



Mugi & 11 others (Suing as delegates of Kenya African National Union (KANU) Kiharu Branch) v Maina & another (Environment and Land Appeal E008 of 2021) [2022] KEELC 2718 (KLR) (19 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2718 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E008 OF 2021**

LN GACHERU, J

MAY 19, 2022

BETWEEN

**BENSON MAINA GATHITHI MUGI 1ST APPELLANT
CATHERINE NJERI KAMBO 2ND APPELLANT
ABDALLA JUMA 3RD APPELLANT
KENNETH MARUBU 4TH APPELLANT
ANTHONY NG'ANG'A 5TH APPELLANT
CHEGE PHARIS 6TH APPELLANT
BENSON MUGORO 7TH APPELLANT
SILVIA NYAMBURA 8TH APPELLANT
BIATO ITIMU 9TH APPELLANT
JOHN IRUNGU 10TH APPELLANT
CYRUS GATHIGA 11TH APPELLANT
FRANCIS THIONG'O 12TH APPELLANT
SUING AS DELEGATES OF KENYA AFRICAN NATIONAL UNION (KANU)
KIHARU BRANCH**

AND

**JOHN NJIRE MAINA 1ST RESPONDENT
KENYA AFRICAN NATIONAL UNION (KANU) 2ND RESPONDENT**

(Being an Appeal from the Judgment of the Senior Principal Magistrate E M Nyaga, at Murang'a delivered on 23rd March, 2021 in Murang'a CMCC No. 195 of 2018)



JUDGMENT

1. The trial Court delivered Judgment on the 23rd March 2021, dismissing the Appellants' case with costs to the Respondents. Aggrieved by the Judgment, the Appellants preferred the instant Appeal and filed a Memorandum of Appeal on the 21st April, 2021 with the following grounds
 1. The learned Magistrate erred in law and in fact in allowing the 1st Defendant to produce and rely on documents which he was not a maker without calling the makers nor without the consent of parties
 2. The learned Magistrate erred in law and in fact in failing to find that the purported sell of the suit property by the trustees of the 2nd Appellant to the 1st Appellant was irregular null and void for lack of write approval from the National Governing Council Pursuant to Article 27 of the KANU Constitution.
 3. The learned Magistrate erred in law in failing to find that the Appellants case against the 2nd Respondent was uncontroverted due to their non-attendance in the hearing hence the claim was for allowing
 4. The learned Magistrate erred in law and in fact in holding that the Appellant did not have a genuine and arguable case
 5. The learned Magistrate erred in law in failing to consider all the issues raised by the Appellant in both the written and oral submissions made before him
 6. The learned Magistrate misdirected himself in ruling the way he did.
2. The Appellants sought the following Orders that:
 - a) This appeal be allowed with costs
 - b) The judgment of the trial Court made on 23rd March, 2021, be set aside and be substituted with an order allowing prayers a, b, c, d & e of the Amended plaint dated 23rd January, 2017
 - c) The Court grants any orders upon such terms as this Court deems fair and just
3. The Appellants were the Plaintiffs in the Murang'a CMCC No. 195 of 2018. They instituted a suit against the Respondents vide Nyeri ELC No. 259 of 2016, but the matter was subsequently transferred to the jurisdiction of this Court being Murang'a CMCC No. 195 of 2018. Vide an Amended Plaint filed on the 23rd January, 2017, the Appellants sought orders that
 - a) A declaration that plot No. 1193/0082, also referred to as Plot No. 1193/82 Mukuyu Market or Plot No. Loc. II/ Maragi/1193/82 belongs to KANU Kiharu Branch as it was illegally and irregularly transferred to the Defendants.
 - b) An order for the rectification of the register to Plot No. 1193/0082 also referred as Plot No. 1193/83 Mukuyu Market or Plot No. Loc. II/ Maragi/1193/82 by deleting the name of the Defendants and reverting to the name of KANU Kiharu Branch
 - c) A permanent injunction restraining the Defendants from ever trespassing on Plot No. 1193/0082 also referred as Plot No. 1193/83 Mukuyu Market or Plot No. Loc. II/ Maragi/1193/82



