



**Kirugumi v Wachira & another (Environment and Land Appeal
47 of 2014) [2022] KEELC 4923 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 4923 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 47 OF 2014**

**L WAITHAKA, J
JUNE 16, 2022**

BETWEEN

ANNE NYAWIRA KIRUGUMI APPELLANT

AND

PERIS WANJIRU WACHIRA 1ST RESPONDENT

NIXON NDIRANGU MUCHIRI 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. MKK Serem
delivered on 3rd November 2011 in Nyeri CMCC No.387 of 2007)*

JUDGMENT

Background.

1. By a plaint dated June 26, 2007, the appellant herein instituted a suit in the lower court to wit Nyeri CMCC No 287 of 2007 seeking judgment against the respondents for a declaration that she is the legal owner of plot No 181 Chaka market; cancellation of the purported sale of the said plot by the 1st respondent to the 2nd respondent; a permanent injunction to restrain the respondents, their agents or anyone claiming through them from interfering with her quiet possession of the suit property and an order compelling the 2nd respondent to remove the illegal structures on the suit property, failing which he be forcibly evicted therefrom; costs of the suit and interest.
2. The appellant's case was premised on the grounds that she is the legal owner of plot No 181 Chaka market (hereinafter referred to as the suit property); that there existed a dispute between the 1st respondent and herself over ownership of the suit property and that the dispute was determined in her favour.



3. The appellant complained that on May 11, 2007, the 1st respondent purported to sell the suit property to the 2nd respondent who entered into the suit property and started constructing a permanent building thereon.
4. Lamenting that her attempts to get the 2nd respondent hand over to her vacant possession of the suit property were futile, the appellant brought the suit referred to in paragraph 1 above seeking the reliefs listed therein.
5. Upon being served with summons to enter appearance, the respondents filed the statements of defence dated July 24, 2007 through which they denied the allegations levelled against them.
6. The respondents further denied the allegation that the appellant was the owner of the suit property and contended that the suit property was allocated by Ndathi Mugunda company Ltd to the 1st respondent who sold it to the 2nd respondent.
7. For the foregoing reasons, the respondents urged the court to dismiss the appellant's suit with costs to them.

The Plaintiff's Case.

8. When the case came up for hearing, the appellant availed five witnesses, herself included.
PW1, Anne Nyawira Kirugumi, informed the court that she bought shares from the company herein through Dominic Gichuru (PW4). She paid for two shares but was given one. In 1995, she received information from PW4 that someone was developing her plot. She complained to the company and paid Kshs 40/= for arbitration. For the two plots she paid Kshs 10,600/=. She had no receipts to prove the payments because she lost all the receipts in 2001. Which loss she reported to the police and was issued with a police abstract. She produced the abstract as Pexbt 1(a) and the receipt issued in respect thereof as Pexbt 1(b).
9. The appellant further informed the court that James Wachira whom she had a case with before the district officer (DO), was the one who was developing the suit property. The appellant informed the court that the dispute taken before the DO was decided in her favour. The court heard that the respondents were issued with a letter dated May 25, 2007 by the company and notice of demand of an even date. She produced the letter and demand as Pexbt 3 and 4 respectively.
10. In cross examination, the appellant maintained that she lost all receipts and documents and that the company had shown her the site and issued her with receipts. Several receipts were marked for identification as PMFI-1 to 5 and clearance certificate as PMFI 6. She stated that she was shown the suit property in 1983 and that she had a dispute with the 1st respondent's father in 1995.
11. The court heard that the 2nd respondent took his receipts to the company officials when he was summoned by the company in 2007 but stated she did not see the 1st respondent in 1995 during the dispute with his father and she is not aware of DMFI 1-6.
12. PW2 William Mwangi Macharia, a director of the company from September 14, 2007 informed the court that the appellant is a member of the company; that the appellant reported the loss of her ownership documents to him; that they went to the DO Kieni East in 2003 and the DO gave them minutes dated March 9, 1995 which indicated that the suit property belonged to the appellant.
13. PW2 further informed the court that there were various directors of the company before he came into office; that there was no hand over report from the previous directors to the current directors because they came into office through a court order. He produced the court proceedings through which they



