



Mutuaruchiu & another v Kiriamburi (Environment and Land Appeal 114 of 2021) [2023] KEELC 19216 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19216 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 114 OF 2021**

**CK NZILI, J
JULY 26, 2023**

BETWEEN

M'TABARI MUTUARUCHIU 1ST APPELLANT

NAMAN MUTWIRI 2ND APPELLANT

AND

JEREMIAH KIRIAMBURI RESPONDENT

(Being an appeal from the Judgment of Hon. Tito Gesora CM Maua Law Courts delivered in CM's Civil Case No. 153 of 2014 on 7th October 2021)

JUDGMENT

1. By a memorandum of appeal dated 25.10.2021, the appellants fault the decision delivered on 7.10.2021 because the trial court:
 - i. Erred, in finding the suit, proved against them.
 - ii. Erred, in finding that L.R. No. Kiegoi/Kinyanka/2228 was not a subject matter of the award in the Land Dispute Tribunal (LDT) award adopted by the court as its judgment.
 - iii. Erred, in finding the suit, proved against him.
 - iv. Erred, in finding that LR No. Kiegoi/Kinyanka/2228 was not a subject matter of the award in the Land Dispute Tribunal award adopted by the court as its judgment.
 - v. Erred, in finding fault on the registrar for allegedly acting illegally and unprocedurally by combining L.R No.2228 with the respondent L.R. No.2227 without a valid court order.
 - vi. Erred, and based its finding on the Land Dispute Tribunal award, which was illegal ab initio for want of jurisdiction to deal with titled land.



- vii. Erred, in law, in dismissing their defense and counterclaim with no reasons given.
 - viii. Ruled against the weight of evidence supporting the appellant's defense and counterclaim.
2. This being a first appeal, this court is mandated in law to re-assess or reappraise itself on the lower court record to come up with independent findings on both facts and the law while at the same time being mindful that the trial court had the occasion to see and hear the witnesses first hand. See *Peter vs Sunday Post Ltd (1958) E.A 424*,
 3. At the trial court, the appellants, who are a father and son as defendants, had been sued by the respondent as the plaintiff by a plaint dated 28.7.2014, claiming to be the registered owner of LR No. Kiegoi/Kinyanka/2949 measuring approximately 0.50 acres alleging that the appellants had illegally occupied his said land. He sought eviction against them plus costs. The plaint was accompanied by a list of witnesses' statements dated 2.9.2014 a list of documents dated 20.3.2015, a case summary and a list of issues dated 20.3.2015.
 4. By an amended defense and counterclaim dated 29.2.2016, the appellants denied the claim. They contended that the respondent, without any color of right or notice, secretly and illegally caused the 2nd appellant's L.R. No. Kiegoi/Kinyanka/2228 to be merged with another parcel L.R. No. Kiegoi/Kinyanka/2229 to create his L.R. No. 2949, yet his L.R. No.2228 was not subject to any tribunal case that he was aware of. The appellants averred that they were lawfully occupying and using L.R. No. Kiegoi/Kinyanka/2228, which land they had extensively developed.
 5. By way of a counterclaim, 1st appellant averred that he was initially the registered owner of L.R. No. Kiegoi/Kinyanka/1249, which he subdivided into L.R. No.'s 2226, 2227, 2228 and 2229.
 6. The 1st appellant averred that he obtained a land control board consent and transferred L.R. No. 2226, 2229 and 2228, respectively, to Julius Kirimi, the respondent, and the 2nd appellant. The 1st appellant averred that the land registry mistakenly failed to register L.R. No.2228 to the names of the 2nd appellant, following which the respondent illegally and irregularly combined L.R. No.2228 with L.R. No.2229 to give rise to L.R. No.2949 under the respondent's names, who had no known interests at all on the portion. The appellant, therefore, sought a declaration that the combination of the two parcels was illegal and irregular and an order directed at the Land Registrar, Igembe Central, to rectify the register by restoring L.R. No.2228 to its original status. The defense and counterclaim were accompanied by witness statements dated 3.9.2014 and a list of documents dated 22.10.2014.
 7. In reply to the defense and defense to the counterclaim dated 24.3.2016, the respondent denied the contents of the counterclaim. He said his late father gave him L.R No.2949.
 8. Following an interlocutory application dated 28.7.2014, the trial court on 11.8.2014 restricted both parties from cutting down any trees, pulling up, or demolishing any structures on the parcels of land pending the hearing of the suit.
 9. By an order dated 24.4.2018, the trial court issued summons to the Land Registrar, Igembe District, to produce documents relating to L.R. No.2228 and 2229. The documents were eventually filed on 27.5.2021 by the letter dated 26.5.2021 by MM Murani, the Land Registrar of Meru North.
 10. Jeremiah Kiramburi testified as PW 1. He adopted his witness statement dated 3.9.2014 as his evidence in chief. His evidence was that the appellant had refused to vacate the land he had inherited from his late father. He said he had stayed on the suit land where he grew miraa, bananas, and tea bushes. PW 1 stated that before, the land was held in trust by the 2nd appellant as the first son of their mother. PW1 said that his father had two wives. Further, he said that his father gave him the land where he settled his