- d) Costs of the suit and interest
 - e) Any further or better relief that the Honorable Court may deem fit to grant
4. The Appellants claim was that they are delegates of the 2nd Respondent, Kiharu Branch. That the Government allocated the suit land to them in the 1970's for construction of an office, but over time they were unable to pay the land rates and they opted to lease out the suit premise to Simon Macharia. That on or about 17th November, 2016, the 1st Defendant demanded payment of rents to it as the owner of the suit property. Further that the 2nd Defendant fraudulently transferred land to itself and urged the Court to cure the illegality by cancelling title issued to the 1st Respondent.
 5. At the hearing of the suit, the Appellants called one witness Benson Maina Gathuthi Mugi, who reiterated the averments in their Plaint. He further added that the property belonged to Kenya African National Union (KANU) Kiharu branch and not Kenya African National Union (KANU) headquarters and thus the sell by 2nd Defendant to 1st Defendant was improper. That there was no resolution by KANU - Kiharu Branch to sell the said property and there is no way it would have been sold. Further, that the property ought to have been disposed off as required by Kenya African National Union (KANU), Constitution. On cross –examination, he maintained that the sell was not done in accordance with the said KANU's Constitution that he had raised an issue with one KEN who was a National Executive Council member and a Director of KANU.
 6. The Appellants filed their submissions where they submitted that the 2nd Respondent having failed to attend Court, the evidence against them was uncontroverted and unchallenged. The Appellants took an issue with the minutes produced by the 1st Defendant showing a resolution for the sale of property and also submitted that the meeting was not properly constituted and could therefore not authorize any sale. That the acquisition of title having been marred by irregularities, such title could not be protected. They urged the Court to impeach the said title as required under Section 26 of the [Land Registration Act](#). Reliance was placed on the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another*, Eldoret ELC Case No. 609 B of 2012. The Appellants also relied on a litany of cases in support of their claim that the 1st Defendant's title ought to be cancelled. In the end, they submitted that the sale was invalid for want of approval from the National Governing Council of the 2nd Respondent.
 7. The 1st Defendant filed a Statement of Defence on the 13th December 2016, denying in toto the contents of the Plaint. He averred that the 2nd Defendant (now Respondent) was allocated the said land on 5th October 1994, by the Commissioner of lands. He admitted that one Simon Macharia occupies the land, but the said occupation was by dint of the limited authority that the KANU-Kiharu branch had. He contended that he legally bought the land and put the Appellants to strict proof on the allegations of fraud.
 8. At the hearing, he told the Court that the Appellants were not known to him. That when he heard about the 2nd Respondent's intentions to sell the land, he went to its the headquarters where he met one Joseph Arap Towet, who confirmed the said intention by producing minutes affirming the intentions to sell. He further told the Court that prior to the purchase, he conducted due diligence including confirming ownership from Murang'a County Government. It was his further testimony that he paid the entire consideration and was introduced to the tenant through the Branch Chairperson, and he never received any complaint. On cross–examination, he informed the Court that the agreement was signed by officials of the 2nd Respondent.