- came to office as Pexbt 6 and certificate of directors as Pexbt 7. He stated that according to the register of the company which is one of the documents served on the company in Nyeri HCC No 791 of 2004, the appellant had two shares and that the 1st respondent does not appear in that register.
14. The court heard that Jane Wamuyu Macharia is the one who sold the suit property to the 1st respondent but only members of the company were entitled to get plots from the company. He stated that the 1st respondent's name does not appear in the company's register as a member. He produced a register of members as Pexbt 8. (The appellant's name appears in the register as No 17 with 2 shares).
 15. Like PW1, he informed the court that there was a dispute over the suit property which the company needed to arbitrate. He informed the court that the 2nd respondent informed him that he bought the suit property from the 1st respondent and came to his office with documents in support of his ownership of the suit property. These documents included an identity card of the 1st respondents, clearance certificate and several receipts and transfer documents signed by the 1st respondent and asked the company to transfer the suit property to the 2nd respondent. He produced a bundle of the documents brought by the 2nd respondent as Pexbt 9(a) including a sale agreement for the suit property and receipts marked PMFI 9(b)-(d).
 16. PW2 admitted that no new receipts are issued by the company on transfer; that the company's policy was to cancel and countersigns the receipts.
 17. The trial court heard that the 2nd respondent had paid Kshs 3000/= to Amos Kinyua to facilitate transfer of the suit property but observed that the plot number is not cancelled.
 18. He informed the court that he wrote the letter dated May 25, 2007 (Pexbt 10) to the 1st respondent to stop development in the suit property and they agreed to meet for arbitration which never took place; that he received the letter dated June 8, 2007 (Pexbt 11) from the appellant's advocate and another dated July 10, 2007 (Pexbt 12) from the company. He reiterated that the appellant is the rightful owner of the suit property and that Jane Wamuyu Macharia and the 1st respondent do not appear on the register of the company.
 19. In cross examination, he stated that he became a director of the company in 2001; that allottees were shown plots at Chaka after paying the given fees; that there was a probe committee set up in 1992 and the DO Kieni West was the chairman of the probe committee; that the DO stamped the back side of receipts for plots without dispute but he did not know whether the 1st respondent had her receipts stamped. He reiterated that no handing over took place between the new and the old directors of the company.
 20. He admitted that not every shareholder got a plot at Chaka and that clearance certificates were given by previous directors; that an annual general meeting (AGM) was called by the new directors and members agreed to reconstruct a new register showing who the original members were; that those members who did not attend the meeting were not placed in the register; that the 2nd respondent presented his documents and lists to him and he observed that the name of Jane Wamuyu in the receipts had been cancelled and replaced with the name of the 1st respondent; that he told the 2nd respondent that the documents were defective and not in accordance with company rules as the plot number had also been cancelled.
 21. PW3 John Githinji Marete, who was DO Kieni West from April 2010, informed the court that he had records of 1995 in respect of land disputes. He also had a report of the probe committee over Chaka plots. The court heard that various disputes were settled by the probe committee. The court further heard that the suit property had a dispute and that it was owned by the appellant. His attempt



to produce the report of the probe committee dated March 9, 1995 was successfully objected to by counsel for the respondents because the report was not signed and the witness was not a party to the proceedings.

22. PW4, Dominic Gichuru Mangu, told the court that in 1978, the appellant sent him to Chaka to assist her locate her plot. She gave him money to pay for membership and for shares. He paid 90/- and was given a receipt which he took to the appellant. The court heard that one plot was going at 1200/= and that the appellant paid Kshs 10,000/= for the suit property. He paid on behalf of the appellant and gave her the receipts which had the appellant's name and the plot number. The appellant was given plot No 181 (the suit property) and later employed him as caretaker of the plot.
23. PW5 Wilson Ndiritu Ngiri, informed the court that he was a director of the company between 1983 and 2001. He stated that the company had many disputes of double allocation from 1994 because the plots were allocated to many people and these disputes were arbitrated by the DO Mweiga. He produced PMFI 2 as Pexbt 2.
24. The court heard that a receipt was issued for every purchase and upon completion of payment, a clearance certificate was issued. The court further heard that the certificate issued on May 10, 2001 is in respect of the suit property. It was issued in favour of the respondent who is the owner of the suit property.
25. He stated that he was not aware whether the appellant was issued with a clearance certificate but maintained that there was double allocation of plots but he did not know who made them.
26. He acknowledged that he did not sign the minutes he produced as Pexbt 2. He stated that although the 1st respondent was not at the meeting during the arbitration, her father was present. He informed the court that he was not aware of how DMFI 1 and 2 were issued.

