Waweru (Suing as the Legal Representative of the Estate of the Late Stephen Waweru Njenga) v Mathu & another (Environment and Land Appeal E002 of 2022) [2023] KEELC 19083 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19083 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND APPEAL E002 OF 2022

LN GACHERU, J

JULY 27, 2023

BETWEEN

JENIFER NGENDO WAWERU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE STEPHEN WAWERU NJENGA) ..... APPELLANT

AND

JAMES MWANGI MATHU ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

(Being an Appeal against the Judgement delivered by Hon. E.M. Nyaga – SPM in Murang'a CM ELC No. 23 of 2019)

JUDGMENT

1. The Appellant filed the instant appeal against the entire Judgment of the trial Court in Murang'a CMELC No. 23 of 2019. By a Memorandum of Appeal dated 4th March 2022, and filed on 7th March 2022, the Appellant raised Nine Grounds against which he sought to rely on.

2. The facts founding the filing of the Appeal were that the Appellant filed a suit against the Respondents vide a Plaint dated 14th October, 2019, seeking cancellation of the 1st Respondent's title over Nginda-Samar Block 2/ 583, on the premise that he acquired the said title through fraud, malfeasance and misrepresentation. The Appellant averred that the suit property was registered in the name of Stephen Waweru Njenga, and it was not until 2019, when she discovered that the land had been registered in the name of the 1st Respondent – James Mwangi Mathu. That the transfer to the 1st Respondent was as a result of Murang'a CMCC No. 20 of 2008, even though the matter did not relate to the suit land.

3. The 1st Respondent - James Mwangi Mathu filed a Defence and Counterclaim and maintained that he became the registered owner of the suit property in realization of the award of the tribunal. He

contended that he bought the suit property from Gladys Waithira Kamau, and has been utilizing the suit property.

4. The 2nd Respondent – The Attorney General, entered appearance, filed a statement of Defence and agreed that the 1st Respondent was the registered owner of the suit property and denied the Appellant's allegations.

5. The trial Court rendered its judgment on the 10th February, 2022, and held that the Appellant herein had failed to prove her claim on a balance of probabilities. The Court allowed the 1st Respondent's Counterclaim and entered Judgment for the 1st Respondent. As per the Decree of the said Court, the 1st Respondent was found to be the owner of the suit property, and the title deed held by the Plaintiff(Appellant) was cancelled.

6. The Appellant now faults the Judgment of the trial Court on the premise that inter alia the trial Court failed to properly evaluate the evidence; that the trial Court considered the award in Murang'a Chief Magistrate's LDT No. 20 of 2007.

7. The Appeal was dispensed with by way of written submissions. The Appellant filed her submissions through the Law Firm of Tim Kariuki & Co. Advocates, detailing the facts and evidence at the trial. The Appellant submitted that the trial Court disregarded and/ or ignored the Appellant's evidence. She faulted the trial Court for not interrogating how land was transferred from her deceased husband to the 1st Respondent. The Appellant raised issues on the competence of the Counter-claim to the extent that the same was filed without a Verifying Affidavit and that the trial Court ought to have considered this. Reliance was placed on the case of Galerius Investment Limited vs County Government of Mombasa & Another{2020}EKLR, where the Court struck off a Counter-claim for not being accompanied with a Verifying Affidavit.

8. It was the Appellant's further submissions that the trial Court entered judgment on the premise of an order that was not adduced in Court. That the 2nd Respondent ought to have at least adduced a copy of the order to show that the registration was by dint of an order of Court. She added that the suit CMCC No. 20 of 2008, was an accident claim, and it had nothing to do with the conferment of the title to the 1st Respondent. She thus faulted the trial Court for adopting the order of said Court.

9. The Appellant further submitted that the 1st Respondent did not adduce any Sale Agreement to support his claim of purchase or adduce any evidence to demonstrate how plot 462, was the suit property. She added that there was no evidence adduced by the Respondents to rebut the Appellant's testimony. The Appellant raised an issue with the judgment of the Court and submitted that the same was short of the mandatory requirements of Order 21 Rules 4 & 5 of the Civil Procedure Rules. In submitting that the same was not a judgment, she invited this Court to the pronouncement in the cases of South Nyanza Sugar Co. Ltd vs Omwando{2011}eKLR, and Jameson Siika vs Andrew Maranga Ongeri{2016}eKLR, where the Courts pointed out what should constitute a judgment.

