Kanoro v Kahawa Self Help Group (Suing thro' its Officials) & 5 others (Environment and Land Appeal E053 of 2021) [2023] KEELC 17930 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17930 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E053 OF 2021

CK NZILI, J

MAY 31, 2023

BETWEEN

M'KIRIGIA KANORO ..... APPELLANT

AND

KAHAWA SELF HELP GROUP (SUING THRO' ITS OFFICIALS) ..... 1ST RESPONDENT

JACOB GATOBU MUUNA ..... 2ND RESPONDENT

STANLEY MUBICHI ..... 3RD RESPONDENT

BATHOLOMEW MWAKA ..... 4TH RESPONDENT

SHADRACK KINOTI ..... 5TH RESPONDENT

NICHOLAS MURIUNGI ..... 6TH RESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate's court Hon. J. Irura delivered on 10.2.2021 in Nkubu ELC No. 7 of 2017)

JUDGMENT

1. This appeal arose out of a land dispute at the lower court in which the 1st respondent had sued the appellant for wrongfully and fraudulently acquiring its L.R. No. Nkuene/Taita/1139 for value from the 1st respondents, then officials the 5th & 6th respondents herein, said to have been holding the suit land in trust for the 1st respondent hearing.

2. Following the trial court in a judgment dated 17.2.2021, invalidated the sale and transfer and ordered the land to be retransferred to the 1st appellant. The appellant faults the trial court on the basis that it erred in fact and law in:

    i. Failing to consider that the evidence was in his favor.

    ii. Failing to consider that the respondents had been refunded the entire sale proceeds.

    iii. Failing to consider that so that the land reverts to the 1st respondent, which would amount to the double payment given in the criminal case, another refund had been ordered, and the respondents were given the liberty of executing for it as a civil debt which would amount to double jeopardy and unfair benefit from two judgments.

    iv. For failing to find on record and consider the merits of the defense, he had filed on 25.5.2005.

    v. Failing to find the appellant was a bona fide purchaser for value without notice.

3. This being a first appeal, this court has to rehearse, re-appraise, re-consider, and re-assess the entire record of the primary court, make independent findings on both facts and law and come up with its conclusions but bearing in mind that the trial court had the benefit of seeing and hearing the witnesses' testimony first hand.

4. The 1st respondent, by a plaint dated 19.4.2005 through its chairman, secretary, and treasurer described itself as a self-help group registered under the then Ministry of Gender, Sports, Culture and Social Services sued the 5th and 6th respondents, then defendants, said to be under suspension as members of the group. It was averred that the 1st respondents' primary objective was farming, merry-go-round, and developing its plot to uplift and improve its member's social and economic welfare.

5. It was averred that the 1st respondent in 1996 had acquired L.R. No. Nkuene/Taita/1139, measuring 0.037 ha, situated in Nkubu township, registered under the names of the 5th & 6th respondents in trust for the group.

6. In breach of the fiduciary trust and by-laws of the group, the plaintiff averred that the 5th & 6th respondents fraudulently and secretly conspired with the appellant to dispose of to him the suit land without the consent, approval, or knowledge of the group and its membership. The 1st respondent sought the invalidation of the sale and transfer of the suit property, a reversal of the sale, and retransfer to it. The plaint was accompanied by a list of members, a list of witness statements and documents dated 16.7.2011, a further list of documents dated 2.9.2013, and a case summary dated 7.11.2013.

7. The 5th and 6th respondents opposed the claim by a defense dated 10.8.2006. They denied breach of any by-laws of the 1st respondent or fraudulently disposing of the suit property to the appellant. On the contrary, they averred that the sale and transfer were under a sale agreement by members of the self-help group whose proceeds were still intact and ready for collection by the group, but its current officials had refused to collect it despite a request. The defense was accompanied by a witness statement dated 29.10.2012 and another list of documents dated 2.6.2019.

8. The appellant, by a defense filed on 26.5.2005, denied the 1st respondent's claim, terming it as frivolous, vexatious, and an abuse of the court process. The defendant was accompanied by a list of witness statements dated 7.3.2012, and list of documents dated 16.4.2012, and another list of witnesses dated

9.12.2014. In a reply to the defense by the appellant, 5th and 6th respondents, the 1st -4th respondents termed the defends as raising no triable issues and insisted that the sale and transfer of the suit land was tainted with fraud and illegalities.

