Terer v State Law & 2 others (Environment and Land Appeal E019 of 2024) [2025] KEELC 22 (KLR) (16 January 2025) (Judgment)

Neutral citation: [2025] KEELC 22 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL E019 OF 2024

A OMBWAYO, J

JANUARY 16, 2025

BETWEEN

HANNAH CHELANGAT TERER ..... APPELLANT

AND

STATE LAW ..... 1ST RESPONDENT

MINISTRY OF LANDS AND PHYSICAL PLANNING & ANOTHER & ANOTHER & ANOTHER ..... 2ND RESPONDENT

JUDGMENT

Introduction

1. Hannah Chelangat Terer (hereinafter referred to as appellant) has come to this court on appeal from the decision (judgment) of the Hon E.G Nderitu (CM) delivered on 9th April 2024 in Molo MCELC No. E075 of 2021 between herself and Jane Chepkemoi (hereinafter referred to as the 1st respondent), County Land Registrar (hereinafter referred to as the 2nd respondent) and the Hon Attorney General (hereinafter referred to as the 3rd respondent). The appellant is dissatisfied with the judgment of the court on grounds that the learned Magistrate failed to consider the appellant's matrimonial claim over the suit property which required a spousal consent before the same could be disposed. It is the appellant's contention that having contributed to the purchase of the property the court ought to have held that her husband held the same in-trust for the wife.

2. The appellant's other ground is that the learned magistrate misconceived the *Law of Succession Act* Cap 160 Laws of Kenya by holding that the 1st respondent was entitled to the property in dispute as a beneficiary.

3. Moreover, that the learned Magistrate erred in fact and law by finding that the land was transferred to the 1st respondent as a gift inter vivos and failed to find that the same was transferred to the 1st respondent through a fraudulent scheme.

4. In this appeal the appellant prays for an order that the entire judgment of the subordinate court be set aside and an order allowing the suit be issued. The appellant prays for cost in the subordinate court and this court.

5. The facts of the case in the lower court are that the appellant was the wife to Stanley Kipngeno Terer, the sole registered proprietor of Elbugon/Arimi Ndoshwa Block 5/51 before its subdivision. It was evident that the appellant was married to the deceased on 30th August 1961. It is also evident that Elbugon/Arimi Ndoshwa Block 5/51 (Tegat) was acquired and registered in the name of the appellant's deceased husband on the 17th January 1996. In the year 2018, the property was subdivided into Block 5/290 (Tegat)(hereinafter referred to as the suit property), and Elburgon/Arimi Ndoshwa BLOCK 5/291 (Tegat). This dispute revolves on Block 5/290 which was transferred to the 1st respondent by the deceased.

6. The appellant moved to the Magistrates Court Molo alleging that the 1st respondent obtained title to the property through fraud, omission, mistake and misrepresentation on her part and on the part of the 2nd respondent and therefore, the 1st respondent was a trespasser. The appellant prayed in the lower court for an order holding and declaring that the transfer in favour of the 1st respondent of the Parcel known as Title No. Elburgon/Arixui Ndoshwa Block 5/290 (Tegat) was and remains fraudulent and illegal hence null and void ab initio.

7. Moreover, she prayed for an order of cancellation of the transfer of the suit property known as Title No.Elburgon/Arimi Ndoshwa Block 5/290 (Tegat) made in' favour of the 1st respondent. Furthermore, she prayed for an order of permanent injunction restraining/barring the 1st respondent and her agents, servants, employees and any other person acting on her authority from trespassing, selling, sealing, erecting structures/buildings, tilling, entering, remaining, dealing and/or in any other way transacting on any part and/or whole of all that Parcel of land known as Title No. Elburgon/Arimi Ndoshwa Block 5/290 (Tegat),

8. She prayed further for an order of eviction of the 1st respondent and her agents, servants, employees and any other person acting on her authority from trespassing, leasing, selling, erecting structures/buildings, tilling, entering, remaining, dealing and/or in any other way transacting on any part and/or whole of all that Parcel of land known as Title No. Elburgon/Arimi Ndoshwa Block 5/290 (Tegat). Ultimately she prayed for costs of the suit and interest thereon at court rates.

(Evidence of Parties)

9. In the lower court the appellant, Hannah Chelegat Terer gave evidence that she is the only widower of Stanely Kipngeno Terer having solemnized the marriage on 30th August 1961. She stated that they jointly pooled resources to acquire the suit property and developed it to exclusion of the 1st respondent and constructed a house with the husband. She relocated to Kericho in 2016 but kept checking on the property. She was surprised that the property was subdivided and part of it transferred to the 1st respondent. According to the appellant, her children have always tilled the land. She contends that her consent was required before the transfer of the property to the 1st respondent.

10. PW2, Richard Kipkirui Ngeno, son to the appellant adopted his statement on record whose gist was that the 1st respondent was his father's worker on the farm and that the house on the farm was constructed by his father in 2004. The 1st respondent used to do house chores and would live with her sister in the neighborhood.

11. PW3 Charles Kipyegon Ngeno was also son to the appellant. He states that his mother and father lived on the land. His father never told him of the 1st respondent as his wife.

12. PW4, Loise Chepkemoi Sange, a sister of the appellant testified that his brother in law and sister were always in possession of the suit property. They were working on the land. The deceased never introduced the 1st respondent to Pw4.

13. PW5, Clement Kiptai Yegota, a neighbour knew the appellant as the only wife to the deceased. He came to know the 1st respondent in 2017 as she lived with a sister in the area.

