



REPUBLIC OF KENYA



**Mathu & 22 others v Inkom Investment Limited & 2 others (Environment and Land Appeal 10 of 2020) [2023] KEELC 19275 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19275 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 10 OF 2020**

**BM EBOSO, J**

**JULY 25, 2023**

**BETWEEN**

**BENRODGERS NGARE MATHU ..... 1<sup>ST</sup> APPELLANT**  
**RUFUS MWANGI ..... 2<sup>ND</sup> APPELLANT**  
**HELLEN WANJA KARIUKI ..... 3<sup>RD</sup> APPELLANT**  
**RACHEAL WANJIKU MAINA ..... 4<sup>TH</sup> APPELLANT**  
**MUKAMI KIMANI ..... 5<sup>TH</sup> APPELLANT**  
**ELUID GATHECHE ..... 6<sup>TH</sup> APPELLANT**  
**PAUL NDUNGU NGATAARA ..... 7<sup>TH</sup> APPELLANT**  
**JOSEPH GITARA NDIBA ..... 8<sup>TH</sup> APPELLANT**  
**GABRIEL WASYA KAVILA ..... 9<sup>TH</sup> APPELLANT**  
**HENRY GIKUNJU NJAU ..... 10<sup>TH</sup> APPELLANT**  
**ISABELLA WANJIKU KARANJA ..... 11<sup>TH</sup> APPELLANT**  
**JULIUS KIARIE NJUGUNA ..... 12<sup>TH</sup> APPELLANT**  
**JAMES NJOROGE NGARI & MIRIAM K ..... 13<sup>TH</sup> APPELLANT**  
**MARY MWIHAKI MUKUNA ..... 14<sup>TH</sup> APPELLANT**  
**PETER NGUGI ..... 15<sup>TH</sup> APPELLANT**  
**JANE WANJIRU NGANGA ..... 16<sup>TH</sup> APPELLANT**  
**PETER KURIA CHEGE ..... 17<sup>TH</sup> APPELLANT**  
**MARGARET WANGARI KIRAGU ..... 18<sup>TH</sup> APPELLANT**  
**HARLLAN KAMWERU NJUGUNA ..... 19<sup>TH</sup> APPELLANT**



JACKSON MWITA ..... 20<sup>TH</sup> APPELLANT  
AMBROSE MASHARIA MWANGI ..... 21<sup>ST</sup> APPELLANT  
WILLIAM GITHAGA ..... 22<sup>ND</sup> APPELLANT  
FRANCIS MARARA ..... 23<sup>RD</sup> APPELLANT

AND

INKOM INVESTMENT LIMITED ..... 1<sup>ST</sup> RESPONDENT  
JULIUS KIMANI T/A GEOMATH MANAGEMENT ..... 2<sup>ND</sup> RESPONDENT  
MICHEAL NJOROGE MBITO ..... 3<sup>RD</sup> RESPONDENT

*(Being an Appeal against the Judgment of Hon M.W Mutuku, Senior Principal Magistrate, delivered by Hon B.J Bartoo, Resident Magistrate, on 26/7/2015 in Thika Chief Magistrate Court Civil Case No. 36 of 2011)*

## JUDGMENT

### Background

1. This appeal challenges the Judgment of Hon M W Mutuku, Senior Principal Magistrate, rendered in Thika Chief Magistrate Court Civil Case No 36 of 2011 on 26/7/2015. The Judgment was read by Hon BJ Bartoo, Resident Magistrate. The appeal was brought five years after the impugned Judgment. The limitation period for lodging the appeal was enlarged by this Court (Okongo J) through a ruling rendered on 30/1/2020 in Milimani ELC Misc Application No 273 of 2015. Before I dispose the issues that fall for determination in the appeal, I will briefly outline the background to the appeal.
2. In the year 2011, the 1st respondent instituted a suit in the trial court against the 2nd respondent. The plaint was subsequently amended on 15/2/2014. Through the amendments of 2014, the 1st respondent joined the appellants alongside the 3rd respondent as 2nd to 25th defendants in the suit. The 1st respondent sought the following reliefs against the 25 defendants: (i) an order of injunction restraining them against intermeddling, alienating, selling and/or constructing on Land Reference Number 61/16 [hereinafter referred to as “the suit land”]. (ii) an eviction order; (iii) as an alternative relief to (ii) above, an order directing the defendants to purchase the plots they occupied within the suit land at the prevailing market value within a time-frame to be stated by the court; (iv) an order directing the 2nd respondent to remit to the 1st respondent and to the court accounts for survey work done; (v) mesne profits; and (vi) costs of the suit.
3. The case of the 1st respondent was that, in the year 2003, they engaged the services of the 2nd respondent to subdivide a 10 acre portion of the suit land into 105 plots. They contended that the 2nd respondent undertook to complete the work within 90 days and submit the deed plans for the 105 plots to their advocates, M/s Munene & Company Advocates. They added that two years passed without the 2nd respondent availing “cash or deed plans.” Consequently, they terminated the services of the 2nd respondent.
4. The 1st respondent further contended that the 2nd respondent started selling the plots in his own name and issued share certificates in his own name without any authority from the 1st respondent. Despite warnings, the 2nd respondent ignored them. The 1st respondent termed the 2nd respondent’s



- actions as trespass. They similarly termed the appellants to whom the 2nd respondent had purported to sell the plots as trespassers. They contended that it was against the above background that they sought the above reliefs.
5. The 2nd respondent filed a defence dated 4/4/2011 and an amended defence dated 4/4/2011, in which he averred that he duly carried out the sub-division but the 1st respondent failed or refused to meet the cost of the sub-division. He added that the 1st respondent having failed to pay the cost of the sub-division, they allocated him land which he in turn sub-divided into plots and sold in order to meet the entire cost of sub-dividing the land. He denied trespass and faulted the 1st respondent and their advocates, M/s Munene & Co. Advocates, for “fraudulently” selling plots that had already been allocated to him, thereby creating a scenario of double allocation. He urged the court to dismiss the 1st respondent’s suit.
  6. The 1st to the 15th appellants, together with one Charles Wanyoike Maina, filed a joint amended defence and counterclaim dated 26/1/2015. They denied the 1st respondent’s claim, stating that they were strangers to the claim. They added that they were innocent purchasers for value without notice. By way of counterclaim, they prayed for an order directing the 1st respondent to facilitate issuance of titles to them.
  7. The 16th to the 23rd appellants filed a joint statement of defence and counterclaim dated 27/6/2014, in which they denied the allegation of trespass and averred that they were on the suit land by right and as innocent purchasers for value, having purchased their plots with the consent of the 1st respondent. By way of counterclaim, they contended that they were in occupation of portions allocated to them by the 2nd respondent with the knowledge and consent of the 1st respondent in 2006. They added that they had lived on the land for eight years and had developed their respective plots. They further contended that they were bonafide purchasers for value who had legitimately bought their plots with the “blessings” of the 1st respondent. It was their case that the 1st respondent was estopped from “claiming otherwise as it acquiesced” to their occupation of the suit land. They prayed for: (i) an order of injunction restraining the 1st respondent against evicting them, disposing their plots or demolishing their structures; (ii) an order compelling the 1st respondent to issue them with titles; and costs of the suit.
  8. Michael Njoroge Mbito who is the 3rd respondent in this appeal similarly filed a defence and counterclaim dated 14/1/2015. His case was that the 1st respondent sold to him four plots in the sub-division scheme, designated as Plot Nos 61, 63, 65 and 66. By way of counterclaim, he urged the trial court to declare that he was the proprietor of the four plots and compel the 1st respondent to deliver titles to him. He further sought an injunctive order restraining the 1st respondent against entering, encroaching, developing or interfering with his possession of the four plots.
  9. Upon conclusion of trial, the trial court rendered the impugned Judgment in which it made the following findings: (i) the 2nd respondent had no proprietary interest in the suit land; (ii) the 2nd respondent had no right to sell the plots to the appellants; (iii) the 1st respondent was not bound by the agreements between the 2nd respondent and the appellants; (iv) the appellants did not acquire legal rights in the suit land; (v) the appellants were trespassers on the suit land; and (vi) Michael Njoroge Mbito (the 3rd respondent) was the bonafide proprietor of the four plots that he claimed, namely, Plot Nos 61, 63, 64 and 66.
  10. Consequently, the trial court issued the following *verbatim* disposal orders:
    - a. That a permanent injunction be hereby issued restraining the 1st to 25th defendants herein either by themselves, their agents, employees and/or anybody claiming through them from