10. The 1st Respondent on the other hand filed his submissions through the Law Firm of Mbue Ndegwa & Co. Advocates, and submitted that he had indeed proven his case and was entitled to the Judgment. It was his submissions that the trial Court adequately analyzed the evidence and made a pronouncement as is evident in paragraph 125-128, of the Record of Appeal. He added that he has been in occupation of the suit property, even when the Appellant's husband was alive and the Appellant cannot feign knowledge of this.

11. The 1st Respondent also submitted that he was able to lead evidence as to his acquisition of title, but the Appellant, failed to as required by the case of Minyu Maina vs Hiram Gathih Maina. He added further

that the Appellant failed to lead any evidence on the allegations of fraud as to the required standard. Reliance was placed on a number of cases, as quoted by the 1st Respondent.

12. The 1st Respondent further submitted that the 2nd Respondent cleared the error in recording of an Order as noted in the registrar. He invited the Court to note the discrepancies in the entries contained in the title deed as well as the green card. On the inefficiency of the Counter-claim, the 1st Respondent submitted that it was a new issue introduced on appeal, and the same could be cured by Article 159(2)(d) of *the Constitution*.

13. The Court has considered the Lower Court record, the Judgement entered, the Memo of Appeal and the rival written Submissions and finds as follows; -

> A perusal of the Record of Appeal informs this Court that the Appellant was claiming interest over a parcel of land registered as Nginda- Samar Block 2/583, which is registered in the name of the 1st Respondent – James Mwangi Mathu. While the Appellant maintained that her husband, Stephen Waweru Njenga, was the owner of the suit property, the 1st Respondent maintained that he is the owner of the said property having bought it from Gladys Waithira Kamau.

14. Parties have made reference to following cases;

    i. Maragua Land Dispute Tribunal, Case No. 13 of 2007, James Mwangi Mathu vs. Stephen Waweru Njenga: the 1st Respondent herein had moved the Tribunal against the Stephen Waweru Njenga claiming ownership of the suit property. The Tribunal found in favour of the 1st Respondent.

    ii. Murang'a LDT No. 20 of 2007, James Mwangi Mathu vs. Stephen Waweru Njenga: there is an order issued on 3rd October, 2007, where the Court adopted the award in Maragwa Land Disputes Tribunal. As per the order, the 1st Respondent herein who was the Plaintiff/Applicant in that suit was given the right of occupation of the suit property and directed to move Court to challenge the title deed issued to the Defendant.

    iii. Murang'a Civil Suit No. 20 of 2008, Daniel Macharia Miano vs Maitim M Mtamkindia which was an accident claim and as submitted by the Appellant had nothing to do with the suit property.

15. What flows from the foregoing case laws is that the suit land had been subject to litigation between the 1st Respondent – James Mwangi Mathu and the Appellant's husband – Stephen Waweru Njenga. As per the Green card adduced as evidence by the 2nd Respondent, the suit land was a government land before it was first registered under the name of Mboi- Kamiti Farmers Co. Ltd on 2nd February, 1993. On 9th November, 2006, Stephen Waweru Njenga, was registered as the owner before being issued with a title deed on 10th November, 2006. The 1st Respondent thereafter registered a caution on the suit property on 8th February 2007, and on 15th March 2016, the 1st Respondent became the registered owner, before he was issued with a title deed on 18th April, 2016. What is also evident from the Green Card is that the entries giving rise to the registration of the suit land and issuance of title deed thereof in the name of Stephen Waweru Njenga was cancelled on 15th March, 2016.