14. The 1st respondent, Jane Chepkemoi testified as DW1 and relied on her statement dated 9th July 2022 filed on 13th July 2022. According to the 1st respondent, Stanely Kipngeno Terer was her husband. They got married in 2008 vide a customary marriage and lived at his house on the suit land that had been already built. She found cows on the land. They lived in the house since 2008 until the demise of her husband and she continued living in the house till today. She improved the house by cementing it, fixing electricity, extended verandah, put up a water tank and planted trees. The original tittle was in the name of the deceased. He subdivided the land and transferred a portion of 7 acres to the 1st respondent.

15. DW2, Erick Korir a resident of Elburgon who lived within the vicinity of the suit property testified that he knew the appellant respondent and the deceased. The appellant used to live in the suit premises before she moved away. The 1st respondent got married to the deceased later and moved into the house and stays in the same todate.

16. DW3 Kiprono Leboso stated that the 1st respondent got married to the deceased in 2008 in accordance with Kipsigis customary rites.

17. DW4 Kennedy Langat stated that there was a marriage ceremony between the 1st respondent and the deceased and Dowry was paid. They were given 3 cows by the deceased.

18. The Attorney General called the County Land Registrar Collins Liyai Aliela who testified that the legal procedure in the transfer of the land to the 1st respondent was followed. However, he was not able to trace the parcel file.

(Decision by the Lower Court).

19. The learned Magistrate retired to write the judgment and after considering the pleading, evidence on record and submissions, found that the first issue for determination was whether the subdivision of block5/51 and transfer of the resultant portion block 5/290 to the 1st respondent was done fraudulently by the respondents and whether the 1st respondent was party to the fraud. On this issue, the learned Magistrate rightly found that the onus of establishing fraud remains with the person who alleges that there was fraud and that the onus never shifts and that the standard of proof is higher than the standard in ordinary civil cases.

20. On this issue, the learned Magistrate found that the appellant did not prove fraud but gave evidence that the suit property was matrimonial property and argued that it was wrong for her late husband to subdivide and transfer the same without her consent. The learned magistrate relied on the evidence tendered by the land registrar to find that it was the appellants husband who applied for subdivision, consent to subdivide, subdivided the land and transferred block 5/ 290 to the 1st respondent. There was no evidence of collusion by the 1st respondent and therefore there was no proof that the 1st respondent participated in any fraud.

21. The second issue considered by the learned magistrate was whether the 1st respondent was a wife to the deceased Stanley Chepngeno Terer. The court found that the 1st respondent got married to the deceased in the year 2008 in a Kalenjin customary marriage and that they lived together on the

suit property. The deceased passed on and left the 1st respondent living on the property. On the marriage between the appellant and the deceased, the court found that the oral evidence indicated that the appellant and the deceased got married on 30th August 1961 but the Marriage certificate produced showed that the couple was married on 25th May 2021 under the *Marriage Act* of 2014. The learned magistrate found that the deceased having married under the *Marriage Act* 2014 lacked the capacity to contract another marriage with another woman. However, the learned magistrate held that for purposes of succession under section 3(5) of the *law of succession Act* she could benefit from the property with her children as beneficiaries. The learned magistrate held that despite the deceased being married under the statute, the 1st respondent was a beneficiary of the estate by virtue of the second marriage. The learned Magistrate further held that the deceased gifted the 1st respondent with the parcel of land and she found that it was a gift inter-vivos. The suit was dismissed with each party to bear own costs.

Appellants Submissions

22. The appellant states that in her Judgment, the trial magistrate did not make any determination as to whether the suit parcel was Matrimonial property or not and whether the Appellant held any rights over the same. This omission, according to the appellant was a fundamental error on the trial Court's part given the Appellant had produced a Certified copy of a Certificate of Marriage showing she got married to the immediate former registered owner on 30th August 1961, a substantial number of years before the suit property was purchased and which marriage was acknowledged by the 1st Respondent who in paragraph 4 of her defence averred she was the late Stanley's second wife and who further confirmed that she knew the Appellant as a wife to the immediate former registered owner.

23. According to the appellant, evidence was led by the Appellant to the effect that she worked as a teacher and had contributed financially to the family's income. The Appellant had further informed the Court that she and her husband were blessed with several children whom they raised together as they jointly with the assistance of the children substantially improved the property building a house, planting crops and undertaking dairy farming which evidence brought the suit property within the ambit of the definition of Matrimonial property.

24. The appellant submits that it is trite that a Spouse's consent must be obtained prior to disposition of matrimonial property as per the provisions of Section 93 (4) of the *Land Registration Act* that provides;

> "If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection (3) (a) or (3)(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition."

> The appellant further referred to Section 12 (1) *Matrimonial Property Act* that provides; "An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise."

25. According to the appellant, the requirement of spousal consent in transactions relating to matrimonial property has been interpreted in various case laws including in JKN v JWN & 3 others [2022] eKLR where the learned Judge held;-

> "Therefore, this Court finds and holds that before the suit property could not be transferred to the 2nd Defendant, the same being a matrimonial home, even with the Amendment of

> Section 93 of the *Land Registration Act*, the Plaintiff's consent ought to have been sought and there was indeed need for spousal consent before transfer. None has been produced in evidence."