9. In his submissions, the 1st Respondent submitted that the Appellants failed to show that they were members or delegates of the 2nd Respondent. That the Certificate of Search showed that the land belonged to the 2nd Respondent and there was no evidence tendered to show that the land belonged to the Appellants. The 1st Respondent further submitted on the shortcoming in the Appellants' case and urged the trial Court to dismiss the case.
10. The 2nd Defendant(Respondent)s filed their Amended Statement of Defence on 25th October 2018, and denied that they had sold the suit land to the 1st Defendant and put him to strict proof thereof. It averred that the sell and transfer was fraudulent and attributed it to the 1st Defendant. The 2nd Defendant/Respondent urged Court to dismiss the suit against it, but be allowed against the 1st Defendant. However, the 2nd Defendant it did not prosecute their case.
11. The trial Court in its Judgment found that the evidence adduced confirmed that the suit property belonged to the 2nd Defendant(Respondent) who procedurally sold it to the 1st Defendant(Respondent). In the end, the trial Court dismissed the Appellants' case with costs to the Defendants (Respondents herein).
12. The Appellants filed their Record of Appeal on the 18th October 2021, and this Court directed that the Appeal be dispensed with by way of written submissions.
13. The Appellants filed their submissions on the 24th January 2022, and pointed out the role of this Court as the Appellate Court in consonance with the holding in *Selle vs Associated Motor Boat Co.* {1968} EA 123. The Appellants further submitted that the Court allowed the 1st Respondent to produce documents which he was not the maker to wit, Affidavits sworn by Titus Koceyo and the other by Nick Salat. That the 1st Respondent ought to have demonstrated the difficulty in procuring the attendance of the markers of the documents and could therefore not oust the application of Section 35(b) of the *Evidence Act* and go ahead to produce the documents. Further that the documents were only marked and were of no evidential value as was held by the Court in *Kenneth Nyaga Mwigie vs Austin Kiguta & 2 Others* (2015) eKLR, where the trial Court elaborated on the probative value of documents that are marked for identification and not produced.
14. It is the Appellants' further submissions that the trial Court was not well guided when it concluded that the sell was legal, since the same was devoid of written approval from National Governing Council as required by Article 27 of the KANU's Constitution. Additionally, it is the Appellants' submissions that the 2012 amendments of the KANU Constitution did not take away the Powers of National Governing Council, to give approval to any sale of their property. The Appellants also submitted that the minutes produced as evidence by the 1st Respondent to demonstrate that there was approval for sale could not be relied on as the National Executive Council(NEC), did not have power to authorize the sell.
15. On the sanctity of title, the Appellants submitted that the fact that the title was obtained irregularly, it mattered not that the 1st Respondent was a party or not to the fraud. Reliance was placed on the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another* {2013}eKLR, where the Court opined that the title of an innocent purchaser is impeachable, if it was obtained illegally, unprocedurally or through corrupt means. To buttress their submissions on sanctity of 1st Respondent's title, the Appellants relied on three other case law and concluded that they successfully demonstrated to the trial Court that the title was ripe for impeachment.
16. The Appellants also submitted on the third ground of Appeal to the extent that trial Court erred in failing to pronounce that the suit against the 2nd Respondent was uncontroverted. The Appellants



invited this Court to the pronouncements in *Trust Bank Limited v Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS HCCS No. 1243 of 2001*, *Bristone Pte Ltd v Smith & Associates Far East Limited [2007] 4 SLR (R) 855 at 59* on uncontroverted evidence. In the end, they urged this Court to set aside the judgment and allow the Appeal.

17. The 1st Respondent filed his submissions on the 25th February 2022, and submitted that the Appellants had in their possession the documents objected to, but waited until the hearing date to object to their production and also that the Appellants produced documents which they were also not the makers. On the issue of approval by National Governing Council, the 1st Respondent submitted that that was not an issue during trial and maintains that he demonstrated how he lawfully bought the suit property from the 2nd Respondent. It is the 1st Respondent's further submissions that the Appellants were under a civil duty to prove existence of the facts asserted to and in this case that the suit property belonged to KANU Kiharu branch, but they failed to do so. In poking holes on the Appellants' submissions the 1st Respondent submitted that the Appellants' are trying to sneak in the issue of power of National Governing Council, in regards to the sale of the suit property. He urged this Court to find that the Appellants did not prove their case on the required standard and their appeal should thus be dismissed.
18. This is a first Appeal and by law, it can be based on both law and facts. This Court takes cognizant of fact that it neither saw nor heard the witnesses. It is thus aptly guided by the holding of the Court in the case of *Peters v Sunday Post Limited [1958] EA 424*, where the Court held:
 - (i) Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved or has plainly gone wrong, the appellate Court will not hesitate so to decide.
 - (ii) As there was documentary and other evidence which either tended strongly to confirm the Appellant's evidence or, alternative to show that the Respondent's principal witness was unworthy of credit, the full significance of which the trial judge had apparently not appreciated this was a case where the appellate Court ought not to allow the conclusion reached by the trial judge to stand.
19. The duty of the 1st appellate Court was further explained in the case of *Selle and Another supra* as quoted by the Appellants. This is also captured by Section 78 of the [Civil Procedure Act](#), which espouses the role of a first appellate Court which is to: '..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'
20. This provision was buttressed by the Court of Appeal in the case of *Peter M. Kariuki v Attorney General [2014] eKLR*, where it was held that:

We have also, as we are duty bound to do as a first appellate Court, reconsider the evidence adduced before the trial Court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.
21. This Court has perused the pleadings and has noted that the principal issue is on ownership of Plot No. 1193/0082, also referred to as Plot No. 1193/82 Mukuyu Market or Plot No. Loc. II/ Maragi/1193/82. The Appellants maintained that they were the owners of the suit property and not the 2nd Respondent and therefore the transfer to the 1st Respondent was fraudulent. The trial Court did not find in favor of the Appellants hence the Appeal.



