



**Wanjau & another v Njenga (Environment & Land Case 103 of 2014)  
[2022] KEELC 3084 (KLR) (3 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 3084 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 103 OF 2014**

**JO MBOYA, J  
AUGUST 3, 2022**

**BETWEEN**

**FRANCIS MACHIRA WANJAU ..... 1<sup>ST</sup> PLAINTIFF**

**CHRISTOPHER WAINAINA NGUGI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FREDERICK NJENGA ..... DEFENDANT**

**JUDGMENT**

1. Vide the plaint dated the February 4, 2014, the plaintiffs herein has approached the court seeking for the following reliefs;
  - i. Permanent Injunction restraining the Defendant whether by himself, his servants and/or agents from trespassing, encroaching or in any other manner whatsoever from interfering with the Plaintiffs quiet possession over all those parcel of land known as L.R No's Kiambaa Thimbigua/7141, 7146, 7147, 7148, 7150, 7151, 7154, 7155, 7157, 7159, 7160, 7161, 7162, 7163 and 7164 situate in the Thimbigua area of Kiambu County.
  - ii. Declaration that the Plaintiffs are the only legal and valid owners of all that parcel of lands known as L.R No's Kiambaa Thimbigua/7141, 7146, 7147, 7148, 7150, 7151, 7154, 7155, 7157, 7159, 7160, 7161, 7162, 7163 and 7164.
  - iii. Costs of the suit.
2. Upon being served with the plaint and summons to enter appearance, the defendant herein duly entered appearance on the February 18, 2014 and thereafter filed a statement of defense and counterclaim on the February 28, 2020.
3. Pursuant to the counter-claim, the defendant herein sought various reliefs, inter-alia;



- a. The plaintiffs suit be dismissed with costs together with interests at court rates until payments in full.
  - b. Declaration that the Plaintiffs' have no good title over the Property, namely L.R No's Kiambaa Thimbigua/1393 and the resultant subdivisions.
  - c. An order directing the plaintiffs' to surrender the original title documents for the resultant subdivisions of the property L.R No's Kiambaa Thimbigua/1393 to the Land Registrar, Kiambu County in any event within 14 days from the date of Judgment for purposes of Cancellation and the same to revert to the name of Stephen Githaria Nyawira, deceased.
  - d. In default of compliance with ( c ) above, the Deputy Registrar of this Court do proceed to Cancel the resultant Titles arising from the Sub-division of the titles number in the name of Stephen Githaria Nyawira, deceased.
  - e. Any other and/or further orders that this Honourable court may deem fit and Just to grant.
4. From the record, it is not evident and or apparent whether the Plaintiffs' herein filed a reply to the statement of defense and defence to the counterclaim. In this regard, it suffices to observe that the counter-claim by and or on behalf of the defendant was not defended and/or opposed.
  5. Be that as it may, the pleadings in respect of the subject matter ultimately closed and the suit was set down for hearing on various dates.

**Evidence By the Parties:**

Plaintiffs Case:

6. Though the suit was filed by and/or on behalf of the plaintiffs, the plaintiffs herein did not show keen interest in the prosecution and hearing of the same. For clarity, no attempts were made by the plaintiffs to progress the matter for hearing or at all.
7. Owing to the apathy and or lack of interest by the plaintiffs, counsel for the defendant filed and/or lodged an application dated the June 9, 2021, wherein same sought to have the suit dismissed for want of prosecution.
8. Subsequently, the application dated the June 9, 2021 was fixed for hearing on the January 20, 2022, but yet again neither the plaintiffs' nor their advocates on record attended court.
9. Owing to the failure by the Plaintiffs to attend court, the application dated the June 9, 2021 was allowed as prayed. in short, the plaintiffs suit was dismissed for want of prosecution.

**Defendants Case:**

10. The defendant herein testified as DW1 and same stated that the suit property initially belonged to and was registered in the name of one Stephen Githaria Nyawira, now deceased, who was his Father.
11. Further, the witness testified that during the lifetime of his Father, same gifted the suit property to and in favor of the witness and thereafter the witness assumed occupation and possession of the suit property.
12. It was the further evidence of DW1 that he has been in occupation and possession of the suit property since the year 1975, when the suit property was gifted unto him until to date.