26. On subsisting marriages, the appellant submits that Subject to section 8, a married person shall not, while-

    (a) In a monogamous marriage, contract another marriage

27. The appellant submits that the purported marriage pleaded by the 1st Respondent and sought to be proved by her witnesses remains null and void. The issue on presumption of marriage submitted on by the 1st Respondent therefore had no basis in law and the 1st respondent could not for any purpose of the suit be considered.

    as a co-wife to the Appellant given the Deceased's lack of capacity to marry as provided under Section 9 (a) of the *Marriage Act* and the fact that the 1st Respondent's alleged customary marriage has never been registered as required under Section 45 of the *Marriage Act*. The appellant relied on the case of *CWN v DK (Civil Suit 17 of 2017)* [2021] KEHC 12535 (KLR) (9 April 2021) (Judgment) "There is simply no proof of customary marriage between the plaintiff and the defendant. And even if such marriage existed, it would not be recognized in law until it has been registered. I have already alluded to this requirement of registration of marriages including marriages solemnized under customary law. I need not say anything more save to reiterate that under section 96 (2) and (3) of the *Marriage Act*, 2014, parties to a marriage contracted under customary law, among other laws specified in that section, ought to have registered their union within three years of the commencement of the Act. To this extent, the Act is retrospective in its effect."

28. The appellant submits that the purported gift failed to meet the threshold under the provisions of section 3 of the *Law of Contract Act* and Section 38 of the *Land Act* that requires all dispositions over land to be in writing given no deed was produced by the 1st Respondent in support of the allegation the property was transferred as a gift.

29. According to the appellant, Section 12 of the *Matrimonial Property Act* and Section 93 of the *Land Registration Act* 2012 made it mandatory for the Appellant's consent to be obtained prior to any disposition in the land being made, as a result the sub-division and subsequent transfer of the resultant parcel number Elburgon/ Arimi Ndoshwa Block 5/290 (Tegat) without the Appellant's consent was irregular, unlawful and as such void ab initio. The appellant relied on the decision in Gacheru J. in JKN v JWN & 3 others [2022] eKLR

> "Therefore, this Court finds and holds that before the suit property could be transferred to the 2nd Defendant, the same being a matrimonial home, even with the Amendment of Section 93 of the *Land Registration Act*, the Plaintiff's consent ought to have been sought and there was indeed need for spousal consent before transfer . None has been produced in evidence.

30. The appellant submits that the centrality of a wife's right to be treated equally in disposition of matrimonial property is further anchored on Article 45 of *the Constitution* that underscores the fundamental place of a family in a society and it is therefore strange in law for the 1st Respondent to argue the deceased could deal with the family's property without the consent of the appellant.

31. She cites K v S K K & 5 others [2018] eKLR where the learned Justice J. Kemei stated;

> "*The Constitution* of Kenya under Article 45 (3) underscores the fundamental place of the family in our society. It provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage."

32. The appellant therefore urges the court to find that the title held by the 1st Respondent is not good title for lack of the Appellant's spousal consent and by virtue of such holding, to proceed to cancel the 1st Respondent's title as held by Justices Kemei and Gacheru in the cases listed above. The appellant submits that the transfer of the suit property to the 1st Defendant without her consent offended her Matrimonial rights as guaranteed by *the Constitution*, the *Land Act*, the *Land Registration Act* and the *Matrimonial Property Act*.

33. On the issue as to whether the learned trial Magistrate erred in law and fact in turning the Appellant's cause of action anchored on Matrimonial rights into a Succession dispute the appellant argues that the trial court upon stating the facts and the evidence tendered proceeded to decide the suit against the *Law of Succession Act* at page 20 of the Judgment by stating that despite having lacked the capacity to marry the 1st Respondent by virtue of the existing civil marriage between the Appellant and the Late Stanley Terer, the transfer of the parcel in favor of the 1st Respondent was pursuant to a Gift Intervivos undertaken by the deceased in contemplation of an eventuality meaning death. The appellant argues that the cause of action raised by the Appellant centered fundamentally around matrimonial rights not succession rights and in her response, 1st Respondent alleged the Appellant's consent was not required. Additionally, the 1st Respondent alleged their "husband" was organizing her family but did not in any way raise the issue of the property having been transferred to her pursuant to a gift inter vivos. Consequently, the appellant submits that the 1st Respondent could not proceed with her case based on a cause of action related to a Gift Inter vivos and that the Court was not at liberty to introduce and decide on it as it was not raised in the pleadings. The appellant relies on the case of Dakianga Distributors (K) Ltd v Kenya Seed Company Limited [2015] eKLR where the Court of Appeal held.

> ".... Learned counsel for the appellant is with due respect to him, wrong in his submission that the appellant was entitled to proceed on a case that ran contrary to the pleading in its defence. The appellant was bound by the pleading in the defence which was not amended to allow for the learned judge to consider issues that the appellants witness was introducing through evidence in court...." In any event according to the appellant, the alleged gift did not meet the legal threshold on Gifts inter vivos for the Court to base its findings on as unlike gifts mortis causa, Gifts inter vivos are not made in contemplation of death and are supposed to be made by way of a deed in writing by a person with the capacity to do so. The appellant relies on the case of Re Estate of M'Raiji Kithiano (Deceased) [2017] eKLR quoted Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR in dealing with the law on gifts where Nyamweya J stated;-
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> > "In law, gifts are of two types. There are the gifts made between living persons (gifts inter vivos), and gifts made in contemplation of death (gifts mortis causa)....

34. For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. 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. Gifts inter vivos must be complete for the same to be valid."

35. The appellant pleads that this court exercises its jurisdiction to re-evaluate the pleadings and evidence which jurisdiction has rightly been invoked. The appellant relies on the case of Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123 where it was held;

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

36. On whether the trial magistrate failed to appreciate the law on establishing fraud and the shift in standard of proof the appellant submits that while addressing the standard of proof, the learned trial magistrate indicated the no evidence was led to establish the allegations of fraud. She submits that this, does no portray the true picture of the proceedings and the provision of the Law as to when and how a burden of proof shifts in civil cases according to the appellant.