The Defendant's Case.

27. The respondents on their part availed three witness. Peris Wanjiru Wachira (DW1), informed the court that she had a plot at Chaka plot No 181 which she sold to the 2nd respondent.
28. She informed the court that she bought the plot from Jane Wamuyu Macharia who had bought it on ballot from the company herein. Jane Wamuyu gave her receipts for plot No 181 dated June 2, 1992 which she produced as Dexbt (2).
29. DW1 informed the court that the company gave her a clearance certificate which was produced by DW3, (a director of the company), as Dexbt 1. DW1, produced other receipts given to her by Jane Wamuyu; receipt for Kshs 40/- dated August 3, 1978 (Dexbt 1); receipt dated July 6, 1982 (Dexbt 2), receipt dated June 3, 1991 as (Dexbt 4) and receipt dated June 4, 1991 (Dexbt 3). All these receipts bore plot No 181 and the name of DW1.
30. DW1 informed the court that she took possession of the suit property in 1992 and developed it by erecting a building thereon in 1995. That after effecting developments in the suit property, she went to Narok where she had a business and thereafter; sold the suit property to the 2nd respondent in 2007 for Kshs 250,000/-.
31. DW1 told the court that she was not aware of any arbitration in respect of the suit property and only got to know the appellant when the suit hereto was filed.
32. Upon being cross examined by counsel for the appellant, DW1 stated that Dexbt 5 was issued to her by the probe committee after paying Kshs 800/= as survey fees. She informed the court that she did not



- sign any sale agreement with Jane Wamuyu and could not explain why Dexbt 4 is cancelled and replaced with plot No 181. she explained that all the receipts given to her by Jane Wamuyu bore plot No 393 but were later cancelled to read 181 and duly stamped by the probe committee. She acknowledged that there was a probe committee that was chaired by the DO but stated that she didn't know whether her father James Wachira, participated in the arbitration in relation to the suit property. She denied playing any role in changing the plot number from 393 to 181.
33. DW2, Nickson Ndirangu Muchiri, informed the court that he bought the suit property from the 1st respondent; that the 1st respondent had a clearance certificate and receipts from the company for plot number 181 (suit property) duly signed and sealed by Amos Kinyua (DW3), who was the secretary of the company.
 34. DW2 confirmed DW1's testimony to the effect that the suit property was developed when he bought it and on enquiry, the community informed him that the developments were effected by the 1st respondent. After buying the property, he completed the developments thereon, the 1st respondent having executed a transfer in his favour which he produced as Dexbt 6 and photographs of the developments in the suit property as Dexbt 7(a) to (d).
 35. Explaining that he was not aware of any case of double allocation in respect of the suit property, he stated that he did not know the appellant until she filed the case hereto against him.
 36. Concerning the appellant's claim to the suit property, DW1 stated that the appellant had no documents capable of proving her ownership. Terming the police abstract produced by the appellant a forgery, DW1 observed that it does not contain any plot number.
 37. Concerning the appellant's assertion that she lost her documents, DW2 stated that the appellant could easily have gone to the company and obtained duplicate receipts.
 38. Explaining that he has suffered loss and damage, DW2 urged the trial court to dismiss the appellant's case.
 39. In cross examination, DW2 acknowledged that Dexbt 5 had corrections on the face of it-(plot No 393 was cancelled and plot No 181 inserted). The name of Jane Wamuyu Macharia had also been cancelled and replaced with that of the 1st respondent who informed him that the register had been corrected clarifying ownership of the suit property. He acknowledged that the cancellations on the receipts he was given by the 1st respondent are not endorsed except Dexbt 1.
 40. Concerning circumstances upon which plot No 393 changed to 181, he stated that the company officials, (DW3, the company secretary at the material time), told him that the changes occurred when the company's land was resurveyed and that he (DW3) had signed the clearance certificate as the secretary of the company (PW3 was introduced to him by the 1st respondent before he bought the suit property and was further confirmed by the community as the secretary of the company). DW3 verified the genuineness of the documents at DW3' office in Nyeri.
 41. Concerning the photographs he produced, he stated that he took them through a photographer who also processed the photographs.
 42. In re-examination, he stated that he is in possession of plot No 181 and not 393; that the suit herein is in respect of plot No 181 and not 393 and that all receipts handed over to him by the 1st respondent were duly stamped by the company and the DO which cured the cancellations. Pointing out that the clearance certificate handed over to him by the 2nd respondent is in the name of the company and duly sealed, he maintained that the appellant has no receipts for the suit property or plot No 393.