- family, which the respondent and the 2nd appellant were aware of, but instead, the 1st appellant allowed his grandson to occupy his portion, which he now sought to be evicted or restrained from interfering with.
11. In cross-examination, PW 1 said that the 1st defendant was holding the land in trust from him since his late father drew a sketch map on how each of the four brothers would share the land, only for him to establish in 2006 that the 1st defendant was the registered owner. He said that his brother then subdivided the land into four portions in his absence and that parcel L.R No.2229 was supposed to be his hence why he went to complain to the district officer and later the LDT, who recommended the cancellation so that the subdivision could start afresh.
 12. PW 1 said that after the LDT award, the land registrar discovered that L.R. No.1294 did not exist, so he took L.R. No.2228 and combined it with 2229 to become L.R. No.2949. His evidence was that the 2nd appellant was occupying his portion, so he wanted him to vacate his land, which had tea, miraa plants, and a house. According to PW 1, the land registrar combined the two parcels since the one occupied by the 2nd appellant had been hived from his land. He denied any alleged collusion with the land registrar to effect the changes.
 13. M'Munjuri M'Ruaruchiu testified as PW 2. His evidence was that, per the witness statement dated 3.9.2014, the respondent and the 1st appellant were his brothers, who had a land case before the LDT, over land acquired from their late father but had refused to transfer a portion to the respondent. PW2 told the court that the 1st appellant allowed the 2nd appellant, his grandson, to occupy the portion and erect structures thereon instead of surrendering it to him.
 14. PW 2 said their late father gave them the land, with one Kaberia and the respondent. In his evidence, their late father, alongside Mugambi, gave them L.R. No.597 and that though registered under his name, the same way the 1st appellant was holding the suit land in trust of the respondent, who was a minor at the time of registration in 1980.
 15. Further, PW 2 confirmed that he was also a witness at the LDT. Similarly, PW 2 clarified that the miraa plants on the suit land belonged to the respondent but not the 2nd appellant. Additionally, PW 2 testified that the respondent had lived on the suit land all along, even during the demarcation and issuance of the title deed.
 16. M'Mwirabua Mwirabua testified as PW 3 as a brother-in-law to the 1st appellant and the respondent. His evidence was that his father-in-law shared out all land with his sons, only for the 1st appellant, to give out a portion belonging to the respondent to his daughter married to the 2nd appellant despite warnings from the rest of the family members. In cross-examination, PW 3 confirmed that he was present when his late father-in-law shared the land among his sons.
 17. M'Itabari M'Ituaruchiu testified as DW 1. He testified that the respondent was his elder brother, while the 2nd appellant was his son-in-law. He adopted his witness statement filed on 24.11.2014 as his evidence in chief. He told the court that he acquired the land in issue from his late father in the same way the respondent was allocated land in the Arthi area.
 18. D.W. 1 said that he was the first registered owner of L.R. No.1294, measuring 1.26 acres which he had gathered but allowed the respondent to occupy a portion measuring 0.25 acres as he prepared to move out to his land at Arthi. Following this, D.W. 1 told the court that clan members in 2006 requested him to allow the respondent to continue living on his land where after he accepted the clan wish and transferred 0.25 acres of his land to the respondent as L.R. No.2229 among the four subdivisions as L.R. No's. 2226, 2227, 2228 and 2229.