37. The appellant submits that her contention that her consent had not been obtained prior to the transfer of the suit property was not disputed and in addition, the Appellant produced as an exhibit a letter dated 12th May 2021 seeking information form the Registrar as to how the parcel was transferred which letter was not responded to and that while being cross examined, the 1st Respondent confirmed she never attended any Land control Board, that she never executed any Land Transfer Forms and that she never appeared before any advocate, or Land registrar or paid stamp duty before obtaining a Title in her name. On his part, the Land Registrar appeared before court without the parcel file.

38. The appellant submits that the evidential burden of proof in matters fraud will be deemed to have shifted in certain circumstances. He relies on the case of Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR, cited in Sambayon Ole Semera v Kalka Flowers Limited & another [2021] eKLR where the Supreme Court held;

> "Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."

39. The court in the above case of Sambayon ole Semera (Supra) also stated as follows with regard to the burden of proof;

> "Section 107 of the *Evidence Act* (Cap 80) provides that whoever desires the court to give judgment on the basis of existence of certain facts, must prove that such facts exist. Further, section 108 provides that the burden of proof in a suit or civil proceedings lies on the person who would fail if no evidence was led at all by either party. In this regard, the plaintiff bore the burden to prove his case against the 1st defendant on this issue. That position of the law notwithstanding, the plaintiff denied donating the power of attorney to Halai. That

> power of attorney triggered the events that followed and are the subject of this dispute. The plaintiff also argued that he did not appear before the advocate who allegedly attested his signature and he did not know him. With this denial, the burden of proof shifted to the 1st defendant and its officials to prove that the plaintiff actually donated the power to Halal, executed that power and appeared before the advocate who attested his signature. Section 109 of the Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. In that case, the 1st defendant wanted the court to believe that the plaintiff donated the power to Halai which the plaintiff denied. The burden of proof, therefore, shifted to the 1st defendant on this issue"

40. According to the appellant, she proved that she was the only legal wife to the registered owner and that her consent was not obtained, it further shows that the 1st Respondent acknowledged that she had not attended any land control board for purposes of obtaining a consent to transfer the parcel in her favour and that she never executed any instruments of transfer either before an Advocate or the Land Registrar or paid the requisite Stamp Duty as required under Section 46 of the *Land registration Act* which acts and omissions established a prima facie irregular and illegal transfer that shifted the evidential burden of proof to the Respondents for them to prove that the Land control Board consent (The *Land Control Act*) was not violated. The provisions of the *Land Control Act* were applicable to the subject parcel and as such, the property could not have been transferred to the 1st Respondent without the consent of the Land Control Board which consent the Plaintiff herself stated she never procured. He relies on M W K v S K K (Supra) where Kemei J. held.

> "Section 8 of the Land Control Board Act Cap 302 makes it mandatory for the consent of the Land Control Board to be obtained. This is a statutory obligation in default of which a sale is invalid null and void. The Court finds that there were no valid land control board consents in respect to the sale transfers and charge of the suit land."

41. The appellant further submits that the trial Court alluded to the Land Registrar establishing that the deceased sub divided the land and transferred it to the 1st Respondent. The trial Court goes further to state that the Land Registrar's evidence was supported by all the documents duly signed by the deceased and produced in evidence. The source of the trial Court's findings that all documents were signed remains a myth as it is on record at The Land Registrar in his testimony confirmed that he did not have the parcel file and that he could not confirm if transfer forms were executed and whether a land control board consent was applied for and issued. The non-disclosure by the Land Registrar was fatal to the Respondent's attempt to validate the Title Deed whose root had been questioned and to that end, the appellant submits that the court ought not to have made a finding validating the acquisition by the 1st respondent of the suit parcel.

42. By ignoring these fundamental procedural omissions, the trial magistrate overlooked clear evidence of irregularity and placed reliance on an unsubstantiated assumption of regularity without any factual or legal foundation, as no documentation or evidence meeting statutory requirements was presented to verify the legitimacy of the process.

43. The appellant submits that although not in dispute and a certified copy of the Appellant's marriage certificate having been produced without any objection from all Respondents and the trial court itself having rightly found at page 19 of the Judgment that the Plaintiff was married to the Late Stanley Terer under a Statutory marriage which was monogamous, the trial court for strange unexplained reasons found fault on the Certified Copy of the Marriage Certificate produced as Pexbt 2 on the ground that the there was no explanation as to why the certificate was issued in the year 2021 under the *Marriage Act* 2014 yet the marriage was conducted in the year 1961.

44. According to the appellant, this finding was made in complete ignorance to the provisions of Section 59 (1) (b) of the *Marriage Act* 2014 that albeit with transitional provisions repealed the provisions of The African Christian Marriage And Divorce Act (Repealed) under whose provisions the Appellant's marriage was conducted and in complete disregard to the provisions of Sections 59 and 60 (1) (e) of the *Evidence ACT*.

45. On this issue, the appellant concludes that in any event, no issue on the validity of the marriage between the deceased and the Appellant arose in the pleadings and during trial and as such, there was no basis for the finding by the trial court.

Submissions by the 1st Respondent

46. The 1st respondent has identified the issues for determination as follows:-

    a. Whether the Learned trial magistrate erred in law and fact by failing to consider the plaintiff's matrimonial claim over the suit property.

    b. Whether the Learned trial magistrate erred in law and fact by failing to appreciate the law ones tablishing fraud and the shift in the standard of proof

    c. Whether the learned trial magistrate erred in law and fact in failing to appreciate the appellant's vital evidence, relied on non-existent evidence and considered irrelevant factors.