43. DW3 Amos Kinyua, informed the court that he was the secretary of the company from 1993 to 2002 and a member of the probe committee for a short while. He stated that the company had seven (7) elected directors. Wilson Ndiritu Ngili who was the chairman and Stephen Migwi the treasurer. Terming the clearance certificate held by the respondents genuine, he acknowledged having signed it together with the chairman and treasurer. He told the court that a clearance certificate is issued on clearance of payments and that it is a proof of ownership. He confirmed that the 1st respondent had come to their offices together with the receipts for payment before she was issued with the clearance certificate for the suit property (plot No 181).
44. Explaining that the company kept duplicate copies of the receipts, he confirmed seeing the documents marked for identification as DMFI 1 to 5 before the clearance certificate was issued. He produced the clearance certificate as Dexbt 1 stating that all the receipts were stamped.
45. Explaining that there were cases of double allocation and that such cases were removed from the register, he stated that in performing this exercise, they were assisted by the provincial administration and police to rectify the register.
46. Concerning the circumstances upon which plot number 393 was substituted with plot No 181, he stated that plot No 393 was none existent.
47. Asked what happens if one lost their documents, he stated that one was required to submit a police abstract to the company for replacement of the lost documents then the company would write a letter. In the appellant's case, she only brought to the company a police abstract.
48. Maintaining that the suit property is owned by the 2nd respondent and not the appellant, he stated that the appellant has no letter from the company. He produced the documents marked for identification as DMFI 1 to 5 as Dexbt 1 to 5 and the transfer letter issued to the 2nd respondent, marked as DMFI 6 as Dexbt 6.
49. In cross examination, he stated that he is aware of Nyeri High Court civil case No 79 of 2004. He acknowledged that in that case, he had sued the company and that he had supplied the list of members to the court and that the name of the appellant features in the list as member No 17.
50. Concerning the cancellations in respect of plot No 181 and 393, he stated that he is not the one who cancelled them and did not know who made the cancellations which as per the register are not endorsed. He further stated that he does not know who the owner of plot No 393 is/was and whether plot 393 and 181 had disputes but acknowledged that there were many disputes at the company.
51. In re-examination he stated that Nyeri HCCC No 79 of 2004 does not indicate that the plaintiff owns the suit property. The court heard that the company had a splinter committee which he belonged to in 2007 when he signed documents for the company and that DW1 was a member of the probe committee which lasted for three years.
52. Upon considering the evidence adduced before him, the learned trial magistrate observed: -

“From the evidence on record, there is absolutely no evidence that the plaintiff ever owned plot No 181 Chaka market. The only evidence available to the plaintiff is the loss of all her documents in respect of plot No 181 and the subsequent issuance of a police abstract in respect of the loss which as I said earlier was not sufficient in the absence of other independent evidence to fortify the same.....Having therefore gone through the



entire evidence on record, I am more persuaded on a balance of preponderance that the plaintiff case has no merit and the same stands dismissed with costs to the defendants.”

The Appeal.