13. Nevertheless, the witness has testified that without his knowledge and/or involvement his sisters, namely, Lilian Wambui Mohamed and Peris Wambui Mwangi, illegally, unlawfully and without any rights, proceeded to and sold the suit property to one Nelson Waruingi Gitogo.
14. On the other hand, the witness further testified that upon the sale of the suit property to the said Nelson Waruingi Gitogo, same caused the suit property to be transferred to his name and thereafter pretended to be the lawful owner of the suit Property.
15. Other than the foregoing, the witness further testified that Nelson Waruingi Gitogo also proceeded to and sold the suit property to and in favor of the current Plaintiffs, who pursued and became registered as the owners of the suit property.
16. However, the witness maintained that neither Lilian Wambui Mohamed nor Peris Wambui Mwangi, who are indicated as now deceased, had any authority to sell, dispose of and/or alienate the suit property.
17. Besides, the witness also stated that because his sisters, namely, Lilian Wambui Mohamed and Peris Wambui Mwangi, respectively, had no good title over the suit property, same could therefore not confer any valid title to the Purchasers.
18. Notwithstanding the foregoing, the witness further testified that same came across the Land Sale Agreement entered into between Nelson Waruingi Gitogo and the current plaintiffs and the witness maintained that the said Agreements had several defects and anomalies.
19. In any event, the witness stated that having not consented to the sale and transfer of the suit property to any of the Purchasers thereof, including the current Plaintiffs, the transaction involving the suit property, were therefore illegal, unlawful and fraudulent.
20. At any rate, the witness also testified that when the plaintiffs herein interfered with his occupation, possession and use of the suit property, he lodged various complaints, inter-alia to the National Land Commission, Kiambu County, with a view to having the illegal transactions in favor of the current Plaintiffs herein revoked and cancelled.
21. Be that as it may, the witness testified that the Plaintiffs herein continued with their offensive activities, including subdividing the suit properties into various portions, without his consent and/or permission.
22. Further, the witness also testified that the subdivision of the suit property, were taken by the Plaintiffs with a view to selling and/or disposing of the resultant sub-divisions in favor of Innocent Third Parties, purposefully to perpetuate the fraud.
23. In the premises, the witness contended that the entire transactions involving the suit property did not have his blessings and therefore it was appropriate that same be nullified, revoked and or canceled and that the suit property should revert back to the names of Stephen Githaria Nyawira, now deceased.
24. Other than the foregoing, the witness referred to his witness statement dated the 28<sup>th</sup> February 2020 and sought to adopt and rely on same. Consequently, the court admitted the Witness statement as further evidence of the witness.
25. Besides, the witness also alluded to the List and Bundle of documents dated the 28<sup>th</sup> February 2020, containing 12 documents and same sought to produce the Documents as Exhibits before the court.
26. Premised on the invitation by the witness, the court proceeded to and admitted the Documents at the foot of the List dated the 28<sup>th</sup> February 2020, as Exhibits P1 to P12, respectively.



27. Finally, the witness also alluded to a further list of documents dated the 7<sup>th</sup> July 2022, containing one document, namely, the Grant of Letters of Administration in respect of the Estate of the late Stephen Githaria Nyawira, now deceased.
28. For coherence, the witness also sought to rely on the said document and thus invited the court to admit same as an exhibit. In this regard, the Grant of Letters of Administration, was admitted as Plaintiffs Exhibit 13.
29. Having tendered his evidence and relied on the assorted documents, details in terms of the preceding paragraphs, the Defendant proceeded to and closed his case.