9. At the trial, Jacob Gatobu Muuna testified as PW 1. As a member of the plaintiff, he told the court that the 5th and 6th respondents were the chairman and treasurer of the group, while the appellant was a neighbor but not a member. He adopted his witness statement dated 16.7.2011 as his evidence in chief and produced the certificate of the group as P. Exh No. (1), list of members as P. Exh No. (2), by laws of the group as P. Exh No. (3), letter dated 9.12.04 as P. Exh No. (4), letter dated 28.2.2005 as P. Exh No. (5), copy of the record for the suit land as P. Exh No. (6) and lastly, judgment in Nkubu SRMC Cr. Case No. 190 of 2005 as P. Exh No. (7).

10. In cross-examination, PW 1 told the court that the 5th & 6th respondents were charged and convicted in P. Exh No. (7) whose conviction was also in Meru H.C. Criminal Appeal No. 78 of 2011, and money paid as cash bail was ordered to offset the debt that they owed the group, but members refused to go for the money since they wanted to develop the plot. PW1 said the outcome was not appealed against since this case was also pending. Further, PW 1 confirmed that no valuation had been undertaken over the plot either on 20th June 2013 or at the hearing. His view was that what the high court ordered or summoned them to do was against the wishes of the group, that it is, the title deed and the land which had been fraudulently transferred to the appellant on 21.2.2000 otherwise, the money would not have benefited the group.

11. In re-examination, PW 1 told the court that in the criminal case, the 5th and 6th respondents were found guilty of fraud and sentenced to 3 years imprisonment, but the sentence was substituted with a refund of the proceed to the group on top of the cash bail. The group secretary Stanley Mubichi testified as PW 2. He adopted his witness statement dated 16.7.2011 as his evidence-in-chief. He admitted appearing before the High Court but refused to collect any money from the 5th and 6th respondents since they only wanted the plot retransferred to them since it had been illegally and fraudulently sold to the appellant and because the group had no intention of disposing of the property in the first instance. PW 2 acknowledged that he had also been charged alongside the 5th and 6th respondents but was acquitted for lack of evidence.

12. Shadrack Kinoti M'Ibuuri testified as D.W. 1, he adopted his witness statement dated 29.10.2020 as his evidence-in-chief and produced a judgment in Meru H.C Cr. Case No. 78 of 2011 as D. Exh No. (1), K.C.B deposit slip for Kshs.7,000/= dated 16.12.2013 as D. Exh No. (2), cash bail deposit slip for Kshs.70,000 as D. Exh. No. (3), letter to D.R. dated 3.10.2013 as D. Exh No. (4), letter to Kiogora and Associates Advocates dated 3.10.2013 as D. Exh. No. (5) and reply from the 1st respondent's lawyers dated 3.10.2013 as D. Exh No. (6). He admitted that the suit property had been bought by the group from Silas Kioga for Kshs.250,000/= but put under their names as officials to hold in trust for the group. His evidence was that the group members had sanctioned the sale for Kshs.120,000/= and transferred to the appellant through a resolution whose minutes he did not have since he had handed over the files after being removed from the chairman's office. His evidence was that the current chair incited members, who declined to collect the money they had offered to surrender as held in the group account with the Nkuene Farmer's Cooperative Society (dissolved) and later with the Kieru Coffee Farmers Cooperative Society. He said they could not open an account because they were no longer signatories for the group. He admitted the contents of P. Exh No. 7 and D. Exh No. (1) and the deadline to refund was set for 20.12.2013, which the 1st respondent declined to receive, leaving them with no option but to deposit it before the court on 16.12.2013 as per D. Exh No's 2, 4, 5. D.W 1 acknowledged that D. Exh No. (1) did not order for the retransfer of the land. He said the land was sold at Kshs.120,000/=, which was the prevailing rate for plots at the time though there was no valuation

report; otherwise, the sale was lawful, and the 1st respondent had no basis for filing the suit. He admitted that the green card indicated them as trustees for the group and that he received Kshs.120,000/= on behalf of the group. D.W. 1 confirmed that he did not write to the members to collect the proceed nor use the chief to intervene on his behalf. D.W. 2 clarified that his lawyers did not respond to the letter dated 7.12.2013 and that the criminal appeal reasons did not stop the instant suit.