53. Aggrieved by the said decision, the appellant appealed to this court on the grounds that the learned trial magistrate erred by: -
- i. Ignoring her evidence and the evidence of her witnesses;
 - ii. Concluding that he did not call a crucial witness by the name Dominic Gicheru yet the said person testified as PW4;
 - iii. Treating her evidence in contempt and putting unnecessary weight on the evidence of the respondents and their witnesses when it did not deserve the same;
 - iv. Being biased against her.
54. The appellant urges this court to allow the appeal, order that she is the owner of the suit property and award her the costs of the appeal and of the case before the lower court.
55. Pursuant to directions issued on October 25, 2018, the appeal was disposed of by way of written submissions.
56. In her submissions, the appellant adopted and relied on the submissions filed in the lower court. It is contended that the learned trial magistrate totally ignored the submissions yet they were not challenged by the respondents. It is further contended that the learned trial magistrate did not analyze the evidence tendered by the appellant and her witnesses. Arguing that the appellant’s membership to the company was neither in dispute nor disputed, the appellant states that the probe committee in its meeting of March 9, 1995 acknowledged that plot No 181 belonged to her.
57. The appellant acknowledges that the committee was to visit the plots in dispute but submits that from the minutes, there were facts that were not in dispute. The facts said to have not been in dispute are that the 1st respondent’s father was not claiming plot 181 but 393; that if the 1st respondent was allocated plot No 181, it was not her wish as it was not hers; that there is no evidence that the appellant was given a chance before she was dispossessed of the plot. It is further submitted that whether or not the probe committee visited the plots, that could not change those facts.
58. The learned trial magistrate is said to have failed to give any reason as to why he could not rely on the evidence of PW2, PW3 and PW4, all of whom said the plot belonged to the appellant.
59. It is acknowledged that PW4 was a crucial witness for the appellant as he was the links person between the company and the provincial administration and the caretaker of the appellant’s interest in the suit property. He also knew where the property was and reported to the DO when the 1st respondent’s father cleared it. The learned trial magistrate is faulted for ignoring his evidence.
60. The evidence tendered by the respondents is said to have been inconsistent and contradictory. In that regard, it is pointed out that contrary to her allegation that she bought the suit property from Jane Wamuyu, that issue was not before the probe committee. The evidence before the probe committee was that the plot was given to the 1st respondent.
61. Wondering why the 1st respondent was claiming plot No 181 if the plot she bought was 393, the learned trial magistrate is faulted for having failed to find that Jane Wamuyu was a crucial witness.



62. Claiming that the learned trial magistrate was biased against her, the appellant laments that her evidence of loss of documents was found to be unbelievable.
63. On whether the appellant made efforts to obtain the lost documents, reference is made to the testimony of PW2 to the effect that they met a DO called Mohamed who did not give them the receipts but gave them the minutes dated March 9, 1995, and submitted that it is not true that they did not make efforts to get the documents.
64. It is further submitted that the evidence of the appellant was more credible than that of the respondents and their witnesses. The learned trial magistrate is said to have put unnecessary weight on the evidence of the respondents.
65. For the foregoing reasons, the appellant urges this court to allow the appeal, set aside the judgment of the lower court and substitute it with a judgment awarding the appellant the suit property.
66. In their submissions, the respondents have submitted that the appellant failed to discharge the burden imposed on her of proving that she was indeed the owner of the suit property. The respondents, on the other hand, proved that the property belonged to them.
67. On the observation by the court that the appellant failed to call a crucial witness, when the witness had indeed testified as PW4, the respondents have urged this court to re-evaluate the testimony of that witness and come up with its own opinion on whether the evidence of that witness would have affected the decision of the learned trial magistrate, if it was considered.
68. It is contended that the evidence of the said witness, PW4, does not prove that the appellant was the owner of the suit property. According to the appellant, the evidence of PW4 merely shows that he was sent to pay for plots. Because of lack of documentary proof of the allegations in the testimony of PW4, the evidence of PW4 is said to be incapable of adding value to the appellant's case.

Analysis And Determination

69. In discharge of the duty imposed on me as a first appellate court, I have considered the evidence presented before the lower court, re-evaluated it, bearing in mind that I neither saw nor heard the witnesses testify. I have also made allowance for that.
70. With regard to the first ground of appeal, which is that the trial court ignored the appellant's evidence and that of her witnesses, a review of the judgment of the trial court shows that the learned trial magistrate comprehensively reviewed the evidence of the appellant (PW1) and that of William Mwangi Macharia (PW2) but did not review and give his opinion about the other witnesses. His failure to consider the testimony of the other witnesses is apparent in his finding that the appellant failed to avail a crucial witness, Dominic Gichuru, yet that person testified as PW4.
71. In support of the finding that the learned trial magistrate considered the evidence of the appellant and the evidence of one of his witness, see the judgment, which at the relevant part(s) provides as follows: -

“...The plaintiff called five witnesses in support of her case whereas the defendant called three witnesses.

PW1 was the plaintiff herself and she stated that she was the legal owner of plot number 181 having bought the said plot between 1978 and 1983 and that she was allocated plot number 181 in 1983. PW1 stated that one Dominic Gichuru paid for plot number 181 on her behalf. PW1 stated that she had paid Kshs 40 to the Ndathi Mugunda Land Buying



Company being registration fees. PW1 stated that she had paid in all a total of Kshs 10, 600 for the two plots one being plot number 181.

PW1 told the court that in 2001, she lost all her documents including the receipts she had issued in respect of the disputed plot number 181 and she had reported the matter to the police and issued with a police abstract. PW1 produced the police abstract in court marked as exhibit 1(a) and (b).

On or around 1995, a dispute arose as to the ownership of plot number 181 and it emerged from evidence that the father of the first defendant, Peris Wanjiru Wachira, was called James Wachira. James Wachira had produced receipts for plot number 393 and not 181. PW1 produced the proceedings of March 9, 1995 as exhibit 2.

I have perused the proceedings of the said arbitration and indeed minute number 52/95 dealt with the dispute involving plot number 181 and 393. The proceedings provided that Peris Wanjiru Wachira was given plot number 393 but the plot was found to be developed by somebody else instead she was given plot number 181. She claims that she has already developed plot 181. In Mr Cheres list plot number 181 belongs to Ann Nyawira Kirugumi who has not appeared since then.

The decision of the panel was that the committee to visit the plots for more details and to return on May 9, 1995...

From the above piece of evidence, it is clear that the arbitration did not conclusively determine the issue of ownership.”

PW1 insisted that the arbitration resolved that plot number 181 was owned by the plaintiff whereas plot number 393 was owned by the 1st defendant, Peris Wanjiru Wachira, the 1st and 2nd defendants were given a letter dated May 25, 2007 by Ndathi Mugunda Company which letter was produced as exhibit 3.

PW2 was William Macharia and he told the court that PW1 was the legal owner of plot number 181. PW2 was a director/secretary of Ndathi Mugunda Company and he produced exhibits 6 and 7. Exhibit 6 are court proceedings in which the High Court at Nyeri reinstated PW2 and other directors of Ndathi Mugunda Company into office. Exhibit 7 is a certificate of directors of Ndathi Mugunda Company.

PW2 told the court that one lady called Jane wamuyu Macharia had sold plot number 181 to the 1st defendant herein, Peris Wanjiru Wachira. PW2 further told court that the 1st defendant Peris Wanjiru Wachira does not appear in the register but the plaintiff appears in the register as number 17. PW1 produced a list of documents marked as exhibit 8.

The 2nd defendant went to PW2 on June 1, 2007 went to PW2 with a bundle of documents including receipts, a clearance certificate and a sale agreement in which he had purchased plot number 181 from the 1st defendant. The bundle of documents were identified in court by PW2 and marked as MFI-9(a) to (d).

On May 25, 2007, PW2 wrote a letter to the 2nd defendant to stop developing plot number 181. The letter is marked as exhibit 10. PW2 went ahead and produced other exhibits namely 11 and 12. Finally PW2 stated that Jane Wamuyu Macharia and the 1st defendant, Peris Wanjiru Wachira do not appear in the Ndathi Mugunda Company Register....



72. The judgment of the trial court at page 7 and 8 shows that the learned trial magistrate considered the appellant's evidence. In that regard see the following extracts from the judgment: -

“From the evidence on record and the exhibits produced in court, it is very clear and uncontested that plot number 181 was originally owned by a lady by the names Jane Wamuyu Macharia. There is no evidence on record that plot number 181 was ever owned by the plaintiff in this case.

The plaintiff has however attempted to demonstrate to the court that all her documents in respect of plot number 181 got lost and that she reported the matter to the police upon which a police abstract was issued. There is no other supporting document to fortify the plaintiff's assertion that she lost all her documents and under what circumstances.

In her evidence in chief, the plaintiff herein, Ann Nyawira Kirugumi, informed the court that between 1978-1983, she bought two shares at Ndathi Mugunda Company and one of the shares was in respect of plot number 181. In fact, the plaintiff told the court that one person by the name Dominic Gichuru paid for the plots in question on her behalf and in fact obtained receipts. Dominic Gichuru was the caretaker of the plaintiff. The plaintiff did not however for undisclosed reasons call this crucial witness by the name Dominic Gichuru to fortify her claims that she had indeed bought plot number 181. In the absence of any receipts and which the plaintiff claimed got lost and subsequently obtained a police abstract.

There was also no evidence from the plaintiff that she attempted to get duplicates of the lost receipts from Ndathi Mugunda company. This could have further fortified the plaintiff's case as to the ownership of plot number 181.”