22. To adequately determine this Appeal, the Court will determine each ground of appeal as hereunder;
1. Whether the learned Magistrate erred in law and in fact in allowing the 1st Respondent to produce and rely on documents which he was not a maker without calling the makers nor without the consent of parties
 2. Whether the learned Magistrate erred in law and in fact in failing to find that the purported sell of the suit property by the trustees of the 2nd Respondent to the 1st Respondent was irregular null and void for lack of written approval from the National Governing Council, pursuant to Article 27 of the KANU Constitution.
 3. Whether the learned Magistrate erred in law in failing to find that the Appellants case against the 2nd Respondent was uncontroverted due to their non-attendance in the hearing hence the claim was for allowing
 4. Grounds four and five

i. Whether the learned Magistrate erred in law and in fact in allowing the 1st Respondent to produce and rely on documents which he was not a maker without calling the makers nor without the consent of parties

23. It is the Appellants' case that the trial Court admitted into evidence the 1st Respondent's documents despite him not being the maker of the same. The documents in contention based on the Appellants' submissions on appeal are two Affidavits; one sworn by Titus Koceyo and the other by Nicholas Kiptoo Arap Salat, both dated 19th July, 2018. This Court has perused the proceedings of 9th February 2021, before the trial Court and notes that the counsel for the Appellants, Mr. Ongeri objected to the production of documents in the list of documents dated 22nd August, 2018. The trial Magistrate in overruling the objection held "I do not see what prejudice the Plaintiffs will suffer with the production of the same. I will allow their production."
24. The law on production of Statements in documents is well settled under section 35 of the [Evidence Act](#). It provides;
1. In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—
 - (a) If the maker of the statement either—
 - i. Had personal knowledge of the matters dealt with by the statement; or
 - ii. Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and
 - b. If the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable.



25. What the above provision of law envisages is that for any statement made in a document to be admissible in Court, such document must be produced in its original state and the same must be produced by the maker. However, there are circumstances when the attendance of a maker may be dispensed with as provided for under section 35(b) above. Additionally, a Court may order that the attendance of a maker be dispensed with as provided for under Section 35(2) of the *Evidence Act* which provides
- (2) In any civil proceedings, the Court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—
- (a) Notwithstanding that the maker of the statement is available but is not called as a witness;
26. A plain reading of the above exceptions mirrors the oxygen principles on the just and expeditious disposal of Civil disputes. A Court retains the power to admit into evidence such a document without calling the maker for the ends of justice to be reached. In the instant case, the trial Court pointed out that there was no prejudice that the Appellants' would suffer. A reading of the two Affidavits shades some light on the alleged sell which is sworn by the Secretary General and Advocate for the 2nd Respondent.
27. The Appellants did not challenge the contents of the Affidavits, but only challenged the production of the same by the 1st Respondent, who was not the maker. It was the 1st Respondent's testimony that he bought the land and transacted with the Law Firm of Koceyo & Co. Advocates. This is evident by the sale agreement found on page 173 of the Record of Appeal. The 2nd Respondent filed a Statement of Defence denying ever selling land to the 1st Respondent. The 2nd Respondent did not appear in Court to give their evidence and they did not defend the suit. Their Defence therefore, remained mere allegations.
28. The standard of proof in civil cases is on a balance of probabilities and parties must lead evidence in support of their cases. The Affidavits were relevant to advance the 1st Respondent's case and both confirm that the land belonged to the 2nd Respondent and was sold to the 1st Respondent. However, relying on such statement would amount to hearsay. The Appellants needed an opportunity to cross-examine the maker of the documents. There was no reason advanced by the 1st Respondent for not calling the makers of the said documents.
29. However, the trial Court found no prejudice would be occasioned to the Appellants with the production of the said documents. This Court would not agree with the trial Court, since the content thereof are not in agreement with the Appellants' case. However, a look at the Judgement of the trial Court did not take into consideration the said Affidavits as a foundation of the said judgment. Also, a reading of the proceedings indicate that the 2nd Respondent did not participate in the said proceedings save for filing their Statement of Defence and the documents to be relied on.
30. The deponents are officials of the 2nd Respondent and it would be difficult for the 1st Respondent to procure their attendance whilst they could not prosecute their case. Thus admitting the said documents into evidence without calling the makers was justified and lawful for reasons that procuring the attendance of the deponents would delay the case and not the reason stated by the trial Court. If any, such rejection can be cured by Section 175 of *Evidence Act*. This position was adopted in the case of *Esther Wanjiru Donde t/a Cyber Kids v Kenya Commercial Bank Limited* [2019] eKLR, where