13. Nicholas Muringi M'Inoti testified as D.W. 2 and adopted his witness statement dated 29.10.2012 as his evidence in chief. He associated himself with the evidence of D.W 1 and the documents produced. He acknowledged that the land was registered under his name as trustee for the 1st respondent. He testified that no sale agreement was made between themselves and the appellant herein.

14. The appellant testified as D.W. 3 and adopted his witness statement dated 9.12.2014 as his evidence in chief. His testimony was that he bought the plot in 2004 for Kshs.120,000/= which sum the 5th & 6th respondents acknowledged receipt after it was advertised by the group for sale. He denied any alleged fraud. D.W. 3 told the court that he was an innocent bonafide purchaser for which he paid the final installment on 10.9.2014, and the officials, including PW 3, facilitated his transfer by attending the land control board meeting.

15. D.W. 3 produced the record of money paid as 3DD Exh No. (1), green card as 3DD No. Exh (2), and title deed as 3DD Exh No. (3). He said that the sale agreement was confiscated by the Nkubu Police Station when he was arrested but was cleared of any such allegations of fraud by the same police. Further, D.W. 3 told the court he conducted an official search before he bought the land and found no restrictions on it hence proceeded to pay the 5th and 6th respondents the money as both the chair and treasurer of the group. He insisted that he followed due process and in genuinely an owner while buying the land.

16. In cross-examination, D.W. 3 admitted that he was aware that the land had been registered in the names of the 5th and 6th respondents on behalf of the group whose members he did not know at the time, nor had he come across the group by-laws. He told the court that the sale agreement was witnessed by an advocate who retained a copy, after which he attended the land control board meeting for consent to transfer the land to him alongside the 5th & 6th respondents and a vice chairman, DW 3. He admitted knowledge of the criminal charges against the 5th and 6th respondents and its outcome. After going through the proceedings and submissions, the trial court allowed the claim, the subject matter of this appeal

17. With leave of court, parties agreed to dispose of the appeal through written submissions dated 15.3.2023 and 14.3.2023, respectively. The appellant submitted that he had been left with neither money nor the land from the 5th and 6th respondents as an innocent purchaser for value without notice. On grounds 2, 3, 6, 7 & 8, the appellant submitted that the doctrine of functus officio bars the court from revisiting a matter on merits based on engagement once a final judgment has been entered and a decree issued. Further, it was submitted that under equity, no wrong was without a remedy, and therefore had the court taken a stance on the issue of the same of the property to the appellant in which the 5th & 6th respondents had been asked to remit the amount received to the 1st, 2nd & 3rd respondents. Reliance was placed on Raila Odinga & others v IEBC & others [2013] eKLR.

18. The appellant submitted that under Section 13 of the *Trustee Act*, trustees were mandated to sell trust property. Given that the self-help group was registered on 4.4.2005 while the property was sold on 21.2.2000, the appellant submitted that there was no record to show that the 1st respondent owned the property for no minutes was provided to show that it had duly acquired the property and named the 5th and 6th respondents to hold the property in trust for it.

19. While submitting that there might have been fraud on the part of the 5th & 6th respondents, the appellant held the view that the by-laws might have been drafted after the sale of the property. Additionally, the appellant submitted that the trial court failed to consider that Hon. L. J. Lesiit, as she then was now a judge of appeal, had ordered for the refund and, therefore, on the same breath to award the property to the 1st respondent would amount to double jeopardy on the part of the court.