19. D.W. 1 further testified that the respondent never complained over the rest of the land, which he had transferred to John Kirimi as parcel L.R No.2226 and LR 2228 to the 2nd appellant. D.W1 told the court that the parcel number for the 2nd appellant was not effected by an error at the land registry. He told the court that the respondent objected to the defunct LDT claiming 0.50 acres and that the Land Registrar, without any justification, effected the changes. He termed the consolidation of L.R. No's 2228 with L.R No 2229 as illegal, yet L.R. No.2228 was fully occupied and developed by the 2nd appellant. He produced a copy of the green card for LR No. Kiegoi/Kinyanka/1294 as D. Exh No. (1), a copy of the mutation form for L.R No. Kiegoi/Kinyanka/1294 as D. Exh No. (2), a copy of the green card for L.R. No. Kiegoi/Kinyanka/2228 as D. Exh No. (3), a copy of the title deed for L.R. No. Kiegoi/Kinyanka/2226 as D. Exh No. (4) and a copy of a letter dated 4.6.2013 from the District Land Registrar as D. Exh. No. (5).
20. In cross-examination, D.W. 1 denied that the land was ancestral. He said it was out of pity that he had accommodated the respondent on his land. Further, D.W. 1 termed the miraa plants on the land as his and not the respondents. The trial court noted that the respondent, in cross-examination of D.W. 1, insisted that at the time of the subdivisions of the land by his late father, he did not possess any Identification card. D.W. 1 emphasized that the respondent was mature and married when he became a registered owner of the land and that there was no land his late father had directed him to subdivide to anybody.
21. DW 2 was Naaman Muthuri Itabari the 2nd appellant herein. He adopted his witness statement filed on 24.11.2014. His testimony was that he lived on a portion in LR No. 1294 that had been given to him by the 1st appellant before he caused the four subdivisions in 2006, among them L.R. No.2228 in his favor. He testified that the 1st appellant had applied for and obtained a land control board consent to transfer the portion to him, which was eventually lodged with the lands office, but for unknown reasons, the land registrar failed to effect the changes. DW2 testified that in 2016, he discovered that L.R. No.2228 was illegally consolidated with the respondent's L.R. No.2229 to create L.R. No.2949, yet he had extensively developed or put up two permanent houses, planted miraa and other crops. He termed the consolidation as unprocedural, illegal, and invalid. D.W. 1 confirmed that the respondent, out of the intervention by the clan elders, was transferred a portion by the 1st appellant; hence the claim against them was baseless and unmerited. D.W. 2 denied knowledge of his grandfather's wishes to have the land subdivided among the sons. In cross-examination, D.W. 2 denied being a grandson of the 1st appellant, his father-in-law, born in 1985.
22. D.W. 3 was Michael Murithi Mwangi, the Land Registrar. He produced a report dated 26.5.2021 and filed in court on 27.5.2021 as D. Exh No. (6). His testimony was that L.R. No. Kiegoi/Kinyanka/2949, measuring 0.202 ha, belonged to the respondent. Further, DW3 testified that the title was a creation of L.R. No.2228 and 2229, following the award in LDJ/T/19/04/2010. He said that at the time of the award, L.R. No.1294 was non-existent since it had been subdivided on 06.11.2006, giving rise to L.R. No.2226, 2227, 2228 & 2229 as per the green card.
23. With this evidence, the trial court rendered its judgment, the subject matter to this appeal, which parties, by consent, were directed to canvass by written submissions whose filing deadline was 16.5.2023. The appellants have submitted that three issues fall for the court's determination.
24. On whether the L.R. No. Kiegoi/Kinyanka/2228 was affected by the decision of the L.D.T; the appellants submitted that the register for the land was created on 6.11.2006, going by the green card on page 47 of the record of appeal. From the proceedings of the L.D.T on page 22 of the record of appeal, the appellants submitted that the respondent complaint was over L.R. No.2227 and not L.R.No 2228, and the finding of the L.D.T was on L.R. No.1294 and not L.R. No.2228.



25. Consequently, the appellants submitted that the subsequent award by the trial court was on L.R. No.1294, meaning that the combination of L.R. No.2228 and 2229 was illegal and irregular in which case the trial court should have invalidated the title deeds.
26. On whether the decision of the land registrar was illegal, irregular, and unprocedural, the appellants submitted that the respondent case in the lower court was for eviction against them from L.R. No.2949, which they contended was illegally created in their defense and counterclaim since at the time the L.D.T award was adopted, L.R. No.1294 was in existent both on record and on the ground, due to the subdivisions into four portions, hence the letter by the land registrar dated 4.6.2013 admitting that the award was incapable of implementation.
27. Unfortunately, the appellants submitted that by a letter on page 52 of the record of appeal, the land registrar unilaterally and without leave of court amended the award, combined the two portions of land, and created L.R. No.2949 in favor of the respondent; hence the reasons that the appellants took the view that the said title deed was irregularly done, yet the trial court ruled otherwise.
28. On whether the LDT award was null and void, the appellants submitted that under Section 3 (1) of the repealed Land Dispute Tribunal Act, the award made by the LDT over LR No.1294 was beyond its jurisdiction, and after that, the trial court should not have aided the respondent to derive any benefits from property acquired irregularly and illegally.
29. The court has carefully reviewed the lower court, the record of appeal, written submissions, and the law. The issues calling for the court's determination are:-
 - i. If the judgement is based on the pleaded facts, evidence, and the law.
 - ii. If the appeal has merits.
30. In trite law, parties are bound by their pleadings, and issues flow from them. See *Galaxy Paints Company Ltd vs. Falcon Guards Ltd* (2000) 2 EA 355. In *Raila vs. IEBC* (2017) eKLR, the court held that in an adversarial system, the parties set the agenda by bringing the facts and evidence and must not be allowed to travel outside their pleadings. Further, in *Mary Njeri Nyaga & another vs. Erastus Njue Gitonga & others* (2020) eKLR, the court cited with approval *Virjay Morjaria vs. Nansingh Madhusingh Darbar & another* (2000) eKLR, that fraud must be specifically pleaded and that particulars of fraud, its alleged conduct must be stated on the face of the pleading and proved. The court cited with approval *Evans Otieno Nyakana vs. Cleophas Bwana Ongaro* (2015) eKLR, that the burden of proof on fraud lay upon the respondent who had alleged forgery of the plaintiff's documents in the defence and counterclaim. See *Cental Bank of Kenya vs. Trust Bank Ltd & 5 others* (2000) eKLR.
31. In *Ann Wairimu Wanjohi vs. James Wambiru Mukabi* (2021) eKLR, the court cited with approval *Odd Jobs vs. Mubia* (1974) E.A 476 and *Gas Industries vs. Diocese of Meru* (1976) eKLR, that a court may base its decisions on unpleaded issues if it appears from the course followed at the trial that the issue was left for the court's determination.
32. In *David Sirona Ole Tunkai vs. Francis Arap Munge and others* (2014) eKLR, the court held that it could not grant a remedy that had not been applied for or not pleaded, for it was the parties who set the agenda so that there can be certainty and finality that each party was bound by its pleadings. The court observed that a party could not raise a different case from what it had pleaded without due amendment being made. As to raising unpleaded issues at the appeal stage, the court in *Lemita Ole Lemein vs. A.G. & others* (2020) eKLR cited with approval *Political Parties Forum a Coalition and 3 others vs. Registrar of Political Parties Nairobi Appeal No. 80 of 2014*, that pleadings filed by parties bound a court which could not investigate or examine on behalf of the society at large.



33. In this appeal, the primary pleadings before the trial court were the plaint dated 28.8.2014, the amended defense and counterclaim dated 29.2.2016, and the reply to defense and defense to counterclaim dated 24.3.2016. The respondent sought eviction orders against the appellants alleged to have trespassed into his L.R No. 2949.
34. On the other hand, the appellants denied ownership of the land by the respondent claiming that it was secretly, illegally, and unprocedurally combined with the 2nd appellant's L.R. No. Kiegoi/Kinyanka/2228 and L.R. No.2227 to create LR No. 2949.
35. By counterclaim, the 1st appellant averred that L.R. No.2949 was illegally, irregularly, and unprocedurally created and registered in respondent's name. The appellants sought for a declaration that the combination was illegal and irregular and an order that the original number be restored by rectifying the land register.
36. In reply to the defense and defense to counterclaim, the respondent pleaded that he was not an employee of the Ministry of Lands to answer to issues of a combination of the two parcels. He further contended that he acquired L.R. No.2949 from his biological father. The appellants did not file a reply to the defense to the counterclaim and specifically respond to whether the respondent could be held liable for actions falling under the land registrar's jurisdiction.
37. The defense and counterclaim dated 29.2.2016 did not specifically plead fraud or particulars of irregularity or illegality on the part of the respondent. The dates and details of when, where, and how the respondent combined, registered, and acquired land belonging to the appellants were not specifically pleaded. In *Wambui vs. Mwangi & others* (civil appeal 465 of 2019) (2021) KECA 144 (KLR) (19th November 2021) Judgment, the court held that under Sections 80 of the [Land Registration Act](#), no court of law should sanction and pass as valid any title to property founded on fraud, deceitfulness, a contrived decree, illegality, nullity, irregularity, unprocedural or otherwise was a product of a corrupt scheme. The court noted that an appeal court, just like the primary court, was tied by issues raised in the pleadings and evidence before the court.
38. In the case of *Raila Amollo Odinga & another vs. IEBC & 2 others* (2017) eKLR, the court observed that though the legal and evidential burden of establishing the facts and contentions which will support a party's case was static and remained constant through trial with the plaintiff. In contrast, the court said that the evidential burden kept shifting anytime it was determined by answering the question as to who would lose if no further evidence was introduced.
39. In this appeal, the appellants had the burden of proof under Section 107 of the [Evidence Act](#) to plead and prove illegality, unprocedural, irregularity, and fraud in that the respondent's title to the land was acquired by amalgamating their portion of land. The appellants would have pleaded the specific dates, times, and manner in which this occurred and whether the respondent was solely responsible. The respondent had maintained that he had never worked with the Ministry of Lands and could not be held liable for any mistakes by the Ministry of Lands. The burden of proof was on the appellants, particularly the 2nd appellant, to bring cogent and tangible evidence on how they lawfully acquired their parcels of land in the first instance. The 2nd appellant never availed any documentation on how he acquired his land. As held in *Raila Odinga* (supra), the appellants bore the evidential burden to adduce factual evidence to prove the allegations of breach or non-compliance with the law. See *Samuel Kamere vs Land Registrar Kajiado* (2018) eKLR.
40. Similarly, the appellants did not produce any forensic or investigative report which had found the respondent and land registrar culpable of merging their land and proceeding with the issuance of the title deed in favor of the respondent.



41. In *Westmont Power (K) Ltd vs. Westmont Power (K) Ltd* (2003) eKLR, the court observed that a defendant should have built a structure showing that there was fraud and that a general allegation or a mere assertion of fraud or illegality without particulars of facts suggesting fraud or illegality could not suffice.
42. In *Vijay Morjaria* (supra) the court observed that fraud must be specifically pleaded and that particulars of fraud must be stated explicitly on the face of the pleadings, including the acts alleged to be fraudulent. Similarly, the court said fraudulent conduct must be distinctly alleged and proved. The court further noted that it was not allowable to leave fraud to be inferred from the facts.
43. In this appeal, the counterclaim stated that L.R. No.2228, in the name of the 2nd appellant, was mistakenly not registered. If then it was not registered in the first instance and the 1st appellant did not make a follow-up with the land registrar about how the error occurred, on what basis could the appellants allege without proving that it was combined with L.R. No.2229 to form L.R. No.2949 in favor of the respondent? Additionally, if the mistake or error was occasioned by the land registrar, on what basis could the appellants blame the respondent for acts of omission or commission by the land registrar, who was not even a party to the primary suit?
44. D. Exh No. 2 which the appellants relied upon lacked vital information including the registration date and registration fees paid. The details of the presentation book number and receipt number were also lacking. The appellants failed to produce any documentation to prove that their parcel of land was part of the respondent's parcel of land. No evidence was tendered on when the appellants discovered that L.R. No.2228 was not registered in 2006. No material was produced before the trial court if, after the discovery, the appellants lodged any complaint with the land registrar for issuance of a title deed. Further, there was also no evidence that the appellants lodged any documents to support the registration of L.R. No.2228 by way of payment of stamp duty and registration fees.
45. D. Exh No. (6), the transfer forms for L.R. No.2949 indicated that Maua Law Courts executive officer(s) signed them, and registration was effected on 25.6.2013. All the supporting documents for the registration of the respondent's parcel of land were produced by D.W. 3. The appellants did not pose any specific questions on illegality, irregularity, unprocedural and or corrupt schemes on the part of D.W. 3 and the respondent.
46. Moreover, the appellants never asked any questions to D.W. 3 regarding any complaints or applications to cancel or revoke the respondent's title deed, which they had made to the land registrar between 2013 and 2021.
47. Without pleadings, facts, issues, and evidence raised at the primary suit, my findings are that grounds numbers 2, 3, 4 & 6 of the appeal new issues or matters not raised before the trial court.
48. Consequently, I conclude that the appeal herein lacks merits and is dismissed with no order as to costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 26TH DAY OF JULY 2023**

In presence of

C.A John Paul

Gitonga for appellant

Appellants

HON. CK NZILI



ELC JUDGE