**Submissions By The Defendant:**

30. Following the close of the Defendants case, counsel for the Defendant sought for time to file written submissions. Consequently, the court proceeded and granted liberty to counsel for the Defendant to file written submissions.
31. It is imperative to note that the written submissions filed by and/or on behalf of the Defendant formed part and parcel of the record of the court. In this regard, same shall be taken into account and consideration.
32. Briefly however, it is appropriate to highlight the salient features of the Defendant's submissions. Firstly, counsel for the Defendant submitted that the suit property lawfully belonged to and was registered in the name of Stephen Githaria Nyawira, now deceased and hence same comprised of the Estate of the Deceased.
33. Secondly, counsel for the Defendant further submitted that the Defendant having been issued with the Grant of Letters of Administration, same acquired and/or accrued lawful capacity to commence and/or mount the counterclaim on behalf of the Estate of the deceased.
34. Thirdly, counsel for the Defendant submitted that to the extent that the suit property comprised part of the Estate of the Deceased, Lilian Wambui Mohamed and Peris Wambui Mwangi, both deceased, had no capacity to sell and or dispose of the suit property to Nelson Waruingi Gitogo.
35. Fourthly, Learned counsel submitted that the sale and transfer of the suit property to Nelson Waruingi Gitogo was therefore illegal and unlawful.
36. Further, counsel also submitted that to the extent that Nelson Waruingi Gitogo did not acquire a lawful and valid title over the suit property, same therefore had not title capable of being disposed to and transferred in favor of the current Plaintiffs.
37. In the premises, Learned counsel submitted that the various transactions that had been taken over the suit property were therefore illegal, unlawful and fraudulent.
38. Consequently, Learned counsel for the Defendant implored the court to make suitable Declarations to that effect and thereafter to revoke the transfer and registration of the suit property in favor of the Plaintiffs as well as to cancel the resultant subdivision arising therefrom.

**Issues For Determination:**

39. Having reviewed the statement of defense and counter-claim, the witness statement filed therewith and having appraised the oral testimony and the documentary evidence produced on behalf of the defendant; and having considered submissions filed ,the following issues do arise and are thus germane fordetermination;



- i. Whether the suit property comprises of the Estate of Stephen Githaria Nyawira, now deceased and whether same can be litigated over by the legal administrator of the said estate.
- ii. Whether the defendant's counterclaim is legally tenable.
- iii. Whether the defendant has proved the counter-claim and is thus entitled to the Reliefs sought thereunder.

### **Analysis And Determination:**

#### **Issue Number 1:**

Whether the suit Property comprises of the Estate of Stephen Githaria Nyawira, now deceased and whether same can be litigated over by the Legal Administrator of the said Estate.

40. From the onset, it is appropriate to state that the suit property, namely, L.R No's Kiambaa Thimbigua/1393, was registered in the name of one Githaria Nyawira on the October 13, 1975. Consequently, the said Githaria Nyawira became the lawful and legitimate owner of the suit property.
41. Nevertheless, it appears that upon the death of Githaria Nyawira, Deceased, his Estate was duly succeeded by one Frederick A Njenga of I.D Card No. 1881170/66 and thereafter the suit property is indicated to have been transferred vide transmission to the said Frederick A Njenga. In this regard, the transfer in the name of Frederick A Njenga was registered on the 12<sup>th</sup> May 1982.
42. Suffice it to point out that after the transfer vide transmission in favor of Frederick A Njenga, ( details in terms of the preceding paragraph), one Juma Githaria proceeded to and caused a caution to be registered against the title and same was registered on the March 19, 1988.
43. Nevertheless, it is also evident that one Frederick A Njenga appears to have passed on and his Estate was succeeded by Lilian Wairimu Mohamed, Charity Waithera Stephen and Peris Wambui Mwangi, who were duly appointed and constituted as the Legal administratix of the Estate.
44. Subsequently, upon the said Lilian Wairimu Mohamed, Charity Waithera Stephen and Peris Wasmbui Mwangi, being constituted as the legal administratix of the estate of one Frederick Achbold Njega, same proceeded to and caused the suit property to be transferred into their respective names and the transfer were duly endorsed and or entered on the 16<sup>th</sup> June 2008.
45. Thereafter, the Legal administratix of the estate of Frederick Achbold Njenga sold and transferred the suit property to one Nelson Wariungi Gitogo and the transfer to that effect was registered on the July 11, 2008. Consequently, the said Nelson Waruingi Gitogo, acquired title to and in respect of the suit property.
46. Having supplied the foregoing background, it is now appropriate to return to the issue for determination and that is, whether the suit property comprises and or forms part of the Estate of Stephen Githaria Nyawira, Deceased to warrant litigation by his Legal administrator.
47. I have pointed out elsewhere herein before that the Estate of Githaria Nyawira, now deceased appears to have been succeeded by one Frederick A Njenga, in whose favor the suit property was duly transmitted, in terms of the entry contained in exhibit D4, produced by the Defendant.
48. The suit property having been transferred vide transmission to one Frederick A Njenga, who is reported to be also deceased, same ceased to be part of the Estate of one Stephen Githaria Nyawira, Deceased.