the Court did not agree with the reason by the trial Court to overrule an objection, but found that admitting the documents was not unlawful and can be cured by the provisions of Section 175 of the Evidence Act which provides;

The improper admission or rejection of evidence shall not of itself be ground for a new trial or for reversal of any decision in a case if it shall appear to the Court before which the objection is taken that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision.

Sustaining this ground is not relevant and it must therefore fail.

(ii) Whether the learned Magistrate erred in law and in fact in failing to find that the purported sell of the suit property by the trustees of the 2nd Respondent to the 1st Respondent was irregular null and void for lack of written approval from the National Governing Council, pursuant to Article 27 of the KANU Constitution.

31. It is the Appellants' case that the sell was irregular for want of approval from the National Governing Council, as required by Article 27 of KANU Constitution. The Appellants submitted on *the Constitution* of KANU and the provisions of it on disposition of property and maintained that the sell was not done in accordance with Article 27 of their Constitution. At the hearing, PW1 told the trial Court that the land belonged to the Appellants and they never sold the same to the 1st Respondent. The 1st Respondent in submitting on this ground stated that the issue of approval by National Governing Council was not brought out at the hearing of the main suit before the trial Court.
32. The 1st Respondent submitted that the contestation at the trial was on fraudulent sell of the suit property, which the Appellants alleged belonged to them. The Appellants amended their pleadings to include the 2nd Respondent and in their Complaint, they did not make reference to the property being irregularly sold by National Executive Council of KANU or that they were objecting to the sell by the 2nd Respondent.
33. Pleadings play a critical role in determination of suits and our system being adversarial, parties set a field upon which Court can make their pronouncements. The Supreme Court in the case of Raila Amolo Odinga & another v IEBC & 2 others [2017] eKLR although being an issue of Election Petition, cited an Indian Supreme Court case Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & another, Civil Appeal Nos. 5710-5711 of 2012; [2014] 2 SCR where the Court observed;

" In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the Court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a Court to frame an issue not arising on the pleadings....."

34. It is trite that a party is bound by their pleadings and a trial Court cannot depart from the pleadings, unless a party opts to amend their pleadings as required. This position was well enunciated by the



Court in *Galaxy Paints Company Limited v Falcon Guards Limited* Court of Appeal Case Number 219 OF 1998, where the Court of Appeal stated that;

“ issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial Court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the Court’s determination.”

35. Further, the Court of Appeal in the case of *Independent Electoral & Boundaries Commission & another v Stephen Mutinda Mule & 3 others* (2014) eKLR, cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

36. The Appellants averred that they were the registered owners of the suit property, a fact they maintained throughout the suit. The issue of composition and role of the organs in the 2nd Respondent did not form any basis for determination by the trial Court. In fact the trial Court did not have the jurisdiction to determine whether the National Executive Council had exceeded their mandate or not. Additionally, by dint of Article 21 of the KANU Constitution as presented to this Court, the Appellants were by application of the doctrine of exhaustion, barred from seeking the intervention of the trial Court, because *the Constitution* provided for a mechanism for resolving disputes.

