<sup>TH</sup> DAY OF JULY, 2023.**

**L. GACHERU**



**JUDGE**

Delivered online in the presence of; -

Mr Mbue Ndegwa for the Appellant

Mr Kirubi for the Respondent

Joel Njonjo - Court Assistant

**L. GACHERU**

**JUDGE**

**27/7/23**