16. Both the Appellant- Jennifer Ngendo Waweru, and the 1st Respondent- James Mwangi Mathu, are entitled to proprietary rights guaranteed by Article 40 of *the Constitution*. The Courts have a duty to protect and preserve this right as and when they are moved. It is trite law that no two titles can exist over one property as well. Further Court are also called upon to preserve and advance the Torrens system

of land registration and in the end, protect the sanctity of titles. Whether this was done is a matter that can be established from the proceedings before the trial Court.

17. The role of this Court on appeal is well laid out in Section 78 of the *Civil Procedure Act*, which is to re-evaluate, re-assess and re-analyze the evidence as contained in the Record of Appeal. This position was held by the Court in the case of Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where the Court rightly held: -

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

18. The discretionary power of the trial Court just like this Court is donated by *the Constitution* as well as Statute and as such, this Court cannot unnecessarily interfere with the said discretion. The circumstances under which Court can interfere with such discretion were well laid out by the Supreme Court in the case of Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR, where the Court held:

> " We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious."

19. The superior Court quoted the pronouncement by the New Zealand Supreme Court case of Kacem v. Bashir (2010) NZSC 112; (2011) 2 NZLR 1 (Kacem),where it was held [paragraph 32]:

> " In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter:
>
> (1) error of law or principle;
>
> (2) taking account of irrelevant considerations;
>
> (3) failing to take account of a relevant consideration; or
>
> (4) the decision is plainly wrong."

20. This Court agrees with the role of a Court on first appeal as was set out in the case of Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282, where the Court held:

> " A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons."

21. The Court has perused the Record of Appeal, the rival written submissions by parties and the authorities cited therein and also being alive to the foregoing on the role of this Court, the issues for determination are:

i. Whether the judgment of the trial Court was compliant with Order 21 rule 4 of the Civil Procedure Rules

ii. Whether the Appellant proved her case on a balance of probability

iii. Whether the trial Court erred in entering judgment in favour of the 1st Respondent

iv. Whether the Appeal should be allowed

v. Who should bear costs of the Appeal

I. Whether the judgment of the trial Court was compliant with Order 21 rule 4 of the Civil Procedure Rules?

22. It is relevant to first determine this issue before delving into other issues. The Appellant has challenged the contents of the Judgment of the trial Court on the premise that it was too scanty and it did not appreciate the weighty issues raised by the Plaintiff. The Respondent submitted that the trail Court did set out the prayers sought, analyzed the facts, evidence tendered and the provisions of the law.

23. Order 21 Rule 4 of the Civil Procedure Rules makes provisions on what should constitute a judgment. It provides that:

> "Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

24. The Appellant noted in her submission that "the judgment of the trial Court was a four-page document which merely glossed over the evidence produced by parties as well as the submissions tendered on their behalf" This seems to be an admission that the Court considered the evidence produced as well as the submissions by parties. What the Appellant seems to be unhappy about is the length of the judgment.

25. The Judgment of the trial Court as is evident from the Record of Appeal, shows that the Court did at the beginning record the prayers sought by the Plaintiff and the facts relied on, and thereafter considered the responses before delving into the evidence of parties. The trial Court went ahead and considered the position of the law on the Certificate of title as well as case laws that it sought to rely on. It is on it that it drew a conclusion that the Appellant herein had failed to prove her case on a balance of probabilities.

26. The provisions of Order 21 Rule 4 of the Civil Procedure Rules are coached in mandatory terms and any Judicial Officer must take cognizant of this when writing their Judgments which style may differ. The Court in the case of Simon P M Karimi Vs Kenya Commercial Bank Limited & another [2015] eKLR, when finding that the trial Court was compliant with Order 21 Rule 4 of the Civil Procedure Rules, stated as follows:

> "It is evident from the content of the judgment assessed herein that the learned trial judge set out the appellant's claim; analyzed the appellants oral testimony; considered the content of the common documentary exhibits relied upon by either side; considered both law and case law on the subject before arriving at the conclusion reached. We find this mode of approach compliant with the provisions of order 21 rule 4 of the Civil Procedure Rules"

27. Looking at the judgment of the trial Court, this Court is convinced that the contests of the said Judgment was similar to the one referenced by the Court in the above cited case. Therefore, this Court

finds the Judgment of the trial Court was compliant with the Order 21 Rule 4 of the Civil Procedure Rules.