47. On the issue as to whether the learned trial magistrate erred in law and fact by failing to consider the appellant's matrimonial claim over the suit property, the 1st respondent submits that from the evidence adduced, the Appellant and the Stanley Kipng'eno Terer (deceased) got married on 30th August, 1961 by virtue of certificate of marriage procured on 25th May, 2021 months before filing of the suit and produced in evidence. The 1st respondent argues that it does not make legal sense that that the certificate of marriage was issued in the year 2021 under the *Marriage Act*, 2014 yet the marriage is said to have been conducted in the year 1961. No reason was given/ addressed by the Appellant at the trial stage. The 1st respondent submits that the document was doctored to enable the appellant claim matrimonial property rights. The 1st Respondent led evidence that she was married to the deceased through Kipsigis/Kalenjin customary marriage celebrated in the year 2008, thereafter, she and the deceased together with their son have been living and possessing land parcel Elburgon/Arimi Ndoshwa BLOCK 5/51 (Tegat) since 2008 and even after his passing on 23.7.2021 she still occupies a section of the property which was transferred/gifted to her by the deceased on 22.5.2018, 3 years before his passing on. Prior to his demise on 23.7.2021, the deceased had sub divided BLOCK 5/51 (Tegat) into 2 portions resulting into portions Numbers 290 and 291 wherein the Register for Parcel No. Elburgon/Arimi Ndoshwa BLOCK 5/51 (Tegat was closed on the 22.5.2018. That while the deceased had kept for himself portion number Elburgon/Arimi Ndoshwa BLOCK 5/291, he had distributed/ gifted the remaining portion Elburgon/Arimi Ndoshwa BLOCK 5/ 290(the suit property) to the 1st Respondent. That at the time the 1st Respondent got married to the deceased through the Kipsigis Customary Law, the deceased was already married to the Plaintiff herein on 30th August, 1961 through a statutory marriage. Section 37 of the *Marriage Act* provides that:

> "Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted. "

48. The 1st respondent submits that it was pursuant to this provision that the decisions in Re Ruenji's Estate [1977] KLR 21 and Re Ogola's Estate [1978] KR 18 were decided. However with the enactment of the *Law of Succession Act* which came into force in 1981, section 3(5) therefore provides that:

> "Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

49. The 1st respondent implores Section 3(5) of the *Law of Succession Act*, for the court to extensively and deeply adjudicate the matter before court.

50. On whether there existed a Valid Customary Marriage, the 1st respondent submits that in this case, the 1st Respondent presented evidence to show the customary rites necessary for a valid marriage under Kipsigis Customary Law had been performed to Solemnize her marriage with the deceased in the year 2008. Through minutes of dowry negotiations produced, DExh -1 Dowry had been paid to her parents, and she and the deceased had undergone the grass-tying ceremony that symbolised a Kipsigis customary marriage. She gave evidence of her possession and developments made on the property. DW3, Kiprono Laboso, an elderly man, testified that he attended/witnessed ratet, (marriage ceremony) between the 1st respondent and the deceased sometime in the year 2008. As one of the deceased's clan's men he was invited by the deceased together with others to witness his customary union with the 1st respondent where he continued to narrate step by step on what he witnessed the day of the ceremony to wit-The 1st Defendant walked in with the groom, Stanly Terer, dressed in cloak made of animal skin, where four pieces of sereetyoot, a certain grass which had been made and anointed with butter were brought. The bride and bridegroom, sitting side by side, each tied on the wrist of the other a bracelet of sereetyoot, while the elder chants blessings, asking happiness, prosperity and many children for the two. sereetyoot, was special grass used for tying in the wedding ceremony. At the ceremony, the four elders, carrying in their hands bouquets of the leaves of the Karasek of their clan, form a procession going round the beer pot under an arch of beer tubes, and then outside and round the " mabwayta ", each four times. The mabwayta corresponds to an altar. It was his evidence that the officiating elder exhorted and blessed the two, the bouquets, and finally the mutual bracelet on their wrist, which correspond to the wedding ring.

51. The ceremony lasted for about three hours, there was food, traditional ugali made of millet, mursik from guards, traditional vegetables and meat from goats and sheep. DW4, Kenneth Langat, the 1st respondent's elder brother corroborated the testimony of DW2 that after Kipsigis Customary marriage (ratet) done in the year 2008 where the two had been living as husband and wife, on 12th November, 2016 Stanley Terer(deceased) accompanied by one Andrew Langat visited their home for koito ceremony for his sister. That he together with their father, Joshua Sang accompanied by Kipsigis clan elders and other relatives, dowry negotiations kicked off where it was agreed that Stanley would pay the family the various items.

52. His testimony was that a date was set where on that very day they were invited to pick the payments from the land where the two had been living as per the customs, all this was paid by Stanley Terer (deceased) husband to Jane Terer. In Evidence minutes of the said dowry negotiations were produced from which it contained signatures of parties present including the deceased and the 1st Defendant's father. The1st respondent submits that the testimony of the said witnesses was not controverted.

53. The appellant submits that considering the evidence and oral testimony before court, there exist a customary marriage between the 1st respondent and the deceased out of they occupied the property, Elburgon/Arimi Ndoshwa BLOCK 5/51 (Tegat)with the deceased. The court is called upon to find that there existed a valid customary marriage by virtue of customary rites necessary for a valid marriage under Kipsigis customary law had been performed to solemnize union of the 1st Defendant and the deceased.

54. On Presumption of Marriage, the 1st respondent submits that the concept of presumption of marriage exists in our jurisdiction.