37. If the Appellants wanted the Court to determine whether National Executive Council had exceeded their mandate, this would have formed part of the trial. They cannot now circumvent the wheels of justice and raise the issue on Appeal. The Court has noted from the Appellants submissions on pages 267- 275 of the Record of Appeal, that the Appellants attempted to raise the issue of approval by National Governing Council and consent to sell. Submissions are not pleadings, and it is just an opportunity for parties to convince the Court to find in their favor. As well stated by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR:

“ Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the Court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

38. To this end, this Court agrees with the 1st Respondent that the issue raised in this ground of appeal was not an issue before the trial Court. It cannot therefore be a basis upon which this Court is called upon to fault the Judgment of the trial Court. This Court finds and holds that this ground must fail.



iii. Whether the learned Magistrate erred in law in failing to find that the Appellants case against the 2nd Respondent was uncontroverted due to their non-attendance in the hearing hence the claim was for allowing

39. The 2nd Respondent filed its Amended Defence on the 25th October 2018, and their list of documents, but failed to prosecute their case. Order 12 of the Civil Procedure Rules makes provisions for attendance at the hearings and relevant to this case is Rule 5 which provides;

“ If only some of the defendants attend; the Court may proceed with the suit and may give such judgment as is just in respect of the defendants who have not attended”.

40. This Court has a duty to interrogate and evaluate uncontroverted evidence in order to determine whether the Claimant is entitled to the prayers sought. Further this Court did pronounce itself on uncontroverted evidence in Murang’a ELCA No. 16 of 2017 Gichinga Kibutha v Caroline Nduku [2018] eKLR, on the said issue it is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have its way in Court. The Claimant must discharge the burden of proof. He must proof his case, however much the opponent has not made a presence in the contest. This Court concurs with the findings in Nakuru Civ App No 110 of 2013 Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR, where the Court held;

“ I am of the considered view that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a Court should not take it truthful without interrogation for the reason only that it is uncontroverted”.

41. This is a claim for land and if it were a claim for liquidated sum, then it would be easy for the Court to enter Judgment in default of attendance. The Appellants had a duty to lead evidence as to the irregularities on the part of the 2nd Respondent to warrant the entry of judgment against it. Even though the 2nd Respondent did not appear in Court to adduce evidence, the Appellants still had an obligation to call sufficient evidence to prove their case, on the required standard, a test this Court finds they failed. This Court finds and holds this ground of Appeal must fail too.

iv. Ground Four and Five

42. It is the Appellants allegations that they had an arguable case and the trial Court ought to have found so. The trial Court in dismissing the Appellants suit found that the Plaintiffs(Appellants) suit was without merit. Whether this amounts to a genuine and arguable case should be interrogated. Although an arguable case is sometimes referenced to as a prima facie case, the later is weightier as was stated by Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd& 2 others[2003] eKLR where the Court held;

But as I earlier endeavoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.

43. He who alleges must prove and both parties had their day in Court to adduce sufficient evidence in consonance with their pleadings. This Court has had a chance to look at the Plaintiffs (Appellants) list of documents contained in pages 25-38 and 47-119 of Record of Appeal. The documents point out to the fact that the suit land belonged to 2nd Respondent, but was under utilization by Simon Macharia Kairu, subject to a lease agreement between him and the Appellants (See page 31 of the Record of



Appeal). They also point out that the Appellants were delegates of the 2nd Respondent and some were officials in appreciation of Article 16 of the KANU Constitution, see page 92.

44. Under Article 27 of the KANU Constitution, all properties belonging to KANU were under that trusteeship of KANU Foundation and a reading of the article shows that the same had not been created. It was the Appellants duty to avail evidence and prove to the trial Court that had been created. However, that was not done as it did not form a basis of the pleadings. None of the documents produced before the trial Court indicate that the property belonged to the Appellants. Further the Court has also looked at the 1st Respondent's list of documents on pages 122-131 and 194-222 of the Record of Appeal and particularly to a letter dated 30th September, 2016, which indicates that the property was allocated to KANU in 1994, vide Allotment No. 41/565/VIII, (see page 124). The 1st Respondent told the trial Court that he bought the land from the 2nd Respondent and he buttressed the claim vide the Sale Agreement contained in pg 197. A look at the said sale agreement shows that it meets the threshold of a valid contract capable of transferring rights. There was no evidence presented before the trial Court to show that the sale agreement was marred with irregularities or was obtained fraudulently.
45. It is important to point out that the Appellants made allegations of fraud. While it can be cliché to allege fraud, the Courts are particular on such grave allegations and have often held that a party ought to particularize and prove the allegations. The Court of Appeal in Mombasa Civ Appeal No. 312 of 2012;- *Emfil Limited v Registrar of Titles Mombasa & 2 others* [2014] eKLR stated;

“ Allegations of fraud are allegations of a serious nature, normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities ”.