II. Whether the Appellant proved her case on a balance of probability?

28. The Appellant was the Plaintiff in the suit and she maintained that the suit land belonged to her husband, Stephen Waweru Njenga. She did not state how her husband acquired title over the said land, but she produced a copy of title deed issued in her husband's name.

29. It is trite law that the legal burden of proof rests with the person alleging, but what will shift often times is the evidentiary burden. Section 107 of the *Evidence Act* makes provision for the legal burden of proof, it provides:

> "Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

30. The evidential burden on the other hand is provided for under Sections 109 and 112 of the *Evidence Act* which provides:

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
>
> 112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

31. The Appellant had the burden of adducing evidence before the trial Court to prove her case, and whether the burden shifted at any point, this Court will have to peruse the record. The shifting of burden was explained in the case of Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR, where the Court expressed itself as follows:

> (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?"

32. Similarly, the Supreme Court in the case of Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR, stated as follows on the evidential burden of proof:

> (132) 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.
>
> (133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations

of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.....

33. The Appellant had a duty to lead evidence and not to expect the 1st Respondent to adduce evidence that he validly acquired title of the suit property.

34. It was her testimony on cross-examination during trial that she did not know how her husband acquired property. Interestingly, she did not know about the cases over the suit property which evidentially were conducted when her husband was alive. Further, she told the trial Court that the title Deed to the suit property was misplaced and that she did not know how the title changed hands.

35. There is no evidence from the Record of Appeal that shows the Appellant ever filed for loss of title deed. The Appellant's title if any was subject to challenge, and it was in the interest of justice that she travelled beyond the title and give evidence as to how her husband acquired it. This Court agrees with the pronouncement of the Court in the case of Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others[2016] eKLR, where the Court held:

> 'A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'

36. Further in the case of Munyu Maina v Hiram Gathiha Maina [2013] eKLR Court held:

> " We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony."

37. The Appellant did not discharge her legal burden of proof and all she did was to flaunt a Certificate of title, without leading evidence as to how the title was acquired. The Appellant now contends that the trial Court failed to consider her evidence when there is no evidence that she presented before the trial Court to support her husband's acquisition of title. For the above reasons, this court finds that the Appellant failed to prove her case on a balance of probability.

III. Whether the trial Court erred in entering judgment in favour of the 1st Respondent?

38. As stated above the evidential burden of proof never shifted to the Respondents, but be that as it may, the 1st Respondent raised a Counter-claim. As per the 1st Respondent, he acquired ownership of the land through purchase from Gladys Waithira Kamau vide a sale agreement of 12th July, 2000. This Court has perused the said sale agreement and it possesses the tenets of a valid agreement within the

provisions of Section 3 (3) of the Contract Act. This was an agreement for sale of land, which was reduced into writing and which indicated that the land for sale was plot No. 583, for a consideration and was duly executed by the parties.

39. The Appellant did not object to the production of the said Sale Agreement during trial, but has now raised an issue on appeal. She contends that this document was an acknowledgment, but not a sale agreement and might have been forged. That is a ridiculous analogy. The document clearly indicates that the same was a sale agreement for plot 583. A reading of this document as well as the agreement of 16th November, 2000, shows that the consideration for the sale was Kshs. 230,000/= which was duly paid and acknowledged by the vendor.

40. As pointed out earlier, this land was first issued to Mbo-I Kamiti Farmers Limited. The 1st Respondent produced before the trial Court correspondences between Gladys Waithera Kamau and the said Mbo-I Kamiti Farmers Ltd, where the former acknowledged that she was the owner of the suit property, but had surrendered to the 1st Respondent. The 1st Respondent was then issued with receipts by Mbo-I Kamiti Farmers Ltd, and as per the letter addressed to Mathenge & Muchemi Co. Advocates, Mbo-I Kamiti Farmers Ltd, issued instructions that transfer documents be executed in favour of the 1st respondent.