55. That a marriage between the 1st respondent and the deceased could be presumed. The appellants own evidence and that of her witnesses, as well as the concessions in cross-examination by the 1st respondent, shows that the deceased and the 1st respondent cohabited in the property Elburgon/Arimi Ndoshwa BLOCK 5/51 (Tegat)until his demise where the 1st respondent continues to occupy and possess especially on the part gifted to her even after his demise to date. That it was admitted by the appellant that she left the parcel 5/51 and moved to another property in Kericho. The Plaintiff as the first wife had left the deceased by the time the 1st respondent married him and lived with him from the year 2008.

56. The 1st respondent submits that it is uncontroverted evidence that the deceased and the 1st respondent had cohabited for over 10 years. The deceased subdivided the property, parcel 5/51, where his interest therein was transferred to the 1st respondent.

57. The 1st respondent relied on the decision of the Court of Appeal in Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie Civil Appeal No. 20 of 2009 [2010] 1 KLR 159 where it was held that: "There is a long line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on section 119 of the *Evidence Act*, Cap 80, Laws of Kenya which provides that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

58. That the concept of presumption has a statutory underpinning and this was recognized that once it is proved that there was long cohabitation between the deceased and the person claiming to be the wife, it was further held in M N M vs. D N M K & 13 Others that:

> "The onus is on the person alleging that there is no presumption of marriage to prove otherwise and to lead evidence to displace the presumption of marriage (Mbogoh v.Muthoni & Another, (supra). Mustapha, JA added in Hortensia Wanjiku Yawe v. Public Trustee (supra) that long cohabitation as a man and wife gave rise to a presumption of marriage in favour of the wife and that only cogent evidence to the contrary can rebut such a presumption. (See also Kimani v. Kimani & 2 Others (supra)."

59. The court went further to state that:-

> "This leads us to the question whether on the evidence before it, the court could have presumed a marriage between the deceased and E based on cohabitation and the parties holding themselves out to society as husband and wife. In Mbogoh v. Muthoni & Another [2006] 1 KLR 199, this Court stated that where the requirements of statutory or customary marriage have not been proved and the issue of presumption of marriage has been raised, the

> Court had to go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable. (See also Kimani v. Kimani & 2 Others [2006] 2 KLR 272)."

60. The 1st respondent submits that in this case, it was averred by the 1st respondent and not disputed by the appellant and witnesses that there was a long cohabitation between the 1st respondent and the Deceased spanning over a decade and by the time of the death of the deceased, he had sired a child with 1st respondent. It was deposed that the deceased in fact built a family house for his 2nd family and the 1st respondent moved in which is to-date her place of abode. It was deposed that the said child considered the deceased as his father, adopted his name upon undergoing circumcision and the deceased likewise treated him as his child.

61. It is therefore the 1st respondent's submissions that such a long cohabitation coupled with the resultant issues of the said cohabitation, the conduct of the deceased can only lead to the conclusion that the deceased and the 1st respondent intended that they be presumed to be husband and wife and this Court ought not to put their desires asunder.

62. Having so considered, section 3(5) of the *Law of Succession Act* must come into play and the 1st respondent being a wife for the purposes of distribution of the said property, and her child is accordingly child within the meaning of the said Act.

63. On the appellant's matrimonial claim, the 1st respondent submits that there is no sale agreement produced where the appellant was party or witness in the transaction over suit property. There is no indication whatsoever that the appellant was aware of any sale or Purchase of the suit property by the deceased who was registered as the sole and absolute owner of the suit property and proceeded to pay rates over the said property where receipts were issued in his name solely.

64. The 1st respondent argues that the property was not held by the deceased in trust for the appellant for the reasons that the only name in the Tegat Farm members register produced is that of Stanley Kipngeno Terer(deceased), no evidence that the appellant was a member of the said Tegat Farm. No evidence of existence of joint account created and operated by the appellant and the deceased from which funds were deposited or drawn for such purpose as alleged.

65. The pay-slip produced as proof of contribution is in relation to appellant's personal account and not a joint account between the deceased and the appellant as alleged. There is no evidence of any financial contribution by the appellant as alleged.

66. On whether the learned trial magistrate erred in law and fact by failing to appreciate the law on establishing fraud and the shift in the standard of proof, the 1st respondent argues that In the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR the court held as follows:

> ...the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-
>
> > "...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. In the case of Kuria Kiarie & 2 Others v Sammy Magera [2018] EKLR the Court of Appeal stated that:

> "It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo _vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...

68. We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.. "..In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

> The 1st respondent submits that a clear look at paragraph 13 of the Plaint shows that the appellant pleaded and particularized the allegation of fraud. The appellant claims that "the aforesaid subdivision and transfer was undertaken by through a fraudulent scheme orchestrated by the 1st respondent in collusion with the officers of the 2nd respondent at the Ministry of Lands offices in Nakuru."