46. The onus rested on the Appellants to lay before the trial Court such evidence of fraud. The Court of Appeal in *Kinyanjui Kamau VS George Kamau Njoroge* [2015] eKLR, when met with a similar issue on whether fraud was established quoted with approval the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) and held that;-

“ It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis ours)

The Court further held:

“ To succeed in the claim for fraud, the Appellant needed to not only plead and particularise it, but also lay a basis by way of evidence, upon which the Court would make a finding.”

47. All the evidence point out to a proper sale and transfer process and on whether the same was marred with irregularities or fraud, that was a burden that rested upon the Appellants to not only prove such existence but also prove that the 1st Respondent was involved. This Court associates itself fully with the findings of the Court in *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, when the Court enumerated some essentials of fraud that a party should demonstrate to wit
- (a) The suggestion as a fact, of that which is not true by one who does not believe it to be true;
 - (b) The active concealment of a fact by one having knowledge or belief of the fact;



- (c) A promise made without intention of performing it;
 - (d) Any other act fitted to deceive; and
 - (e) Any such act or omission or the law declares to be fraudulent.
48. It does not need thorough investigation of facts or law to find that the Appellants did not demonstrate the foregoing essentials. The trial Court found that the property was sold procedurally to the 1st Defendant(Respondent). Having looked at the testimonies and the documents adduced as evidence, before the trial Court, this Court is satisfied that the Appellants failed to discharge their burden and no fraud was proved. The Court concurs with the trial Courts findings.
49. The Appellants further contend that the trial Court did not consider their oral and written submissions. Order 18 Rule 2 of the Civil Procedure Rules makes provisions on how evidence is taken in by Court and calls for the Plaintiff to first state his/ her case and produce evidence in support of his claim after which the Defendant shall follow. Submissions is not part of how evidence is adduced, but are parties marketing skills as has been observed above. The Appellants filed their submissions reiterating their ownership of the suit property as KANU - Kiharu branch. It called on the trial Court to impeach the 1st Respondent's title for want of approval by National Governing Council. They raised the issue of approval during submissions. The Court when rendering its judgment made a finding that the land did not belong to the Appellants and also analyzed the way the 1st Respondent got ownership. The trial Court was bound by the pleadings and it could not therefore determine the issue of approval as the said issue was not properly brought before trial Court. The bond of contention was on ownership, and how the 1st Respondent acquired title which this Court finds the trial Court adequately dealt with.
50. Suffice to say submissions cannot take the place of evidence. The Court of Appeal in Avenue Car Hire & another v Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997 held:
- " That no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the Civil Procedure Rules. (See Kenya Alliance Insurance Co. Ltd v Thomas Ochieng Apopa [2020] eKLR where the Court determined the position of submissions".
51. A reading of the judgement gives a general overview of the evidence and or whether the Court considered the submissions or not has not come out clearly. Be that as it may, this Court does not see any prejudice that Appellants suffered. These grounds also fail.
52. Having analyzed the foregoing grounds as set out by the Appellants in their Memorandum of Appeal, this Court finds and holds that the Appeal is unmerited and it is thus dismissed entirely with costs to the 1st Respondent.
53. In a Nutshell, this Court finds and holds that the Appeal herein is not merit. Having dismissed the same, the Court upholds the trial Court's determination that was tendered on 23rd March 2021.
54. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 19TH DAY OF MAY, 2022.

L. GACHERU



JUDGE

Delivered virtually in the presence of;

Alex Mugo - Court Assistant

Mr. Ongeru for the Appellants

Mr Waiganjo Gichuki for the 1st Respondent

No Appearance for the 2nd Respondent

L. GACHERU

JUDGE