20. On ground number 4, the appellant submitted that the court should have notified him that the defense was missing from the court file. As to whether he was involved in the fraud, the appellant submitted that fraud had to be proved, and none was proved against him since he remitted the money to the 5th & 6th respondents as a sign of good faith without notice of any irregularities against the seller's titles. Reliance was placed on R.G Patel v Halji Makanji [1957] E. A 314, Black Laws Dictionary 8th Edition, Katende v Haridar & Co. Ltd [2008] 2 E.An 1173, Eunice Grace Njambi Kamalil & another v Hon. A.G & 5 others Civil Suit No. 776 of 2013, ICEA Lion General Insurance Co. Ltd vs Julius Nyaga Chomba [2020] eKLR, Ngorika Farmer's Cooperative Ltd v John Kiarie & others [2019] eKLR and Solomon Magana Kamiti as an Administrator in the estate of David Gikonyo Kamiti v Moses Kweri Kinya & others [2019] eKLR and Solomon Magana Kamiti as an Administrator in the Estate of David Gikonyo Kamiti v Moses Kweri Kinya & others [2021] eKLR.

21. The 1st – 4th respondents submitted that the burden of proof to show that the sale was illegal was since the 5th & 6th respondents were holding the property in trust. As to the evidence of the appellant, the 1st – 4th respondents submitted that the trial court found it contradictory, lacking supporting documents, and not substantiated by independent witnesses to the transaction.

22. Instead, the 1st – 4th respondents submitted that the appellant took the matter casually and saw there was no need to conduct due diligence with the members of the 1st respondent despite the records showing that the 5th & 6th respondents were trustees to the land. Reliance was placed on Alice Chemutai Too v Nicholas Kipkurui Korir and others [2015] eKLR.

23. On the alleged refund, the 1st – 4th respondents submitted that the appellant failed to provide any evidence to show that members of the 1st respondent were refunded the entire proceeds of the sale, which was the reason the members of the 1st respondent filed this claim to recover the suit land which was not valued during the sale and was consequently, grossly undersold. Furthermore, the 1st – 4th respondent submitted the orders in D. Exh No. (1) were not complied with as PW 1 said the cash bail was not refunded for reasons stated on page 121 of the record of appeal as well as D. Exh No. (5) and the evidence of the 5th respondent on page 132. In the absence of evidence of payments received by the 1st – 4th respondents, the appellant's grounds numbers 2, 3 & 6 have no merits.

24. As to ground number 4 of the appeal, the 1st – 4th respondents submitted that the annexed defense had triable issues and that the trial court had enough evidence to enable her to conclude that the 1st – 4th respondents had proved their case on a balance of probability after considering the appellant's testimony and documents. Therefore the 1st – 4th respondents submitted that there was no prejudice against the appellant as his defense was considered alongside that of the 5th & 6th respondents.

25. On grounds numbers 7 & 8 of the appeal, the 1st – 4th respondents submitted were not compensated; no money was collected from either the court or the 5th & 6th respondent, and therefore, the appellant cannot claim there was double jeopardy or compensation. In addition 1st – 4th respondents submitted that the trial court applied the relevant principles and laws and allowed the claim for the title deed to revert to the 1st respondent because of the fraudulent sale and transfer. Lastly, the 1st – 4th respondents submitted that the appellants should seek an alternative recourse against the 5th & 6th respondents.

26. The court has carefully considered the entire lower file, a record of appeal filed grounds of appeal written submissions and the law.

27. At the outset, Order 42 Rule 13 of the Civil Procedure Rules lists the essential documents required in a record of appeal. It is only the court that can dispense with the production of any such documents. To this end, once the appeal is admitted for hearing and directions given under Sections 79B of the *Civil Procedure Act* and the Order 42 Rule II Civil Procedure Rules, the record of appeal must contain the record sent to the appellate court by the primary court.

28. So, the appeal record and its contents must reflect exhibits and pleadings produced before the trial court. That is why the primary court sent three sets of the record. A party is at liberty to collect a set of the documents sent to prepare the record of appeal. It is not open for the appellant to solely prepare a record as per what is contained in his lawyer's office file. The mischief of this rule is to avoid a situation where a party includes documents pleading's or exhibits that did not form part of the material before the trial court. Once evidence is taken before the trial court, all exhibits produced are marked and identified, for they form part of the court record under Order 18 Rules 2 & 4 of the Civil Procedure Rules.