73. Having determined that the learned trial magistrate failed to consider the evidence of some of the witnesses availed by the appellant, I will now review that evidence, alongside the evidence tendered by the appellant and PW2, with a view of determining whether failure to consider the evidence of the other witnesses affected the decision of the trial court.
74. As pointed out herein above, the appellant availed five witnesses, herself included, in support of her case. The testimonies of the appellant and her witnesses are as captured in paragraphs 9 to 37 herein above.
75. A review of the testimonies of the of PW3 and PW5 shows that they could not be relied on to advance the appellant's case. For instance, the evidence of PW4, as relates to ownership of the suit property was, on account of the fact that he did not participate in the proceedings of the probe committee hearsay. Considering that the minutes he sought to rely on were not signed, the trial court properly directed itself on the issue of production of those documents.
76. With regard to the testimony of PW5, it is clear that it was not in support of the appellant but the respondents.
77. As for the testimony of PW3, whilst his evidence as read with other pieces of evidence clearly shows that the appellant was indeed the one who was allocated the suit property, in the absence of any evidence showing that the appellant paid for the property and was, upon completion of the payments issued with a clearance certificate, it cannot reasonably be concluded that the appellant has, on account of the allocation alone, proven that she was the owner of the suit property.
78. It is noteworthy that according to the appellant and PW4, the appellant paid Kshs 10,000/- for two plots. Noting that from the testimony of PW1 each plot was going for Kshs 1,200/=, the appellant



- and/or her agent (PW4) needed to explain why the appellant ended up paying more than the Kshs 2,400/- payable for the two plots she was allocated. The appellant also failed to explain what happened to the other plot, she allegedly paid for. No evidence, whatsoever, was produced of any claim having been made to the company either by the appellant or her agent, PW4, in respect of that other plot.
79. It is noted that the suit property had a dispute way back in 1995. As rightly observed by the learned trial magistrate, the probe committee in its minutes of March 9, 1995 (Pexbt 2) did not conclusively determine the issue of ownership of the suit property. It however, observed that in Mr Cheres' List, the suit property belonged to Ann Nyawira Kirugumi (the appellant herein) who had never appeared. The committee decided to visit the plots (181 and 393) for more details.
80. No evidence was given of the minutes of May 9, 1995. No evidence was given of what Chere's list was or who Chere was, either. The list referred to in the minutes was also not produced in evidence.
81. In view of the gaps in the evidence, the only reasonable conclusion that can be made from the minutes is that the suit property was subject of a dispute before the probe committee. The property, though indicated as owned by the appellant in the list before the probe committee was being claimed by the 1st respondent. The reason why the 1st respondent claimed the property was that the plot allocated to her, plot number 393, had been given to another person. The 1st respondent, through her father, claimed that she was re-allocated plot number 181 (the suit property).
82. In the absence of any evidence, as to what the decision of the probe committee was concerning the dispute presented before it, and on account of the evidence presented before the court by two officers of the company (PW5 and DW3) to the effect that the suit property belongs to the 1st respondent, I have no reason to fault the trial magistrate for holding the account offered by the respondents more believable than the account offered by appellant.
83. Although the documentary evidence relied on by the respondents appears suspicious, the defect in the evidence was cured by the oral testimony of the officers of the company who confirmed to the court that they signed the ownership documents.
84. In my considered view, in the peculiar circumstances of this case, where officers of the company acknowledged having issued the ownership documents relied on by the 1st respondent in support of her ownership to the property, to succeed in her case against the respondents, the appellant should have pleaded and prosecuted a case of fraud against the 1st respondent and/or the officers of the company. Failure to plead and urge a case of fraud in the acquisition of the suit property compromised the appellant's case.
85. By operation of law, fraud must be specifically pleaded and proven. In that regard see the case of *Kuria Kiarie & 2 others v Sammy Magera* (2018) e KLR where the Court of Appeal stated: -
- “It is trite law that any allegations of fraud must be pleaded and strictly proved.”
86. The above conclusion renders the other grounds of appeal otiose.
87. The upshot of the foregoing is that the appeal is found to be lacking in merits and is dismissed with costs to the respondents.

DATED AND SIGNED AT ITEN THIS 10TH DAY OF MAY, 2022.

L. N. WAITHAKA

JUDGE



Read, signed and delivered at Nyeri this 16th day of June 2022.

J. O Olola

JUDGE