41. It appears to this Court that it was in the process of transfer when the 1st Respondent found out that Stephen Waweru Njenga had been issued with title. It is curious that the said Stephen Waweru Njenga acquired title to the land when 1st Respondent was in possession and had already acquired ownership. It is then that he moved the Maragua Land Disputes Tribunal who found in his favour resulting in the adoption of the award in Murang'a Civil Case No. 20 of 2007.

42. It is the strength of this adoption order that lead to the cancellation of the title of Stephen Waweru Njenga and a title deed issued to the 1st Respondent. The 2nd Respondent narrated how they issued the title to the 1st Respondent and the witness statement of Alice Gisemba, the Land Registrar. She stated that they cancelled the title deed of Stephen Waweru by dint of the orders issued in Murang'a Civil Case No. 20 of 2008.

43. The Appellant has now raised an issue with the apparent confusion in terms of the case numbers. While the 2nd Respondent testified that the cancellation was as a result of civil suit 20/2008 the 1st Respondent maintains that it was as a result of Civil suit 20/ 2007. The Appellant adduced before the trial Court a copy of a Plaint of Civil Suit 20/2008, which undoubtedly is an accident claim, but there was no evidence that an order was ever issued in that suit. Even though the 1st Respondent has alleged in his submission that this was a typing error noted by the 2nd Respondent, there is no such evidence in the proceedings.

44. However, this Court has perused a copy of an Order of Court in Civil Suit No. 20 of 2007, and the same touches on the suit property. It also makes reference to the case in Maragua LDT No. 13 of 2007. The parties in these cases were the 1st Respondent – James Mwangi Mathu and Stephen Waweru Njenga. It would be unreasonable to register land based on an accident claim and this is what should have been addressed at trial. But since this Court has the power to re-evaluate evidence, then it shall. Without any shadow of doubt, this was an error that can easily be discerned and can be corrected. There was an order issued in Civil Suit No. 20 of 2007, which makes reference to the suit land, and it would be an absurdity to conclude that there was no error, yet it is so apparent. This error did not in any way prejudice the Appellant. It did not go to the substance of the case.

45. To this end, the 1st Respondent was able to show how he acquired title to the suit property. The Appellant had alluded to the fact that there was fraud, malfeasance and misrepresentation on the part

of the Respondents. Matters fraud are serious in nature and it is the reason why many Courts have required the calling of evidence to buttress such a claim. The Court in the case of Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR, when discussing fraud considered the writings of Bullen, Leake & Jacobs on Pleadings 13th Edition which this Court found so relevant. The authors had this to say:

> " Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved. 'General allegations, however strong may be by words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice".

46. In the case of Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR, the Court pronounced itself on matters of fraud and held;

> " Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities". (emphasis added)

47. Similarly, the Court of Appeal in the case of John Kamunya & another v John Nginyi Muchiri & 3 others [2015] eKLR held:

> " we find that the law is clear as put by Mr. Karanja that matters of "fraud" must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine."

48. As per the proceedings and specifically at the hearing, the Appellant did not adduce any evidence or challenge the testimonies of the Respondents as to shake their credibility. It is baffling that the Appellant opted to challenge the evidence on Appeal, a case in point is raising doubt on the sale agreements. Those were issues that could best have been challenged by bringing evidence to controvert the testimony. The Appellant raised the issue of fraud, and it was not enough to simply particularize them.

49. It was not enough to allege that the 1st Respondent submitted forged documents for purposes of transfer, without even bringing evidence on the alleged forgery. As a matter of record, the Appellant seemed not to be aware of the occupation of the suit property, and how her husband acquired the said property. It is interesting that despite lack of knowledge on acquisition of the suit property, she was able to infer fraud on the part of the Respondents.

50. The Appellant raised an issue on appeal that the Counter-claim in which the judgment was premised on was defective for want of compliance with Order 4 Rule 2(5) and Order 7 Rule 5 (a) of the Civil Procedure Rules, which requires that a counter-claim now must be accompanied by a Verifying affidavit. It is true a counter-claim must be accompanied by a Verifying Affidavit. This was not raised during trial and the parties proceeded as though the same was competent.