69. The 1st respondent submits that in the instant case the onus of proving allegation of fraud to required standard is on the Plaintiff, it is not enough to just aver. First and foremost, from the evidence adduced, it is clear that the deceased had been the owner of the mother title one Elburgon/Arimi Ndoshwa BLOCK 5/51 (Tegat) who had subdivided the same in the year 2018. From the evidence of the Land Registrar who is the custodian of register, coupled with mutation and subdivision of mother title and land board consent in evidence, confirmed that no fraud had been committed in the transfer of the suit land to the 1st respondent. It is important to note in so far as the land registrar was not cross-examined on the issue of whether or not the appellant consented to the subdivision and transfer, the burden of proving allegations whether or not consent was procured and or fraud is on the person who alleges and not the contrary and no contrary evidence was adduced by the appellant in rebuttal that the 1st respondent being the 2nd Wife to the deceased is entitled to beneficial interest in the suit land. She is entitled to a beneficial interest in the land. Her beneficial interest coupled with occupation and her control of the land (through farming and general husbandry) affords her an overriding interest on the suit land that is protected by the law. The 1st respondent submits that being in possession/ occupation and contributing towards development of the suit property the 1st respondent was entitled to a portion relevant to her contribution in tandem with section 9 of the *Matrimonial Property Act*, 2013 and that the 1st respondent upon being gifted one of the resultant subdivision of Elburgon/ Arimi Ndoshwa BLOCK 5/51 (Tegat) the suit property herein under Section 15 of the Matrimonial the *Matrimonial Property Act*, 2013 Act the suit property belongs absolutely to the recipient, the 1st respondent herein and therefore ceases to be a matrimonial property. The appellant cannot claim beneficial interest therein, she may pursue a claim/stake in remaining plot Elburgon/Arimi Ndoshwa BLOCK 5/291 in the name of the deceased. In view of the same, the 1st respondent submits that the trial magistrate appreciated the totality of the evidence that was before her. The trial court considered evidence of the Land Registrar, who produced the registers for the suit property, the application for consent to subdivide, mutation form as well as the application for consent to transfer one of the resultant parcels and that the application for subdivision, consent and transfer were all made by Stanley Kipngeno Terer as the registered proprietor. The land registrar further noted that there was no illegality committed at the time of the subdivision and transfer as the registered proprietor personally made the applications and sought the relevant consent. His testimony was that the parcels must first exist for one to obtain a consent to transfer and that it was possible for a special consent to issue on the same day and transfer to be effected on the same day.

70. The 1st respondent cites 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 fact it is said that the burden of proof lies on that person."

71. On whether the learned trial magistrate erred in law and fact in failing to appreciate the appellant's vital evidence, relied on non-existent evidence and considered irrelevant factors, the 1st respondent submits that while article 45(3) of *the Constitution* dealt with equality of the fundamental rights of spouses during and after dissolution of marriage, equality did not mean the redistribution Of proprietary rights at the dissolution of a marriage. Neither did the Reading of that provision lead to the assumption that spouses were automatically entitled to a 50% share by fact of being married. Construed to mean a division of matrimonial property down the middle through the literal application of the 50:50 division ratio. Proponents of that argument largely opined that since non-monetary contribution could not be quantified but was equally important, a split right in the middle would be more appropriate. The second approach was that 'equal' as provided for under article 45(3), meant that a party obtained an equivalent of what one contributed, monetarily or otherwise. Article. 45(3) of *the Constitution* underscored the concept of equality as one that ensured that there was equality and fairness to both spouses.

Analyisis and Determination.

72. This is a first appeal wherein the appellant pleads that this court exercises its jurisdiction to reevaluate the pleadings and evidence which jurisdiction was properly invoked. In the locus classicus case of Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123 where it was held;

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

73. On the first ground of appeal that the learned magistrate did not consider the appellants matrimonial claim on the land, the appellant contends that the suit property was matrimonial property and therefore her consent was required before any transaction could be undertaken. This court will strive to find out whether the suit land was matrimonial property and whether consent was required to transfer the same to the 1st respondent. To determine whether the suit land was matrimonial property the court is called upon to first of all consider the existence of the two marriages because the court cannot determine the issue as to whether the appellant was entitled to the property under the Matrimonial property rights before determining the existence of the two marriages. It is evident that the appellant was married in 1961 but it is not clear whether it was under the African Christian Marriage or Customary Marriage as no evidence was produced to show that the marriage was solemnized in church

and a certificate of Marriage issued then or the same was done traditionally in 1961. However, it is evident that the certificate of marriage was issued under the *Marriage Act* 2014 on the 25th Day of May 2021. There is no other certificate issue in 1961 and therefore the presumption is that the marriage between the appellant and the deceased was a customary or a presumptive marriage but was converted to a marriage under the *Marriage Act* of 2014 on the 25th May 2021. At the time of the conversion of the marriage, the deceased had married the 1st respondent as a second wife under the Kipsigis/Kalenjin customary law in the year 2008 as explained by DW2, Kiprono Laboso a member of the same clan with the deceased and the clan chairman. He gave the events of the marriage ceremony conducted in the house of Motiryoot who officiated the ceremony. Dowry was paid according to custom and the deceased cohabited with the 1st respondent on the suit property since the year 2008 until his death. The 1st respondent still lives on the land todate.

74. This court finds that the learned magistrate erred in finding that the second marriage between the deceased and the 1st respondent was invalid because the issuance of the Marriage certificate to the deceased and the appellant was done after the deceased and the 1st respondent had conducted their customary marriage. The marriage between the deceased and the appellant and the 1st respondent had already become polygamous and therefore marriage to either of the women could not be converted to monogamous marriage as it was done for the appellant. By registering the 1st marriage under the *marriage Act* 2014, the deceased and the appellant offended the provisions of section 8 of the *Marriage Act* 2014 that provides as follows:-

75. 8. (1) A marriage may be converted from being a potentially polygamous marriage to a monogamous marriage if each spouse voluntarily declares the intent to make such a conversion.

(2) A polygamous marriage may not be converted to a monogamous marriage unless at the time of the conversion the husband has only one wife.

76. Arising from above this court finds that both the appellant and the 1st respondents were wives of the deceased in the meaning of the *Marriage Act* 2014.