29. In this appeal, the record of appeal dated 13.2.2023 does not conform to the rules and is missing vital documents filed and contained in the original court file, including the list of exhibits marked and produced before the trial court. All affidavits accompanying the pleadings were left out. The exhibits were also not court-stamped. Receipts on payments were left out. Witnesses' statements lack court stamps. The record of appeal does not chronologically indicate what is in the original file.

30. The issues calling for my determination are:

    i. If there is a competent appeal before the court.

    ii. If there was a statement of defence before the trial court.

    iii. If the appellant was a bonafide purchaser for value without notice.

    iv. If the appellant was liable for the consequences of fraud established against the 5th and 6th respondents.

    v. If the trial court was bound by the findings and orders to refund the proceeds made by the appellate court in a criminal appeal against the 5th & 6th respondents.

    vi. If the doctrine of double jeopardy applies against the appellant.

    vii. What is the order as to costs?

31. The appellant is appealing against a judgment delivered on 10.2.2021. The appeal before the court was lodged on 16.4.2021 as per receipt dated 16.4.2021 for reference EYEMNLEX Section 79 G of the *Civil Procedure Act* provides that an appeal from the subordinate court shall be filed within 30 days from the date of the decree or order appealed against excluding such period as may be requisite for the preparations and delivery of the decree or order.

32. Nothing has been attached in this appeal to show that the appellant sought and obtained leave under Section 79 G of the *Civil Procedure Act* to file the appeal outside the 30 days. In the absence of that, my finding is that the appeal before the court is incompetent.

33. The second issue is whether there was a statement of defense filed by the appellant on record and, if not, whether there was any prejudice to the extent that it materially affected the outcome of the lower court suit. From the lower court record, this court has established that the appellant entered an appearance by a memorandum of appearance dated 27.4.2005 and filed a statement of defense which is undated but was filed on 26.5.2005. Under a payment receipt no.0139252. The 3rd defendant later, on 7.3.2012, filed a witness statement and subsequently filed a list of documents dated 16.4.2012. The appellant testified on top of cross-examining all the witnesses availed by the other parties to the suit. Before the hearing, the appellant had also participated in the interlocutory applications, filed a replying affidavit sworn on 25.5.2005, and attached the documents as annexures marked M.K 1 & M.K. 2 (a) and (b). Additionally, the appellant had filed another witness statement dated 9.12.2014.

34. In the statement of defense, the appellant merely denied the contents of the plaint. He did not refer to or respond to the averments by the 5th and 6th respondents' defense dated 10.6.2006, who had pleaded at paragraph 7 thereof that they affected the sale on behalf of the self-help group and that the proceeds of the sale were still intact and ready for collection by the group whose current officials had refused to collect despite a request.

35. By a reply to the 5th & 6th respondents dated 16.8.2006, the 1st – 4th respondent had termed the defense as raising no triable issues. They had made a specific pleading in paragraph 4 that the 5th & 6th respondents had fraudulently sold their land to the appellants. After this, an additional list of documents dated 2.9.2013 was filed on 9.9.2013 by the appellant. This was the judgment delivered on 20.6.2013, in which the appellant and the 5th & 6th respondents were active participants. The 1st respondent subsequently filed a list of issues dated 7.11.2013, whether the appellant had bought the parcel of land fraudulently. This may have triggered the appellant to file the witness statement dated 9.12.2014. The 5th & 6th respondents eventually filed a list of documents dated 24.6.2019 and included a judgment in the 5th & 6th respondents, which were produced as D. Exh No. 1, D. Exh No. 2, D. Exh No. 3, D. Exh No's 4, 5 & 6.

36. At the time, the suit commenced for hearing on 3.7.2019. D. Exh No's (2) and (3) were already on the court record. The appellant and the 5th & 6th respondents did not amend their pleadings to reflect the specific facts and emerging issues in the additional documents.