intermeddling, alienating, selling and/or constructing on portion L.R 61/16, parcel that belongs to the Plaintiff.

- b. That the 1st to 24th defendants do vacate the suit land and if they so fail to vacate an eviction does issue against the 1st to 24th defendants, its agents, employees occupying L.R 61/16 for having trespassed, built, constructed structures thereon without express authority from the registered proprietor, the plaintiff herein.
- c. That in the alternative and without prejudice to prayer (ii) above, all the defendants except 1st, 4th and 16th do purchase only the plots they physically occupy at the market value within 90 days (ninety days). The market value of the plots to be determined by an independent valuer agreed by the plaintiff and individual defendants.
- d. That the plaintiff does facilitate the 25th defendant take vacant possession and transfer of plots number 61,63,64 and 65 to the 25th defendant and issue him with title/ownership document in respect of the 4 plots.
- e. That the 1st defendant shall bear the costs of this suit.

## Appeal

11. Aggrieved with the Judgment and decree of the trial court, the appellants (2nd-24th defendants) brought this appeal, albeit five years later, advancing the following twelve verbatim grounds of appeal:
  1. The learned magistrate erred in law and in fact in finding that the appellants illegally and un-procedurally obtained their respective parcel of lands in L.R. No 61/16.
  2. The learned magistrate erred in law and in fact in disregarding the fact that the appellants were innocent and *bona fide* purchasers for value of land without notice and had indefeasible ownership of the subdivided L.R. No 61/16 for value.
  3. The learned magistrate erred in law and in fact in finding that the appellants did not have any legal right to be on the land and that any development thereon amounted to trespass.
  4. The learned magistrate (sic) in law in failing to find that the claim for trespass was time-barred.
  5. The learned magistrate erred in law and in fact in finding in favour of the 1st respondent despite the fact that it did not attach any resolution to show authority to institute legal proceedings against the appellants.
  6. The learned magistrate erred in law and in fact in making an order that the appellants should vacate from the suit property known as Plot No LR No 61/16.
  7. The learned magistrate erred in law and in fact in failing to make a decision and determination that the respondent had not come to the honourable court with clean hands and that in the doctrine of equity and common law the respondent had acquiesced to the possession and ownership of the subdivided Plot No 61/16 by the appellants.



8. The learned trial magistrate erred in law and in fact in failing to consider and failing to make a determination that the respondent is estopped from claiming ownership of the subdivided Plot No 61/16 owned by the appellants based on the doctrine of acquiesce.
  9. The learned magistrate erred in law and in fact in arriving at a decision wholly against the weight of the evidence that had been adduced.
  10. The learned magistrate erred in law by taking into consideration extraneous and irrelevant issues while determining and making decisions in favour of the respondent herein.
  11. The learned magistrate erred in law dismissing the appellant's counter claim.
  12. The learned magistrate erred in law in failing to consider the appellant's submissions in the matter.
12. The appellants sought the following verbatim reliefs in the memorandum of appeal:
- a. That the appeal be allowed in whole and the Judgment of the lower court be set aside.
  - b. That the appellants' counter-claim in the lower court be allowed in its entirety.
  - c. That the appellants be awarded the costs of the appeal and the lower court.

### **Appellants' Submissions**

13. The appeal was canvassed through written submissions dated 9/6/2022, supplementary written submissions dated November 23, 2022, and a list of authorities dated 9/6/2022, filed by M/s Musungu Miriti & Naliaka Advocates LLP. Counsel for the appellants identified the following as the five issues that fell for determination in this appeal:
- (i) Whether the trial court erred in failing to determine all the issues that were raised in the submissions;
  - (ii) Whether the suit was properly instituted by the 1st respondent at the lower court in the absence of company board resolutions;
  - (iii) Whether the firm of Kihara Njuguna & Company Advocates was properly instructed by the 1st respondent;
  - (iv) Whether the 1st respondent is barred from claiming ownership of the land through the principle of estoppel by conduct; and
  - (v) Whether the appellants are innocent purchasers for value without notice and have indefeasible ownership.
14. On whether the trial court erred in failing to determine all the issues that were raised in the submissions, counsel for the appellants submitted that the eight issues framed by the trial court for determination were a replica of the issues that were framed by the 25th defendant (the 3rd respondent in this appeal) and that even though the other defendants also filed submissions, the trial court did not acknowledge that fact in the impugned Judgment. Counsel faulted the trial court for failing to consider the issue relating to the 1st respondent's failure to call any director as a witness and the 1st respondent's failure to exhibit a company board resolution to show authority to file the suit, yet the issue was raised by some of the appellants in their submissions.



15. Counsel argued that the issue had arisen during cross-examination and was subsequently raised in the submissions and hence the trial court should have addressed the issue in its final decision. Counsel argued that the trial court caused a mis-trial by not adjudicating on all the issues before it. Counsel relied on the decisions in *Chandaria v Njeri* (1982) KLR and *Appollo Insurance Company Limited v East African Development Bank & Another* (2016) eKLR to buttress the point.
16. On whether the suit was properly instituted by the 1st respondent at the lower court in the absence of a company board resolution, counsel submitted that the 1st respondent never filed a company board resolution right from the commencement of the suit at the trial court. Counsel contended that the 1st respondent could not seek to regularize their undoing by filing a company resolution at the appeal stage and that attaching the company resolution to the written submissions in this appeal went against the rules of production of evidence. Counsel cited the decision in Nairobi High Court Petition No 600 of 2013; *East African Portland Cement Ltd V The Capital Markets Authority & 5 Others* to support the point.
17. On whether the firm of Kihara Njuguna & Co. Advocates was properly instructed by the 1st respondent, counsel argued that the said firm never adduced any evidence of appointment during the trial and hence the firm lacked the locus standi to act in the matter. Counsel relied on the decision in Nairobi High Court Petition No 600 of 2013; *East African Portland Cement Ltd V The Capital Markets Authority & 5 Others*.
18. On whether the 1st respondent is barred from claiming ownership of the suit land by dint of the principle of estoppel by conduct, counsel quoted Lord Denning in the case of *McIlkenny V Chief Constable of West Midlands* (1980) All ER 227 and also relied on the cases of *748 Air Services Limited V Theuri Munyi* (2017) eKLR and *Serah Njeri Mwobi V John Kimani Njoroge* (2013) eKLR. Counsel urged the court to find that the 1st respondent was estopped from claiming ownership of the land.
19. On whether the appellants are innocent purchasers for value without notice and had acquired indefeasible ownership, counsel submitted that the trial court erred in failing to find that the appellants had proved that they were *bona fide* purchasers for value without notice. Counsel relied on the decision in the Ugandan case of *Katende v Haridar & Company Limited* (2008) 2 E.A. 173. Counsel submitted that the appellants purchased the plots for valuable consideration and that they produced receipts and copies of the sale agreements in the trial court. Counsel argued that the 1st respondent had given the 2nd respondent authority to carry out subdivision of the land and sell the subdivisions, hence the 2nd respondent had a valid title to pass to the appellants.
20. Counsel contended that the appellants engaged the 2nd respondent in good faith and that no evidence was adduced by either the 1st or the 2nd respondents to the effect that any of the appellants engaged in any form of fraud.
21. In conclusion, counsel submitted that the appellants purchased their plots for value and paid the necessary consideration and that the only disputed issue in the trial court was whether the 2nd respondent possessed the authority to sell.

### **Respondents' Submissions**

22. The 1st and 3rd respondents filed written submissions dated November 12, 2022 through M/s Kihara Njuguna & Co. Advocates. Counsel for the 1st and 3rd respondents elected to make submissions based on the five issues that had been framed by the appellants' advocate. On the contention that the trial court failed to determine some issues, counsel submitted that all the issues raised and framed by the parties were fully determined by the trial court.



23. On whether the suit was properly instituted by the 1st respondent at the lower court in the absence of a company board resolution, counsel submitted that the question was never framed as a substantive issue, or otherwise, by the appellants during trial. Counsel contended that the appellants were raising the issue in this appeal as an afterthought. Counsel argued that resolutions are meant for internal management of a company. Counsel further pointed out that the appellants' claim in the trial court was that the 1st respondent had authorised the 2nd respondent to sell the suit property to them and that the said claim was raised without the appellants displaying any form of company resolution. Counsel relied on Article 159 (1) (d) of the *Constitution of Kenya, 2010* and the decisions in *Kenya Ports Authority V Kenya Power & Lighting Co. Limited* (2012) eKLR and *Anchor Limited V Sports Kenya* (2017) eKLR in support of their position.
24. Counsel added that the question as to whether the firm of Kihara Njuguna and Company Advocates was properly instructed by the 1st respondent, was obsolete since the notice of appointment of advocates dated 2/8/2021 had a resolution attached to it.
25. On whether the 1st respondent is barred from claiming ownership of the land under the principle of estoppel by conduct, it was counsel's submission that the appellants did not establish any facts warranting the trial court to arrive at the conclusion that the doctrine of estoppel applied. Counsel further argued that, in any event, the 1st respondent had only granted the 2nd respondent authority to deal with the suit property for the specific task of subdividing the land, which the 1st defendant failed to complete, causing the 1st respondent to withdraw its authority.
26. Counsel added that the "purchasers" referred to in the letter dated 18/7/2008 were Vision Group and Ramukia and not the appellants, a fact which the 1st respondent testified to during the hearing at the trial court.
27. Lastly, on whether the appellants are innocent purchasers for value without notice, counsel submitted that the appellants had share certificates issued to them by the 2nd respondent. Counsel added that the appellants did not exhibit any official searches obtained by them to verify ownership of the property nor did they exhibit any evidence of endorsement by the 1st respondent. Counsel argued that the documents, receipts and certificates of shares produced by the appellants as evidence were issued in the business name of Geomath Management, adding that the share certificates were not titles.
28. It was counsel's prayer that the court finds that the appeal is not merited and dismisses it with costs to the respondents.

### **Analysis and Determination**

29. I have read and considered the original record of the trial court together with the record filed in this appeal; the parties' respective submissions; the relevant legal frameworks; and the jurisprudence relevant to the issues that arise for determination in this appeal. This appeal challenges the trial court's findings and disposal orders on the primary suit which was brought by the 1st respondent.
30. The appellants itemized twelve grounds of appeal in their memorandum of appeal dated 10/2/2020. In their subsequent written submissions dated 9/6/2022, their advocate condensed the twelve grounds of appeal into the following five issues which he invited the court to determine: (i) Whether the trial court erred in failing to determine all the issues that were raised in the submissions; (ii) Whether the suit was properly instituted by the 1st respondent at the lower court in the absence of a company board resolution; (iii) Whether the firm of Kihara Njuguna & Co. Advocates was properly instructed by the 1st respondent; (iv) Whether the 1st respondent is barred from claiming ownership of the suit land under the principle of estoppel by conduct; and (v) Whether the appellants are innocent purchasers



for value without notice and have indefeasible ownership. Counsel for the 1st and 3rd respondents elected to adopt the five issues. The 2nd respondent did not participate in the appeal.

31. I will accordingly dispose this appeal on the basis of the above five issues. The five issues will be analysed and disposed sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
32. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

33. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse 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.”

34. The first identified issue is whether the trial court erred in failing to determine all the issues that were raised in the submissions. The appellants fault the trial court for failing to identify as a key issue, and determine, the question of validity of the 1st respondent’s suit in the absence of a resolution authorising the institution of the suit in the trial court. The appellants further fault the trial court for failing to consider the issue relating to the 1st respondent’s failure to lead evidence by one of its directors.
35. A civil trial in a contested suit under Kenya’s legal system is conducted on the basis of issues. Secondly, issues flow from the pleadings filed by the parties. Ideally, parties are expected to agree on and frame a concise common statement of issues. Where parties are unable to agree on a common statement of issues, they are at liberty to draw, file and serve their respective concise statements of issues. Where parties have agreed on a concise statement of issues and have invited the court to determine the agreed issues, the court is not expected to frame its own set of issues for determination. Where there is no concurrence on a common set of issues, the court looks at the pleadings and the parties’ respective statements of issues and comes up with a concise statement of issues that flow from the pleadings. Similarly, where the parties do not frame the issues either collectively or individually, the court is expected to frame issues based on the pleadings before it.
36. The reason why pleadings are critical cannot be gainsaid. The court of Appeal emphasized the centrality of pleadings in the adjudication of civil disputes in the case of *Farrah v Kenya Ports Authority* [1992] eKLR in the following terms:

“The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.”



37. I have looked at the original record of the trial court. I have also read the pleadings of the appellants. None of the appellants in this appeal raised in their pleadings the issue of lack of a board resolution authorising institution of the suit in the trial court. Similarly, none of them served a notice to produce, requiring the 1st respondent to produce a board resolution authorising institution of the suit. Thirdly, none of them framed the question of board resolution as one of the issues that required trial and determination by the trial court. Fourthly, none of the appellants raised the question of board resolution at the interlocutory stage. Lastly, none of the appellants framed the issue in their respective submissions as a concise issue that required determination by the court.
38. The question of validity of the suit in the absence of a resolution of the board was first framed and raised as a concise issue in the memorandum of appeal initiating this appeal. Clearly, it is unreasonable and untenable for parties who elected not to plead or frame and ventilate an issue prior to and during trial to introduce the issue through the memorandum of appeal at the appellate stage and hope to steal a march on the opponent. It is equally unreasonable and untenable for parties who failed to plead or frame an issue at the pre-trial stage to blame the trial court for failing to determine the issue. Had the appellants pleaded or framed the issue prior to commencement of trial, the 1st respondent would have been expected to lead evidence on the issue. Without pleading or framing the issue, it was not necessary for the 1st respondent to lead evidence on the issue. Similarly, it was not necessary for the trial court to make a determination on the issue.
39. Similarly failure to lead evidence by a director of the 1st respondent was never canvassed as a key issue for determination. Even then, my perusal of the trial court record reveals that Moses Njuguna Kihanda testified as PW1. On 11/8/14, he testified that he was a director and shareholder of Inkom Investment Ltd. He produced the Registration Certificate and Memorandum & Articles of Association of Inkom Investment Limited as part of the 1st respondent's exhibits, in which he is named as one of the directors. During cross-examination, he stated as follows:
- “I am a director and shareholder of Inkom. The other directors are: Godfrey Gachura; Stephen Kahuthu; Njuguna Charles; Patrick Kagunda Githendu and Moses Njuguna (myself). The other directors have allowed me to sue on their behalf. I was not asked to produce their authority when registering the suit. My verifying affidavit only indicates that I am a director. The other directors have not filed witness statements as they have entrusted me with their case.”
40. For the above reasons, it is my finding that the trial court did not fail to determine key issues that were presented to the court for determination.
41. The second and third issues are interrelated. They revolve around the question of validity of the suit in the trial court and validity of the appointment of counsel for the 1st respondent in the absence of an exhibited resolution of the board of directors of the 1st respondent. Counsel for the appellants contended that the suit in the trial court was incompetent for want of a board resolution. Counsel similarly contended that because no board resolution or board minutes were exhibited, the firm of Kihara Njuguna & Company Advocates lacked locus standi in the matter. Counsel relied on a pronouncement by one of Kenya's third tier superior courts in *East African Portland Cement Ltd v Capital Markets Authority & 4 others* [2014] eKLR. Counsel also relied on the Ugandan case of *Bugerere Coffee Growers Ltd V Seraduka & Another* (1970) EA 147.
42. I have observed that the issue relating to absence of a board resolution was neither pleaded nor framed as a concise issue for determination by the trial court. I will nonetheless pronounce myself on the prevailing jurisprudence on the issue.



43. Kenya’s Court of Appeal has made several binding pronouncements on this issue. The emerging jurisprudence is that failure to file a board resolution does not render a suit incompetent. I will briefly advert to some of the pronouncements by the Court of Appeal.
44. In *[Makupa Transit Shade Limited & another v Kenya Ports Authority & another](#)* [2015] eKLR, the Court of Appeal pronounced itself on this issue as follows:
- “In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that “they were duly authorized.” It was then up to the appellants to demonstrate by evidence that they were not so authorized”.
45. In *[Spire Bank Limited v Land Registrar & 2 others](#)* [2019]eKLR, the Court of Appeal rendered itself thus:
- “It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”
46. Counsel for the appellants relied on the decision of the High Court of Uganda in *[Bugerere Coffee Growers Limited V Sebaduka & Another](#)* (1970) IEA 147 and contended that in the absence of a board resolution, the firm of Kihara Njuguna and Company Advocates was not instructed to act for the 1st respondent or to initiate proceedings in the name of the 1st respondent. My understanding of the prevailing jurisprudence is that the above decision was overruled by the Supreme Court of Uganda in *[United Assurance Company Limited V Attorney General](#)* SCCA No 1 of 1998 where the court stated the law as follows:
- It is now settled, as law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct counsel to file proceedings on behalf and in the names of the company. Any director who is authorised to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of the company.”
47. Not long ago, the Court of Appeal of Kenya reaffirmed this as the correct position in law in *[Arthi Highway Developers Limited V West End Butchery Limited & 6 others](#)* (2015) eKLR
48. It is clear from the above binding pronouncements by Kenya’s Court of Appeal that failure to exhibit a board resolution authorising institution of a suit does not in itself render a suit incompetent. The appellants’ contention that the 1st respondent failed to exhibit a resolution or authority to institute the suit appear to be correct on perusal of the trial court’s record. However, the omission was not fatal to the suit. Unless evidence was shown demonstrating that the person who swore the verifying affidavit was not authorised, the trial court had no basis for declaring the suit incompetent. Regrettably, the



appellants did not tender evidence to demonstrate that the person who swore the verifying affidavit had not been authorised as deposed in the verifying affidavit.

49. For the above reasons, it is my finding that failure to exhibit a board resolution did not render the 1st respondent's suit incompetent. Similarly, failure to exhibit a resolution or minutes appointing the firm of Kihara Njuguna and Company Advocates did not invalidate their appointment.
50. The fourth issue is whether the 1st respondent is barred from claiming ownership of the land through the principle of estoppel by conduct. Counsel for the appellant contended that it was not a contested fact that the 1st respondent gave authority to the 2nd respondent to sell the land vide a letter dated 9/6/2005. Counsel added that vide a letter dated 20/3/2007, the 1st respondent confirmed that the 2nd respondent "had authority before the land control board for sub division and change users on his behalf" (sic)
51. Is the 1st respondent barred from claiming ownership of the suit land under the doctrine of estoppel by conduct? The doctrine of estoppel is contained in Section 120 of the *Evidence Act* which provides as follows:
- "When one person has by his declaration act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."
52. In *Diamond Trust Bank Kenya Ltd V Said Hamad Shamiyi & 2 others* (2015) eKLR, the Court of Appeal adopted the following treatise by the Authors of ODG & ERs on Pleadings & Practice, 20th Edition (1971) on the circumstances which should prevail for the doctrine of estoppel to be invoked:
- "An estoppel must always be specially pleaded unless it appears on the face of the adverse pleading, when it is ground for an objection on a point of law. A plea for estoppel must always be drafted with great care and particularity. It must state in full detail the facts on which the party pleading it relies on as constituting the estoppel, and should also specify the allegations which it is contended the other party is precluded from disapproving"
53. Lord Denning M R in the case of *D & C Builders V Sidney Rees* (1966) 2QB 617 stated as follows:
- "It is the first principle upon which all courts of equity proceed, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties."
54. I have carefully examined the original record of the trial court. The appellants did not plead the doctrine of estoppel with particularity as required. Secondly, there is no evidence of any unequivocal representation which the 1st respondent made to any of the appellants, relating to sale of the suit land to any of them. There is no evidence that the 1st respondent unequivocally allowed any of the appellants to enter the suit land or undertake developments on the suit land.
55. For the above reasons, my finding on the issue of estoppel is that there was no basis upon which the trial court could have properly invoked the doctrine of estoppel against the 1st respondent.