77. On the issue of the appellant's matrimonial rights, I do agree with the appellant that the learned magistrate did not make a finding on the issue and therefore this court will consider the same and make a determination. Sections 6 defines matrimonial property as follows:6. Meaning of matrimonial property

(1) For the purposes of this Act, matrimonial property means—

a. the matrimonial home or homes;

b. household goods and effects in the matrimonial home or homes; or

c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

2. Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

3. Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

4. A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

78. Sections 7 and 8 of the *Matrimonial Property Act* Cap 152 Laws of Kenya Make provision on matrimonial property owned by a polygamous family. Section 7 provides thus:-

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

8. Property rights in polygamous marriages

(1) If the parties in a polygamous marriage divorce or a polygamous marriage is otherwise dissolved, the—

(a) matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife; and (b) Matrimonial property acquired by the man after the man marries another wife shall be regarded as owned by the man and the wives taking into account any contributions made by the man and each of the wives.

79. In this case the property no 5/51 was registered in the name of the deceased. The same had a home that was initially occupied by the deceased and his first wife. However, the first wife left the home sometimes in 2008 and the deceased brought into the home his second wife who lives in the home to-date with one child an issue of the marriage. The appellant relocated to the family other farm with a home in Kericho. The 1st respondent demonstrated that the land was purchased by the deceased and that there is no evidence of contribution by the appellant. I do find that the appellant has not proved that the suit land was her matrimonial property as she has not proved contribution to the acquisition of the same and that she has not challenged the fact that the 1st respondent resided in the property with the deceased as husband and wife from the year 2008 to 2021 when the husband died and to-date, she lives in the parcel of land with a child of the deceased and has improved the same by extending the building, connecting electricity, water, installing water tanks and planting trees. I do find that the appellant has no claim of matrimonial property rights on the suit property as the same is the home of the 1st respondent.

80. I do agree with the appellant that the learned magistrate erred in law treating the claim on matrimonial property rights as if it was a succession cause. The issue of gift inter-vivos did not arise because the claim before the court was purely based on fraud and matrimonial property rights and not a succession cause. The learned magistrate erred in finding that section 3(5) of the *Law of succession Act* Cap 160 Laws of Kenya apply and that the issue of beneficiaries to the estate of the deceased did not arise.

81. This court finds that the learned magistrate correctly found that fraud was not proved by the appellant because there was sufficient evidence that the mother title to the suit property was registered in the names of the deceased and that he applied to subdivide the same, obtained consent to subdivide, engaged a surveyor and sub-divided the land and ultimately transferred the resultant Elbugon/Arimi Ndoshwa Block 5/290 to the 1st respondent. It is trite law that whoever alleges fraud in civil cases has the burden of proof and the standard of proof is beyond balance of probabilities but below shadow of doubt. In this case the person who could have answered to the appellants concern, who was the registered owner passed on after the transactions had been done. The parcel file is missing and the same cannot be visited upon the 1st respondent. However the burden of proof remains with the appellant and the standard remains higher than the ordinary civil cases. The first principle is that an allegation

of fraud must be specifically pleaded and proved. In Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA (as he then was) stated 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 facts."

82. In R.G Patel v Lalji Makanji [1957] EA 314 the former Court of Appeal for East Africa stated as follows:

> "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."

83. In Belmont Finance Corporation Ltd v Williams Furniture Ltd Buckley L.J said:

> "An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word 'fraud' or the word 'dishonesty' must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be very clear, and in such a case, it is incumbent upon the pleader to make it clear when dishonest is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegations of its dishonest nature will not have been pleaded with sufficient clarity."

84. The second principle is that the burden of proof of an allegation of fraud is on the person alleging. In Ndolo v Ndolo [2008] 1KLR (G &F) 742 the court stated that:

> "We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

85. In Christopher Ndaru Kagina v Esther Mbandi Kagina & Another [2016] eKLR the court pronounced itself as follows:

> "It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations....."

86. In the case of Urmila w/o Mahendra Shah v Barclays Bank International Ltd & Another [1979] eKLR, the Court of Appeal took the view that the onus to prove fraud in a matter is on the party who alleges it.

87. In Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR, the Court of Appeal observed as follows:

> "In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that

> indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of Janet all the way to the respondent.....”

88. The third principle is that the burden of proof of allegation of fraud is higher than that required in civil cases that of proof on a balance of probabilities; and lower than that required in criminal case that is beyond reasonable doubt. In Ndolo v Ndolo [2008] 1KLR (G &F) 742 the Court stated that: “... Since the Respondent was making serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.....”

89. In Central Bank of Kenya Limited v Trust bank Limited & 4 Others [1996] eKLR, the court rendered itself as follows:

> “The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case.”

90. In Moses Parantai & Peris Wanjiku Mukuru supra, the Court of Appeal observed as follows: “..... Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities.....”

91. In R.G Patel supra the former Court of Appeal for East Africa stated as follows:

> “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.”

92. This court has read the case of Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR, cited in Sambayon Ole Semera v Kalka Flowers Limited & another [2021] eKLR where the Supreme Court held that Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced .

93. The above case does not purport to shift the burden of proof but restates the law.

94. In this case before me the appellant has alleged fraud, given the particulars, without giving the facts of the fraud and now intend to shift the legal burden to the 1st respondent. The burden can only shift to the 1st respondent upon the appellant giving a scintilla of evidence. The appellant merely alleged fraud through omissions on the basis of lack of the appellants Knowledge and spousal consent and lack of the consent of the land control board which is not proof of fraud to the required standard.

95. The upshot of the above is that save that the learned magistrate erred by determining the dispute as if it was a succession cause, the appeal largely fails and the same is dismissed with no order as to costs, this being a family dispute.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO