REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. E10 OF 2020

BRYSON MANGLA AGOT..1ST APPELLANT

LILIAN GATHEGU MANGLA...2ND APPELLANT

VERSUS

JOSHUA KIOKO MUTULILI..RESPONDENT

(Being an Appeal from the Judgment/Order of the Senior Principal Magistrate's Court

at Kangundo in ELC Case No. 138 of 2019 by Hon. D. Orimba (SPM)

delivered on 30th September, 2020)

JUDGMENT

INTRODUCTION

1. Courts in Kenya operate under specific rules and procedures and parties coming before court are expected to act within the bounds of those rules and procedures. Although not cast in stone, these rules and procedures facilitate good order, certainty and predictability. Parties approach courts by way of pleadings and whether a party has legal representation or not, their pleadings ought to be clear, precise and to the point; stating their claim or defence and the justifications thereof. The need for precision and clarity of pleadings is for purposes of ensuring that both the opposing party and the court are able to appreciate a party's claim or defence in order to address it sufficiently and ultimately achieve substantive justice. While courts will strive to make sense of whatever pleadings that are filed, it is in the interest of every party to a suit that their pleadings are clear and precise, because the right of access to justice is not just about getting a remedy from court, but getting an effective judicial protection to the action and this is better achieved from precise pleadings. Under Article 159 of the Constitution read together with Section 3 of the Environment and Land Court Act as well as Sections 1A and 1B of the Civil Procedure Act, this court is enjoined to further the overriding objective of the law by determining cases justly, expeditiously, efficiently and affordably. Therefore, parties coming before this court are expected to assist the court further the overriding objective by ensuring that their pleadings are precise and to the point.

2. The Appellant in this appeal is a former pastor of Redeemed Gospel Church and describes himself as a holder of a Master of Arts degree in Theology. He appears in person, just as he did in the lower court. While a party appearing in person may not be expected to draft their pleadings crisply and succinctly; decency, courtesy, respect, good order, coherence and simplicity in content and presentation of their pleadings is still required of them. Self-representation is not a licence for contempt of the sanctity of the judicial process. The Appellant's pleadings both in the court below and in this court are a jumble of words, insults, name-calling, threats and misplaced legal jargon, all haphazardly strewn about in an incomprehensible mix. As this court's interest is to do substantive justice to all the parties, I have taken time to make sense of what the Appellant's documents on record mean. What is however apparent, is that the Appellant is unhappy with not only the decision of the trial court, but also with the Honourable trial Magistrate, the registry staff, other judicial staff both at Kangundo and Machakos, the Respondents and the Respondent's counsel.

3. The Appellants' conduct in these proceedings has not been desirable and should be discouraged. Without any justification, the Appellant has used abusive language and referred to the trial Magistrate, registry staff, other staff and the Deputy Registrar as corrupt and threated to report them to the Judicial Service Commission. I must observe that with the current Constitutional order that demands more accountability from the courts, the contemporary court in Kenya today is more accountable, transparent and aligned to the national values espoused under Article 10 of the Constitution than ever before. However, these Constitutional dictates, were never intended to provide a platform for parties appearing before court to bully the court whenever the court was not persuaded by their argument. There is no justification whatsoever for a party to attack the Judge or a Judicial Officer, using abusive language against the court and referring to the court as corrupt just because they

lost their case, as was in these proceedings. Our court system is hierarchal and any party dissatisfied with a court's decision has the option and right to appeal to the next higher court

4. The Appellant, filed a Memorandum of Appeal dated 5th November 2020, on 6th November 2020, against the judgment of Honourable D. Orimba, Senior Principal Magistrate, Kangundo, made on 30th September 2020. On 2nd February 2021, he filed an Amended Memorandum of Appeal stating the following grounds as the basis of his appeal;

1. That from the onset against the Appellants/Defendants and with all due respect to the learned SPM, he erred in law and in fact by overly exhibiting a preconceived mindset by repeatedly meddling unfairly in the arena of disputes in a more obnoxious way than the meddling of the infamous/Justice Mbalu Mutava in the Patni case.

2. That the SPM erred in law and in fact and meddled in the dispute by omitting the 1st and 2nd Defendants' Defence documents and joinders etc which had been duly filed and served per Record of Appeal pages 47-191/A.

3. That the SPM also deliberately meddled in the dispute and erred in law and in fact by omitting the 3rd party documents filed and served per Record of Appeal pages 187-321.

4. That the SPM erred in law and in fact by misrepresentation of facts in the opening of his obiter dicta that the Defendants did not file their defence and statements (Judgment Page 2, Paragraph 2).

5. That the SPM erred in law and in fact by not identifying the unbroken chain of dispute involving block 1/13894 and Block 1/14027 per the two demand and counter demand letters.

6. That the SPM erred in both law and in fact for barring the 1st Appellant/Defendant reference to his Bundle of Documents and counter claim during his self-examination in chief and his cross-examination by the Respondent's advocate.

7. That the SPM erred in law and in fact in blocking the 1st Defendant from cross-examining the Respondent/Plaintiff and his witnesses from their own written statements-in chief they referred to and fully relied upon.

8. That the SPM erred in law and in fact and meddled in the arena of dispute by failing to record material oral evidence by PW2 that, she never met and could not remember ever meeting the 1st Appellant in her life time.

9. That the SPM erred in law and in fact by not finding the importance of beneficiaries being present during hereditary land demarcations.

10. That the SPM erred in law and in fact for not holding the Respondent to the strictest proof to produce a different mutation to rebut mutation on page No. 98 of the Record of Appeal (Proceedings page 10 paragraph 3 and judgment page 2 paragraph 5)

11. That the SPM erred in law and in fact in his obiter dicta on paragraph 3 of page 3 of the judgment by unfairly attributing the 1st Appellant's own search at the land registry to the Respondent.

12. That the SPM erred in law and in fact by finding against the Appellants that the Respondent's surveyor discovered 1.7 Acre fraudulent allocation contrary to the government survey report (Record of Appeal pages, 106, 107 and 108- judgment page 3 paragraph 4)

13. That the SPM misdirected himself in law and in fact that the Appellants colluded with other parties which was at no time an issue in the Respondent's demands or plaint (Judgment page 4 paragraph 4)

14. That the SPM erred in law and in fact by not pronouncing himself on 3 distinct transactions that culminated in the purchase of two blocks of land between the Appellants/Defendants on one hand and on the other hand two distinct Respondent and 3rd Party as members of the same family. (Judgment page 5 paragraph 4)

15. That the SPM misdirected himself in law and in fact that oral agreement is a legal form of contract but is not to be entertained by courts in matters of land (Judgment page 5 paragraph 5)

16. That the SPM erred in law and in fact by failing to take judicial notice of the Respondent's cross-examination admissions that he knew the location of the beacons during the succession survey on or before 16.08.2003 (Judgment page 6, paragraph 5.)

17. That the SPM erred in law and in fact by looking away from the government resurvey in 2013 in presence of the sub-chief and the Respondent who did not protest any movement of boundary or beacon if there was any. (Judgment page 6 paragraph 7 and Record of Appeal pages 99, 100 and 102.)

18. That the learned SPM erred in law and in fact by meddling into the arena of dispute that the Appellants did not produce supporting documents whereas he unfairly ignored defence documents and mutilated the case before him in two (Judgment page 7 paragraph 3)

19. That the SPM misdirected himself in case management by allowing two fake lawyers one Kelvin Akonya and one Miss Helen

Wangeci to practice law before him on several occasions with his acquiesce for cartel extortion (Judgment page 8, paragraph 4)

20. That the learned SPM erred in law and in fact by concluding that there was fraud by the Appellants without putting the Respondent to strict proof thereof of his allegations per the standard of the Evidence Act cap 80.

21. That the SPM erred in law and in fact by not allowing the comparison of signatures in court documents with that of the Respondent's PW2. (Record of Appeal pages 99, 141, 156 and 157.)

22. That the SPM erred in law and in fact by looking away on overt inconsistencies in the Plaintiff's and his witnesses written statements vis-à-vis their oral evidence.

23. That the SPM erred in law and in fact by admitting incoherent evidence by a senile witness.

24. That the SPM erred in law and in fact by looking away on the Respondent's admission that he constantly dissuaded buyers of the 1st Appellant's land to cause him economic hardship.

25. That with due respect to the SPM, he erred in law and in fact by certifying proceedings that are full of material errors that resulted in the gross misstatement of facts of what transpired during cross-examinations.

26. That the SPM meddled in the dispute and administered the court proceedings in a scheming manner that is consistent with a Kangaroo court per Black's Law Dictionary definition.

5. The Appellant sought for orders that this court overturns the judgment of the subordinate court in its entirety and that it allows his counterclaim sought in the court below.

BACKGROUND

6. By a plaint dated 5th July 20 19, Joshua Kioko Mutulili, the Plaintiff in Kangundo ELC Case No. 138 of 2019, averred that on 27th July 2003, the Plaintiff and the Defendants entered into an agreement for sale of one acre of land in respect of title L.R NO. DONYO SABUK/KOMAROK BLOCK 1/13894 to be excised from L.R NO. DONYO SABUK/KOMAROK BLOCK 1/13668. That the defendants extended the boundary of the purchased land to 1.7 acres instead of 1 acre, and obtained a title reading 1.4 acres. Therefore, the plaintiff sought for the following orders

a) Cancellation of the said title issued to the Defendants and reading 1.4 acres in favour of a subsequent title reading the contracted 1 acre.

b) A declaration that the property land parcel No. DONYO SABUK/ KOMAROK BLOCK 1/13894 in excess of 1 acre belongs to the Plaintiff.

c) An order directing the land Registrar and Government surveyors to effect prayer "a" above.

d) General damages and loss of user.

e) Costs of the suit.

f) Any other relief the court deems fit and just to grant.

7. On 2nd September 2019, the 1st Defendant filed defence. He confirmed that he purchased 1 acre to be hived from L.R DONYO SABUK/KOMAROK BLOCK 1/13668 and thereafter paid the Plaintiff Kshs. 28,000/= for the extra land and Kshs. 13,500/= as survey fees and that the Plaintiff executed transfer documents for 1.4 acres. He sought for the following prayers;

a) Declaration that the 1st and 2nd Defendants are the rightful owners of DONYO SABUK/ KOMAROK BLOCK 1 /13894 as per the title deed.

b) Order that Priscilla Nthoki Mutulili transfers the title of free standing parcel DONYO SABUK/ KOMAROK BLOCK 1 /14027 as is, per title deed to Bryson Mangla Agot and Lilian Gathengu Mangla at her expense within 30 days.

c) Order the District Land Registrar- Machakos, that upon expiry of the 30 days, and where order b above shall not have been obeyed; to register DONYO SABUK/ KOMAROK BLOCK 1 /14027 in the name of Bryson Mangla Agot and Lilian Gathengu Mangla upon receiving requisite GOK fees from them.

d) Orders that the Plaintiff Joshua Kioko Mutululi and his accomplice the 2nd Plaintiff witness, Priscilla Nthoki Mutulili are hereby convicted, fined and jailed for offences pursuant to Sections 103 1. (a, b, c (iii) and 2 of the land Registration Act.

e) Orders to general, specific damages and costs in favour of the 1st and 2nd Defendants.

8. Simultaneous with the filing of the Defence, the 1st Defendant also filed a verifying affidavit, list of witnesses, his witness statement and list/bundle of documents.

9. The 2nd Defendant filed a document christened *"2nd Defendant's Defence Reply"* dated 2nd September 2019 where she stated that she purchased the suit property jointly with the 1st defendant and that she had adopted the 1st Defendant's defence verbatim. She also filed a verifying affidavit where she stated that she verified the 1st defendants defence and adopted the same.

10. On 26th February 2020, the 1st Defendant filed a counterclaim where he stated that the counterclaim was supported by his defence and claimed for the same prayers made in his defence, as stated above. Subsequently, the 1st Plaintiff filed a document he referred to as *"1st Applicant Counterclaim supporting affidavit"* as well as a rejoinder to the Plaintiff's Defence to counterclaim.

11. Upon hearing the matter, the trial court held as follows;

> ***Having considered the evidence on record as adduced by the parties, I do find that the Plaintiff has proved his case on probability of success to the effect that the defendant occupies a larger portion of land more than what the sale agreement shows. I find further that the title was obtained through fraud by the defendant. In the circumstances therefore, I find the Plaintiff has proved his case and will enter judgment in his favour in terms of prayer a, b, c and e.***

12. This appeal was canvassed by way of written submissions. Although this appeal was not consolidated with Machakos ELC Appeal No. 11 of 2020, the Appellant filed consolidated submissions on 29th June 2021 in respect of the two appeals. The Respondent's submissions were filed on 7th October 2021.

SUBMISSIONS

13. The Appellant submitted that the suit was barred by the Limitation of Actions Act as the date the Respondents knew the locations of the beacons on the suit land, was the date of the agreement which was on 27th July, 2003.

14. Further, the Appellant submitted that all documents filed by Ms. Hellen Wangechi Advocate and Mr. Kelvin Akonya practicing in the firm of Nzaku & Nzaku Advocates should be expunged from the court record as the said advocates were not licensed to practice as advocates. The Appellant referred the court to a letter from the Law Society of Kenya dated 19th February 2021, which was attached to his submissions to the effect that Ms Munyiri Hellen Wangeci did not hold the practicing certificate for the year 2021.

15. Further, the Appellant faulted the trial court for having heard ELC 138 of 2019 and ELC Miscellaneous Application No. 3 of 2020 separately. The Appellant argued that separating the two suits led to a miscarriage of justice as the testimony of PW1 and PW2 demonstrated the relationship of the two parcels of land in the two suits.

16. The Appellant argued that the trial court was not impartial as the trial magistrate indicated that the Appellant filed submissions instead of a defence, when the Appellant had indeed filed a defence. The Appellant pointed out that pages 47 to 120 of volume 1 of the record of Appeal clearly showed his defence and further argued that the trial court violated his right to a fair hearing contrary to Article 50 (1) of the Constitution by failing to consider his defence in the judgment made by the court, contrary to his legitimate expectation.

17. It was also argued by the Appellant that the trial court failed to record several oral applications, and specifically the application to verify the parties' signatures. He further contended that the trial magistrate shifted the burden of proof from the Respondent to the Appellant by expecting the Appellant to have documentary proof of an oral agreement for sale of land.

18. The Appellant further submitted that the trial court failed to hear ELC Misc. Application No. 3 of 2020 which would have led to convicting the respondents of having committed offences of forgery. Further the Appellant contented that the trial magistrate ignored his testimony that he knew where the beacons of the suit property were placed and that he was denied an opportunity to produce his documents including the cadastral map and that the court barred the Appellant from cross-examining PW1 and PW3.

19. The Appellant also submitted that the trial court misguided itself when it held that the Appellant committed fraud, when there was no evidence to support such conclusion and urged that the trial court overlooked inconsistencies in the Respondent's testimony. The Appellant was of the view that the trial magistrate was biased and ascended in to the arena of the dispute.

20. The Appellant maintained that he was entitled to damages in the sum of Kshs. 9,757,000/= and relied on the case of ***Henry Mwangi Gitai & Another v Margaret Wanjiku Godwin ELC No. 59 of 2012***. The Appellant asked the court to commit the Respondents to prison on grounds that the Respondent uttered forged documents. He relied on the case of ***Joseph Simiyu Mwando v Republic Criminal Appels No. 138 of 2014***.

21. Counsel for the Respondent in their submissions expressed their frustrations with the conduct of the Appellant, who from the pleadings and submissions had used abusive language as against the trial magistrate, judiciary staff, as well as counsel for the Respondent. Counsel suggested that there should be regulations to control parties and the kind of documents to be filed and was of the view that if the Appellant does not trust the court system he could as well have keep off the courts.

22. Counsel submitted that the Appellant admitted that the extra 0.4 acres in their title was not indicated in the sale agreement and hastened to add that the same was obtained through a gentleman's agreement upon payment of consideration yet there was no evidence of such gentleman's agreement or payment for the extra 0.4 acres. Counsel also argued that without leave of court the Appellant filed Amended Memorandum of Appeal dated 28th January, 2021 and unheard of documents called Amended Memorandum of Appeal, supporting affidavit

and Amended Memorandum of Appeal verifying affidavit all dated 28th January, 2021.

23. Counsel further submitted that when the matter came up for hearing in the lower court on 3rd June, 2020, the Respondent with all his witnesses were in court while the Appellant was not in court and the matter was adjourned though the Appellant was aware of that date as the same had been given in court in his presence. Further, counsel averred that when the matter came up next in court for hearing on 15th July, 2020, the Appellants were not in court despite having been served, whereof the case proceeded and the Respondent and his witnesses testified. Counsel further pointed out that when the matter came up on the subsequent date for mention for submissions, this time the Appellant was in court and protested having not participated in the suit. That by consent of the Respondent's counsel, the Appellant recalled the Respondent and his witnesses for cross examination and was also given opportunity to testify in defence.

24. On whether the suit was statute barred, the Respondent argued that under Section 26 of the Limitation of Actions Act, the Limitation period does not run until the Plaintiff discovered the fraud. Counsel pointed out that fraud in this case was discovered in 2013 when the Respondent moved to repossess the extra portion of land leading to him being charged in CR. No. 143 of 2013.

25. On the issue as to the size of land purchased from the Respondent by the Appellant, counsel argued that the agreement specifically indicated that the Appellant purchased 1 acre of land from the Respondent. Counsel argued that the agreement was admitted by the Appellant but he went ahead to allege that he purchased the extra 0.4 acres, yet he failed to prove such purchase and or payment of the consideration thereof.

26. Counsel also contended that it was clear that the size of land indicated on the title of the suit land is more than the size indicated in the agreement. Counsel argued that the survey report confirmed that the Appellant was occupying 1.4 acres. Counsel argued that the allegation by the Appellant that the purchase of 0.4 acres was on a gentleman's agreements is not plausible as there is no justification why the sale of 1 acre should be in written while the sale of 0.4 acres should be without written proof. Counsel relied on section 38 of the Land Act and section 3 of the Law of Contract Act for the proposition that no suit should be based on contract for disposition of an interest in land unless the contract is written. Counsel placed reliance on the case of ***Willy Kimtai Kitilit vs Michael Kibet Civil Appeal No. 51 of 2015***. Counsel maintained that reference to a non-existent agreement which the Appellant referred to as the gentleman's agreement demonstrated fraud on the part of the Appellant. Counsel referred the court to the cases of ***Insurance Company of East Africa v. The Attorney General & 3 Others HCC No. 135 of 1998*** and ***Gichinga Kibutha v. Caroline Nduku [2018] eKLR.***

27. Counsel argued that under Section 26 of the Land Registration Act, although a title is *prima facie* evidence of proprietorship, the title can be challenged on grounds of having been fraudulently obtained. Counsel stated that the Amended Memorandum of Appeal filed by the Appellant was filed without leave of the court and therefore the same ought to be struck out. Counsel concluded that the appeal is frivolous and amounts to a fishing expedition and that the same should be dismissed.

ANALYSIS AND DETERMINATION

28. Before I embark on the issues raised by parties in the appeal, I have noted that while the judgment appealed against was delivered on 30th September 2020, the appeal herein was filed on 6th November 2020, which is six days out of time. Although the Respondent did not raise the issue of the appeal being filed out of time, this court ought to exercise its jurisdiction as provided for in law. Having noted that the delay was not inordinate, in the interests of justice, and the need to facilitate the just, expeditious, proportionate and affordable resolution of this matter, I invoke the Proviso to Section 79 G of the Civil Procedure Act and proceed to admit this appeal out of time.

29. I have considered the appeal, the submissions of parties as well as all the material on record. The issues that arise for determination are;

a) ***Whether the Respondent's claim was time barred.***

b) ***Whether the Appellant needed leave to amend his Memorandum of Appeal.***

c) ***Whether the Appellant was accorded a fair hearing.***

d) ***Whether the Respondent proved that the Appellant acquired the suit land by fraud.***

e) ***Whether the Appellant proved his claim in the counter-claim.***

30. This being a first appeal, the role of this court is to re-evaluate the evidence afresh so as to reach an independent conclusion and to establish whether the court below was justified to make the conclusions it did and to arrive at its decision. In the case of ***Selle & Another vs Associated Motor Boat Co. Ltd & Others [1968] EA 123,*** the duty of the first appellate court was stated as follows;

> ***"An appeal to this court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and raw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohammed Sholan, (1955) 22 E.C.A. 270)."***

31. Similarly, in the case of ***China Zhongxing Construction Company Ltd vs. Ann Akuru Sophia [2020] eKLR*** the court cited with approval the Court of Appeal for East African Case of ***Peter vs. Sunday Post Limited [1958] E.A. 424,*** where the court had the following to

say concerning the duty of an appellate court on first Appeal;

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their lordships in the House of Lords in Walt vs Thomas (1), [1947] A.C 484.***
>
> ***"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial court as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.***

32. On the question of whether the Respondent's action is time barred, Section 7 of the Law of Limitation of Actions Act provides that a claim for recovery of land should not be brought after twelve years from the date the right of action accrued.

33. Section 26 of the Limitation of Actions Act provides as follows;

"Where, in the case of an action for which a period of limitation is prescribed, either-

> ***a) The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or***
>
> ***b) The right of action is concealed by the fraud of any such person as aforesaid; or***
>
> ***c) The action is for relief from the consequences of a mistake,***
>
> ***The period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it;***
>
> ***Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting any property which-***
>
> ***i) ………..***
>
> ***ii) ………."***

34. The Appellant argued that the cause of action accrued on the date of the agreement being 27th July, 2003. On the other hand, the Respondent argued that it was not until 2013, that he realized that the Appellant had fraudulently registered himself as proprietor of 1.4 acres of land instead of the 1 acre that he had purchased, which led him to repossess the extra 0.4 acres, resulting in his arrest and charge in CR No. 143 of 2013. As the Respondent's claim was based on fraud, section 26 of the Limitation of Actions Act is applicable in the circumstances of this case and therefore time stated running from the time the fraud was discovered by the Respondent, which is in 2013. As the suit was filed in 2019, I find and hold that the same was filed within time, hence the trial court was justified in holding that the suit was filed within time.

35. I note that the Appellant filed his Memorandum of Appeal on 6th November, 2020. Subsequently on 2nd February 2021, he filed an amended Memorandum of Appeal without leave of court. The Respondent has argued that the Appellant ought to have obtained leave of court to amend the Memorandum of Appeal. Under Order 42 Rule 3 of the Civil Procedure Rules, the Appellant may amend their Memorandum of Appeal without leave of court before directions are issued under Rule 13 of the said Order. As at the time of filing the Amended Memorandum of Appeal, directions in the appeal had not been issued, and therefore the Appellant did not need leave of court to amend his Memorandum of Appeal.

36. The Appellant complained that his defence although on record, was disregarded and referred to as submissions by the trial court. I have perused the Appellant's defence, which is comprised of 22 pages, and which is at pages 48 to page 69 of volume 1 of the Record of Appeal. In the said defence, the Appellant stated that he entered into a written agreement for purchase of one acre of land from the Respondent. That thereafter he paid a sum of Kshs. 28,000/= for the extra portion of land and a further Kshs. 13,500/= as survey fees, whereof the land was demarcated and he was accordingly given his plot. He also prayed for the 4 Prayers referred to earlier in this judgment. A substantive portion of the Appellant's defence exhibited verbosity and unintelligibility instead of brief facts of matters in issue, expected of a pleading, as contemplated under Order 2 of the Civil Procedure Rules.

37. Order 2 Rule 1(1), 2, 3 (1) of the Civil Procedure Rules provides for pleadings as follows;

"1. Pleadings generally

> ***(1) Every pleading in civil proceedings including proceedings against the government shall contain information as to the circumstances in which it is alleged that the liability has arisen and, in the case of the government, the department and officers concerned.***
>
> ***2. Formal requirements***
>
> ***1) Every pleading shall be divided into paragraphs numbered consecutively each allegation being so far as appropriate contained in a separate paragraph***
>
> ***2) ……..***
>
> ***3. Facts not evidence to be pleaded***
>
> ***1) Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.***
>
> ***2) Without prejudice to subrule 1 the effect of any document or the purport of any conversation referred to in the pleading shall, if material be briefly stated, and the precise words of the document or conversation shall not be stated except in so far as those words are themselves material.***
>
> ***3) …..***
>
> ***4) …."***

38. The provisions of Orders 2 of the Civil Procedure Rules, in so far as precision of a pleading is concerned, is not for cosmetic purposes. It is to enable the opposing party and the court appreciate the nature and import of the claim or defence made, so as to address it with precision. A party who makes haphazard averments of all manner of facts, evidence and submissions in their pleadings, not envisaged under Order 2 of the Civil Procedure Rules may cause prejudice, embarrassment and delay in the fair trial of the suit. The clarity of a claim or defence is not necessarily in the verbosity of the pleading, but how simply the same is put across. While every party may have a unique way of framing their pleadings, the bottom-line and the expectation of the law is that a pleading must be framed in a manner that can be understood by both the opposing party and the court and it must address the party's claim or response to the other party's claim with precision. In this matter, the issues raised in the plaint were that the Respondent sold one acre to the Appellant on 27th July, 2003, but discovered in 2013 that the Appellant had fraudulently caused 1.4 acres to be registered in his name instead of one acre. A reasonable man would expect the Appellant to address the matters raised in the plaint and any other matters in respect of the counterclaim. The Plaint is a three-page document of 21 paragraphs. However, the Appellant filed a defence of 22 pages which was a mix of facts, evidence and submissions in an incoherent manner. I do not see any justifications for the extent of the Respondent's verbosity, irrelevance and incoherence in his defence.

39. The Appellant argues that the trial court acted partially by referring to the defence as submissions. As the defence did not comply with Order 2, in its lack of precision, coherence and relevance, it is my finding that the same amounted to an abuse of the court process meant to prejudice, embarrassment and derail the fair determination of the suit.

40. Even with the defence as jumbled up as it was, the trial court allowed the Appellant to testify in defence. Contrary to the Appellant's contention that he was barred from cross-examining PW1 and PW3, the record shows that on 19th August 2020, the Appellant was granted leave to cross-examine the Respondent's witnesses and on 2nd September, 2020, PW1 and PW3 were cross-examined by the Appellant. In addition, on the said date, the Appellant gave his evidence in defence in chief and was subjected to cross-examination. Besides, page 5 of the judgment shows that the trial court took in to account the defendant's defence in its decision. The trial court stated as follows;

> ***The Defendant testified and stated that the Plaintiff was his church member when he was a pastor…That after paying for one (1) he again was given an extra piece of land as compensation for paying additional money…He alleged to have paid Kshs. 28,000/= to the Plaintiff's mother and additional of Kshs. 13,500/= for the title deed.***
>
> ***…shown the agreement, he confirmed that the sale agreement only talks of one acre. He had no other agreement in regard to the additional portion he has i.e. 0.4 acres. He stated that 0.4 acre he bought from the Plaintiffs mother and that there is only acknowledgment for one acre.***

41. The trial court further noted that in his defence, the defendant stated that the suit was time barred and pronounced itself on that issue. Having heard the defendant, the court held that as the plaintiff alleged to have discovered the fraud in 2013, as supported by the surveyor's report which was subject to Criminal Case No. 3 of 2013, the suit was filed within time in line with the provisions of Section 26 of the Limitations of Action Act. The trial court also found that although the defendant alleged to have purchased the extra 0.4 acres, he did not produce any evidence to support that averment. I therefore find and hold that the Appellant's defence was considered in the trial court's judgment and therefore the Appellant was duly accorded a fair hearing.

42. The Appellant also faulted the trial court for hearing case numbers ELC 138 of 2019 and ELC Misc. Application No. 3 of 2020

separately, arguing that the same led to a miscarriage of justice. Having dealt with appeals in respect of the two matters at the same time, *(both are coming up for delivery of judgment on 23rd March 2022),* I note that the two suits concern two different properties and the parties therein are different. Even the prayers sought are different. In case Number ELC No. 138 of 2019, which is subject of this appeal, the Respondent sought against the Appellant for a declaration that parcel No. DONYO SABUK/KOMAROK BLOCK 1 /13894 in excess of 1 acre belongs to him and for cancellation of the said title and issuance of fresh title reflecting one acre for the Appellant. On the other hand, suit number ELC Misc. Application No. 3 of 2020 was filed against the Appellant by Priscilla Nthoki Mutulili and Archbishop Arthur Kitonga for Redeemed Gospel Church, seeking for orders that the Appellant removes a caution he placed on parcel DONYO SABUK/KOMAROCK BLOCK 1/14027. The two Plaintiffs in Miscellaneous Application No. 3 of 2020 were not parties to ELC No. 138 of 2019, while the 2nd Defendant in ELC No. 138 of 2019 was not a party in ELC Miscellaneous Application No. 3 of 2020. In addition, and most importantly, no application for consolidation was filed by the Appellant to consolidate the two suits in the lower court. In a bid to constrain this court to determine the two matters together, the Appellant filed consolidated submissions in ELC Appeal No. 10 of 2020 and ELC Appeal No. 11 of 2020. It is my finding that as the two matters concerned different parties, different prayers and different parcels of land, besides the fact that there was no application on record for consolidation, the trial magistrate did not err in hearing them separately. Besides, the Appellant has not placed any material before this court to show the prejudice he suffered by having the two suits determined separately.

43. On the question of whether Ms. Hellen Munyiri and Mr. Kelvin Akonya were licensed to practice, I have considered the record and I note that that issue was not raised before the trial magistrate. The Appellant has attached to his submissions, a copy of a letter from the Law Society of Kenya dated 19th February, 2021. First, evidence attached to submissions is not admissible, as the same was not subject of the proceedings in the court below, and the other party has had no opportunity to test the veracity of such evidence. Besides, I note that the case in the court below was heard in the year 2020 and judgment delivered on 30th September, 2020. There is no material on record to show that the said counsel were not licensed to practice as advocates in the year 2020. In any event, from the record, the proceedings of 15th July, 2020 and those of 2nd September, 2020, when the matter came up for hearing of both the Plaintiff and Defence cases, were conducted by Mr. Nzaku. I have perused the pleadings of the Respondent and the same were drawn by Nzaku and Nzaku Advocates. There is no evidence that they were drawn by the two advocates. In my considered view, that ground is baseless and it must fail.

44. On whether the Appellant's registration of the suit property was acquired by fraud, the trial court held that the Appellant having failed to explain or produce supporting documents, to show how he acquired the extra 0.4 acres, this left the court with the inference that he acquired the suit property fraudulently. The Appellant has argued that the burden of proof was shifted to him. Sections 107 to 109 of the Evidence Act provides as follows;

> ***"107 Burden of proof***
>
> ***(1) Whoever desires any court to give judgment to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***
>
> ***108. Incidence of burden***
>
> ***The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***
>
> ***109. Proof of a particular fact***
>
> ***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 that fact shall lie on any particular person."***

45. It is therefore clear that any person alleging the existence of a fact must prove it whether that person is the Plaintiff or the Defendant. While the burden of proof in a suit is on the Plaintiff, the evidentiary burden keeps shifting depending on the facts alleged to exist by the parties.

46. The burden of proof of the claim before the court below, rested with the Respondent who was the Plaintiff in that suit. ***Hulsbury's Laws of England, 4th Edition*** at paragraphs 13 and 14 provides that the legal burden of proof remains constant throughout the trial and rests on the party who desires the court to take action. Therefore, the legal burden is discharged by way of evidence, with the opposing party bearing a corresponding obligation of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, evidential burden keeps shifting. Essentially, the plaintiff always bears the legal burden of proof, to prove his claim; while the evidential burden may shift between the parties depending on the adduced evidence by one party and the effect of such evidence.

47. In the ***Supreme Court Presidential Election Petition No. 1 of 2017*** between ***Raila Amolo Odinga & Another vs. IEBC & 2 Others [2017] eKLR,*** on the legal burden of proof and the evidential burden of proof, the court stated as follows;

> ***"132. Although the legal and evidential burden establishing facts and contentions which will support a party's case is static and remains constant throughout 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, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears the 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."

48. It therefore follows that in the trial before the court below, the legal burden of proof rested with the Respondents to prove that property measuring 0.4 acres was fraudulently acquired by the Appellant. To do this, the Respondent produced a sale agreement which indicated that he only sold one acre and also produced a title deed and search for the suit land which showed that the Appellant was the registered proprietor thereof and that the land measured o.567Ha. (1.4 acres). He therefore stated that upon purchase of one acre, the Appellant was wrongly and unjustifiably registered as proprietor of 1.4 acres and hence the acquisition of the extra 0.4 acres could not be accounted for by the Appellant. It is my finding that the Respondent factually proved that the size of the land purchased by the Appellant as indicated on the agreement was less than the land which was subsequently registered in the Appellant's name. The Respondent having discharged the evidential burden on his part, the evidential burden then shifted to the Appellant to prove that the acquisition and registration in his name of the extra 0.4 acres was lawful. Although the Appellant stated that the said property was acquired through a gentleman's agreement, he however failed to produce evidence of the existence of such gentleman's agreement or evidence that he paid consideration in respect of the said extra 0.4 acres. It is my finding that the Appellant failed in discharging the evidential burden to show that the extra 0.4 acres of the suit land was lawfully acquired by himself, hence the inference of fraud on the part of the Appellant was properly arrived at by the trial court. A title obtained by fraud or unlawfully acquired may be cancelled by court.

49. In regard to the Appellant's counterclaim, the Appellant sought to be declared as the rightful owners jointly with his co-defendant in the suit. He also sought for transfer of parcel number DONYO SABUK/ KOMAROCK BLOCK 1/14027 to the himself, an order that the Appellant be registered as proprietor of parcel of land DONYO SABUK/ KOMAROCK BLOCK 1/14027, and an order that the Respondent as well as PW2 be convicted, fined and jailed for offences under section2 103 1 a, b, c, (iii) and 2 of the Land Act. I have considered the evidence of the Appellant in chief, there is no mention of land parcel no. DONYO SABUK/ KOMAROCK BLOCK 1/14027. In cross examination, the Appellant stated that parcel DONYO SABUL/KOMAROCK BLOCK 1/14027 is registered in the name of Priscilla Nthoki. There is no evidence that the said person was duly made a party in this proceedings and or served with summons and counterclaim. On those grounds, the claim in respect of DONYO SABUL/ KOMAROCK BLOCK 1/14027 fails. The claim that the Respondent and Priscilla Nthoki ought to be convicted, fined and jailed cannot be granted by this court as it falls outside the jurisdiction of this court as provided for under Article 162 (2) (b) of the Constitution as read with Section 13 of the Environment and Land Court Act. In any event, no evidence to support the Appellants allegations was given by the Appellant.

50. The upshot is that there is no justification to interfere with the decision of the trial magistrate. In the premises, this Appeal lacks merit, is an abuse of the court process and the same is dismissed with costs to the Respondent.

51. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23RD DAY OF MARCH 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Bryson Mangla the Appellant in person

Mr. Muriithi holding brief for Mr. Nzaku for the Respondent

Ms. Josephine Misigo – Court Assistant