37. In the case of Ann Cherop Koech v Charles Kiprotich Langat [2018] eKLR, the court cited with approval Odd Jobs v Mubia [1979] ER 476 that a court may base its decisions on unpleaded issues where evidence had been led, and the issue was left for the court to determine. In the case of Simon PM Karimi vs. K.C.B. Ltd and another (2015) eKLR, the court took the view that Section 67 of the *Evidence Act* stipulated that the documents must be proved by primary evidence except in cases specified under Section 68 of the Act. The court cited with approval Captain Harry Gandy v C.A.S. Par Air Charters Ltd 1956 Vol. XXII EACA 139, where the court held that the object of pleadings was, of course, to ensure that both parties shall know the points in issue between them so that each may have complete information on the case he has to meet and prepare his evidence on it and that a relief not founded on the pleadings would not be given and that cases must be decided on issues on the record and that if a party desired to raise other issues they must be placed on record by way of amendments. Further, the court in Galaxy Paints Co. Ltd v Falcon Guards Ltd [2000] 2 E. A 385, observed that unless pleadings were amended, the court could only pronounce judgment on the issues arising from the pleadings, on issues framed by the court for the court's determination.

38. Applying the preceding case law to this matter, the appellant has not pleaded that he was a bona fide purchaser for value without notice. The appellant did not specifically respond to the issues raised in paragraphs 9 & 10 of the plaint dated 19.4.2005. There was no specific request for the appellant to be

declared bonafide purchaser for value without notice. He had not pleaded those facts, including that he took vacant possession and had been on the land for over six years. Order 7 of the Civil Procedure Rules, as read together with Orders 2 Rule 4, 2, and 10 of the Civil Procedure Rules, indicates matters that must be pleaded explicitly. Therefore, without such pleadings, the trial court cannot be faulted by the appellant, who, as rightly submitted by the 1st-4th respondents, approached the suit rather casually.

39. The appellant knew of a conviction based on the fraudulent transaction against the 5th and 6th respondents over the suit land. He never pleaded anything to distance himself from the 5th and 6th respondents' conduct. The transactions which had been found fraudulent were undertaken together with the appellant. The conviction had left the appellant in a precarious situation, and therefore it behooved upon him to have sought to amend his pleadings and absolved himself from any wrongdoing by the 5th & 6th respondents.

40. In the absence of that, my finding is that the appellant is estopped from blaming the trial court for not considering a defense on matters neither pleaded nor before the court for determination. In Euro Bank Ltd v Twictor Investments Ltd & others [2020] eKLR, the court cited with approval Virjay Morjaria v Darbar & another [2000] eKLR, that fraudulent conduct must be distinctly alleged or proved and cannot be inferred from the facts.

41. In this appeal, fraud against the appellant was distinctly pleaded. Evidence was also tendered in the copy of the records from the lands office that indicated that the 5th & 6th respondents were holding the land in a fiduciary capacity on behalf of the self-help group. The 1st respondent had pleaded and testified about this. The appellant knew that the land belonged to a group, and prudence would have been required, as held in Alice Chemutai Too (supra) for him to dig deeper and engage the entire membership of the 1st respondent

42. It is also trite law that when a title to land is under question, a title holder must go out of his way and prove or demonstrate that he followed all the elementary processes and procedures of acquisition and produce all the paper trail on the same.

43. In this appeal, it was upon the appellant to show that he conducted due diligence and obtained all the necessary consents and approvals, including minutes or concurrence from the self-help group holders or members apart from the officials. The appellant was obligated to demonstrate that at least a sizeable number of the group members were privy to the transaction and that the land he had acquired was of a value commensurate to the prevailing rates at the time. Again, the obligation was on the appellant to show that he paid consideration to the 5th & 6th respondents on behalf of the group to remove himself from any fault.

44. To this end, D. Exh. No. 1 did not amount to a sale agreement or an acknowledgment of a sale as envisaged under Sections 3 (3) of the *Law of Contract Act*. See Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR.

45. It had unverified writings, dates, and amounts. It did not describe the subject land and the date of taking vacant possession. Further, it lacked the time frames to complete the payments and the transfer dates. The document did not describe the capacity under which the 5th & 6th respondents were selling or transferring the land. It did not mention anywhere that the subject land being sold or transferred was held in a fiduciary capacity. D. Exh No. (1) therefore placed the appellant at the center of the alleged irregularities, illegalities, and unprocedural manner in which the suit land was acquired by him through the 5th & 6th respondents. By the 5th & 6th respondents being indicted in the criminal court and later at the High Court, the appellant was left with no option but to clear his name by showing that he was a

bonafide, innocent, and not answerable to any of the misconduct of the 5th & 6th respondents. It was not enough to rely on the conviction alone or the alleged compensation by the 5th & 6th respondents.