49. At any rate, the Estate of Githaria Nyawira having been long succeeded by Frederick A Njenga, similarly, Deceased, it was not legally tenable and/ or possible for the current Defendant to proceed and commence yet another succession cause over and in respect of the same Estate.
50. Either way, it was incumbent upon the Defendant herein to follow up and authenticate the details pertaining to the succession cause relating to the estate of Githaria Nyawira and upon the ascertainment of same, to take up Summons for Revocation and/or annulment of the Grant of Letters of Administration, if any.
51. Premised on the foregoing and taking into account that the suit property had hitherto moved from the Estate of Githaria Nyawira, Deceased and vested in one Frederick A Njenga, it is my finding and holding that the suit property herein does not comprise of and or constitute the Estate of Githaria Nyawira, to warrant the litigation by the legal administrator of Stephen Githaria Nyawira, Deceased, either vide the Counter-claim herein or at all.
52. In a nutshell, my answer to issue number one is in the negative and hence I declare that the suit property ceased to be part of the Estate of Githaria Nyawira, deceased, following the transfer and registration of same in favor of Frederick Achbold Njenga, now Deceased.

**Issue Number 2:**

Whether the Defendant's counter-claim is Legally tenable.

53. In respect of the second issue herein, the starting point is to state that the defendant's counter-claim is essentially premised and/or predicated on illegal, unlawful and fraudulent sale and alienation of the suit property, firstly to Nelson Waruingi Gitogo and thereafter to the current plaintiffs.
54. Given that the defendant's counter-claim is premised and/or anchored on the illegality and fraud, it was incumbent upon the defendant herein not only to plead illegality and fraud, but to proceed further and supply particulars of the alleged illegality and fraud.
55. However, it is discernable that the best the defendant herein did, was to mention illegality, unlawfulness and fraud, albeit on passing. For clarity, no particulars of the alleged fraud and illegality were pleaded.
56. Before venturing to consider the legal effect and or implication of failing to sufficiently plead and particularize a claim founded on illegality and fraud, it is apt, to take cognizance of the Provisions of order 2 rule 4 of the *Civil Procedure Rules*, 2010, which provides as hereunder;
  4. Matters which must be specifically pleaded [order 2, rule 4.]
    - (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
      - (a) which he alleges makes any claim or defence of the opposite party not maintainable;
      - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
      - (c) which raises issues of fact not arising out of the preceding pleading.
        - (a) which he alleges makes any claim or defence of the opposite party not maintainable;



- (b) which, if not specifically pleaded, might take the opposite party by surprise; or
    - (c) which raises issues of fact not arising out of the preceding pleading.
  - (2) Without prejudice to sub-rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.
  - (3) In this rule “land” includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.
    - (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
      - (a) which he alleges makes any claim or defence of the opposite party not maintainable;
      - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
      - (c) which raises issues of fact not arising out of the preceding pleading.
        - (a) which he alleges makes any claim or defence of the opposite party not maintainable;
        - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
        - (c) which raises issues of fact not arising out of the preceding pleading.
    - (2) Without prejudice to sub-rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.
    - (3) In this rule “land” includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.
57. From the forgoing provisions of the *Civil procedure Rule*, 2010, it is evident that a plea of illegality and fraud must be specifically pleaded and thereafter the particulars must be supplied.
58. Consequently, in a pleading where fraud and illegality are alluded to but the requisite particulars are not pleaded, such a pleading is incompetent and cannot therefore anchor a claim premised on fraud and illegality.
59. On the other hand, it is also worthy to note that fraud and illegality are causes of actions which also require sufficient and credible evidence to be able to prove and the burden of proof lies on the shoulders of the claimant and not otherwise.
60. As concerns the peremptory requirement that one whose claim lies in fraud and illegality, must plead and supply particulars, it is appropriate to refer to the holding of the Court of Appeal in the case of



*Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* [2004] eKLR, where the Court stated as hereunder;

“Firstly, there is no denying that there were no particulars supplied in the defence pleading under Order VI rule 8(1) which requires in mandatory terms that:

“every pleading shall contain the necessary particulars of any claim defence or other matter pleaded including, without prejudice to the generality of the foregoing: –

- (a) particulars of any .....fraud ..... on which the party relies.
- (b) Where a party pleading alleges .....fraudulent intention.....particulars of the facts on which the party relies.”