51. In the case of Luke Cheruiyot and 37 Others v National Oil Corporation NRB CA Civil Appeal No. 91 of 2019 [2015] eKLR, the Court in recognizing other decision had this to say:

> As recently as 11th July 2014, the position taken by the Court in Research International East Africa Ltd. –v- Julius Arisi & 213 Others (supra), was reiterated in the case of Kenya Oil Company Limited -v- Javantilal Dharamshi Gosrami [Nairobi Civil Appeal No. 324 of 2005] (UR). There, we said:
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> > " "The provisions of Rule 1(6) of Order 4 (formerly rule 1(3) of Order VII), gives the court power to strike out a plaint which is not accompanied by a verifying affidavit containing the stipulated particulars.
> >
> > The power to strike out the plaint or [counterclaim] under the Rule is not mandatory but permissive. The phrase "the court may....' in Order 1(3) and in the new Order 1(6) gives the court discretion whether or not to strike out a plaint as the court held in Arisi case

52. What this Court deduces here is that a suit is not invalidated by failure to file a Verifying Affidavit, as a trial Court may grant leave to a party to file the same. This is however late in time for the parties to benefit from it. There is nothing to suggest that the failure to file the Verifying Affidavit caused any prejudice to the Appellant. The trial Court found merits in the Counterclaim and entered judgment in favour of the 1st Respondent against the Appellant. This Court finds no fault on this.

53. The upshot of the foregoing is that the 1st Respondent did on a balance of probabilities prove the root of his title, and was entitled to the orders sought. Thus, the trial Court did not err in entering judgment in favour of the 1st Respondent.

IV. Whether the Appeal should be allowed?

54. The Appellant invited this Court to allow the Appeal and to set aside the judgement of the trial Court based on the grounds set out in the Memorandum of Appeal. This Court has already established hereinabove that there was no fault in the Judgment of the trial Court. The Appellant raised weighty issues on Appeal, but which were countered by evidence anyway during the trial. The new issue introduced on Appeal being the failure to file a Verifying Affidavit should have been addressed during the hearing. This Court will borrow some footing in the case of Rose Njoki King'au & another v Shaba Trustees Limited & another [2018] eKLR, where the Court when dismissing an Appeal refused to determine a question that was raised on Appeal, yet it was not raised before the trial Court. The Court had this to say

> " Turning to the issue of a defective counterclaim, the appellants relied on the provisions of order VII Rule 1(2) of the Civil Procedure Rules (repealed), in support of their submission that the 1st respondent's counterclaim was defective for want of a verifying affidavit, verifying its correctness, and should not have been used to sustain the 1st respondent's application for striking out of their amended plaint, and entry of summary judgment against them in terms of the defence and counterclaim.
>
> .....
>
> Neither in the appellants' depositions in the replying affidavit nor their submissions on the record, have we traced any complaints raised by appellants with regard to that issue before the trial Judge for determination.

> The law is that, a party is bound by his/her pleadings. Our hands are therefore tied in terms of the above guiding rule. We cannot consider it now."

55. This Court is sufficiently guided by the above pronouncement. The Appellant has not given any reasons to this Court as to why it should interfere with the discretion of the trial Court. As a result, the Court finds that this Appeal lacks merits and cannot be allowed.

V. Who should bear costs of the Appeal?

56. Section 27 of the *Civil Procedure Act* requires that costs to follow event but the Court have the discretion to rule otherwise. The Court in Machakos ELC Pet No. 6 of 2013;- Party of Independent Candidate of Kenya & another v Mutula Kilonzo & 2 others [2013] eKLR quoted the case of Levben Products VS Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227 held:

> "It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (FrippvsGibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

57. The Respondents are the successful parties herein. However, only the 1st Respondent participated in the appeal. This Court shall exercise the discretion in the favour of the 1st Respondent.

58. For the above reasons, the Court finds the Instant Appeal is not merited and it is thus dismissed entirely with costs to the 1st Respondent. The Judgement of the trial Court issued on 10th February 2022, is upheld.

59. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 27TH DAY OF JULY, 2023.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Appellant – Absent

Mr Ndegwa Mbue for the 1st Respondent

2nd Respondent – N/A