46. The criminal case and its appellant judgment had not determined the aspect of ownership of the title. The doctrine of res judicata was inapplicable, and the court cannot be said to have been functus officio or res-judicata. The conviction and sentence did not involve the appellant as a critical party. The appellant had to discharge his burden of proof as regards the legality or appropriateness of the title to the land he was holding. The criminal trial court and its appeal did not apportion blame between the appellant and the 5th and 6th respondents and determine their contribution percentages. The High Court did not pronounce itself on the fate of the title deed held by the appellant.

47. On the contrary, the appellate court observed that the complainants could execute the compensation as a civil debt. The 1st – 4th respondents were free to take that course or follow another path they thought would be more appropriate. They cannot be faulted for not taking the approach suggested by the appellate court. Before the trial court, the appellant and the 5th & 6th respondents failed to amend their pleadings and perhaps bring a counterclaim or a set off for the court to incorporate the said appellate court orders as part of proceedings in the trial court.

48. Criminal and civil litigation jurisprudentially are based on different conceptual frameworks. The two may overlap at times, and each may enrich the other. However, the parties must plead facts and move the court appropriately. As has often been said, evidence and written submissions cannot replace pleadings. The appellant and the 5th & 6th respondents had tried to move the trial court through documents and written submissions without amending their pleadings. Unfortunately, the appellant was PW 3 in the criminal case and therefore assisted in the conviction of the 5th & 6th respondents.

49. Both were comrades in crime; the kettle calls the pot black in this appeal. As much as the appellant is trying to distance himself from the acts of the 5th and 6th respondents, ugly tracks on the trail point at him regarding the fraudulent acquisition of the suit land. The appellant is not as white as snow as he wants this court to believe but is a beneficiary of a flawed or fraudulent process. This court would be perpetuating, enforcing illegality to ignore the result of the 5th and 6th respondents' conduct and allow the end product to be enjoyed by the appellant.

50. As to whether the appellant would suffer double jeopardy, the concept is foreign to civil practice as its cousin is res judicata under Section 7 of the *Civil Procedure Act*. Double jeopardy relates to being charged on the same offense over the same and tried where there exits ether enter for acquit or convict against the same party and complainant.

51. The law is also that a conviction and sentence of an accused person does not and cannot absolve an accused of civil liability on an action brought by the injured party. Whereas a criminal court has discretion when passing a sentence against an accused person in addition to any fine order that the complaint be compensated under Section 175 (2) of the Criminal Procedure Code, the appellant was not a party to the appeal but now wants to benefit as an accused person. He did not plead facts such as those in his statement of defense. To do so, in my view, would make the appellant benefit or unjustly benefit out of an illegal exercise. See Geoffrey Mwangi Muya vs. David Mutai Mucheru (2015) eKLR. The court used that avenue to deny the 1st – 4th respondents an accrued constitutional right under Article 40 of *the Constitution*. I do not think so. It would invite anarchy and allow land grabbers to run roughshod as long as one can go to the court and offer to compensate the complainant and keep the land out of them. The 1st – 4th respondents have pleaded and testified that they require the land, not compensation. This court can only determine what is claimed and prayed for. No specific reliefs had been sought by either the appellant or the 5th & 6th respondents to enforce the holdings by the appellate

court. The attempts by the 5th and 6th respondents to appeal against the judgment was thwarted on 26.10.2020 in Meru E.L.C. Appeal No. E045 of 2021 Shadrack Kinoti and another v Kahawa Self Help Group.

52. The appellant cannot in this appeal, purport to advance the said appeal on behalf of the 5th & 6th respondents through the back door.

53. The upshot is that I find the appeal both incompetent and lacking merits. The same is dismissed with costs to 1st – 4th respondents.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 31ST DAY OF MAY 2023

In presence of

C.A John Paul

Miss Gikundi for Appellant

Mukaburu for 1st – 3rd respondents

HON. CK NZILI

ELC JUDGE