56. Are the appellants innocent (*bona fide*) purchasers for value without notice? The Court of Appeal in the case of *Weston Gitonga & 10 others V Peter Rugu Gikanga & another* (2017) eKLR adopted the following Black’s Law Dictionary definition of a bonafide purchaser:

“Black’s Law Dictionary defines “*bona fide* purchaser” as one who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

57. In the often cited Ugandan case of *Katende V Haridar & Company Limited* (2008) 2 E. A 173, an innocent purchaser was defined as follows:

“For the purpose of this appeal, it suffices to describe a *bona fide* purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine, (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

58. It is clear from the above jurisprudence that the doctrine of innocent purchaser for value in a land dispute applies where there is a title to land and the innocent purchaser has been registered as proprietor of the land. It is not invoked in a case where there is no evidence of registration of a purchaser as proprietor of land.

59. I would add that the appellants were obligated to satisfy the requirements of Section 3(3) of the *Law of Contract Act* to demonstrate that there was a valid contract between them as purchasers and the registered proprietor of the suit land as vendor.

60. In the dispute in this appeal, the appellants presented witnesses who testified that they did not bother to conduct searches in the Land Registry to establish who the registered proprietor of the suit land was. Put plainly, the appellants purchased plots without conducting due diligence. Had they conducted due diligence, they would have established that the 2nd respondent had no title to sell or convey to them.

61. Not too long ago, the Court of Appeal in *Arthi Highway Developers Limited V West End Butchery Limited & 6 others* (2015) eKLR lamented about land buyers who enter into land contracts without due diligence in the following words:

“It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima Market. Perhaps the provisions of the new Constitution 2010 and the *Land Registration Act, 2012* will have a positive impact for land investors in future.”



62. The appellants in this appeal entered into purported land purchase transactions relating to a registered land. The purported vendor was not the registered owner of the land. The appellants ignored the mandatory requirements of Section 3(3) of the Law of Contract Act. They knew or ought to have known that the purported vendor was not capable of passing titles to them.
63. From the totality of the evidence that was before the trial court, none of the appellants can answer to the description of an innocent purchaser for value. That is my finding on the last issue.
64. The result is that this appeal fails for lack of merit.
65. Lastly, I will comment on an aspect of the Judgment of the trial court which was neither raised in the memorandum of appeal nor canvassed in this appeal. The trial court cited post-2012 land statutes in a number of paragraphs in the impugned Judgment. This was certainly a misdirections because those statutes were not in force when the causes of action accrued and when the primary suit in the trial court was initiated. This particular misdirection does not, however, impact on the factual findings that the trial court made.
66. In the end, this appeal is rejected for lack of merit. The appeal is dismissed. The appellants shall bear costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 25<sup>TH</sup> DAY OF JULY 2023**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Mungai for the appellants

Mr Manawa for the 1st and 3rd respondents

Court Assistants – Hinga/Osodo