In the absence of such pleading, the insurer is not at liberty to agitate the allegation of fraud or fraudulent intention. Fraud is a serious quasi – criminal imputation and or requires more than proof on a balance of probability though not beyond reasonable doubt. Sufficient notice and particulars must therefore be supplied to the party charged for rebuttal of such allegation.

61. Other than the foregoing decision, the significance of supplying particulars in the case of illegality and fraud before endeavoring to prove same, was re-visited by the Court of Appeal in the case of *Kuria Kiarie & 2 others versus Sammy Magera* [2018] eKLR, where the Court of Appeal stated as hereunder;

25. The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See order 2 rule 4 of the *Civil Procedure Rules*.

26. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows;-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

27. We have examined the appellants' amended defence for any pleading on particulars of fraud or illegality but there is none. The claims were therefore stillborn and no evidence could be tendered. Even if it was open to tender evidence on fraud and illegality, the mere allegation that a sale agreement and a Consent for transfer cannot be obtained on the same day is well below the standard of proof set under the authorities cited. We need not belabour this issue as



we are satisfied that it was neither properly pleaded nor strictly proved. That ground of appeal fails too.

62. In view of the foregoing, I come to the irresistible conclusion that the defendant's counter-claim, which is anchored on illegality and fraud was not sufficiently pleaded and hence same could not purport to tender evidence with a view to proving that which had not been adequately pleaded, either as required by law or at all.
63. Put differently, the defendants counterclaim, was still-borne and thus no amount of evidence, (which in any event has not been tendered), would suffice.
64. Other than the fact that the plea of illegality and fraud were not sufficiently pleaded, the claim herein would still suffer dismissal on account of Limitation of Actions Act, Chapter 22, Laws of Kenya.
65. From the certificate of title/register, which was produced by the defendant herein, it was evident that the suit property moved from the Estate of Githaria Nyawira, Deceased to Frederick A Njenga vide entry dated the May 12, 1982.
66. Besides, evidence abound that the suit property thereafter moved from the name of Frederick A Njenga, now deceased to and in favor of his legal administratrix in the year 2008, who thereafter sold and transferred same to Nelson Waruingi Gitogo, in July 2008.
67. Notwithstanding the foregoing, it was also apparent that Nelson Waruingi Gitogo sold and transferred the suit property to and in favor of the current Plaintiffs on or about the year 2013.
68. Essentially and taking into account the various Entries, the transactions involving the suit property occurred and/or arose more than three years, before the Defendant mounted the counterclaim.
69. To my mind, a claim founded on illegality and fraud are claims in tort and hence ought to be commenced within three years of the cause of action or from the date of discovery of same, whichever is latest.
70. To this end, it is appropriate to take cognizance of the provisions of section 4(2) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya, which provide as hereunder;
  - (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:
71. In my humble view, by the time the defendant lodged the counterclaim on the February 28, 2020, the Limitation period had long lapsed and the defendant's claim over and in respect of the suit property, if any, had become sterile, redundant and extinguished.
72. Consequently, the defendant herein was permanently non-suited and could therefore commence, originate and/or otherwise maintain the subject counterclaim with view to invalidating the transactions, some of which were nearly 40 years by the time the counterclaim was filed.
73. To underscore the legal effect, implication and tenor of the law of limitations, it is appropriate to restate the holding of the court in the case of *Moffat Muriithi Muchai (suing on behalf of the Estate of the Late Milka Njoki Muchai (Deceased)) v Wanjiru Wanjohi Gatundu & 2 others* [2019] eKLR, where the court stated as hereunder;
  34. Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Plaintiff's mother having bought the suit land in the 1990's and thereby claiming



ownership in the same, he could seek to recover it from the 1<sup>st</sup> defendant, but only if he did so within twelve years from the date on which the right of action accrued to him.

35. There is no doubt that a period of about sixteen years have lapsed from the date on which the right of action accrued to the date when this suit was filed. No leave for extension of time to file the suit outside the twelve-year period has been exhibited before this court. The plaintiff needed to commence his claim within the time prescribed under Section 7 of the Limitation of Actions Act. It follows therefore that by the time he filed this suit, the claim was statute barred.
74. Similarly and on the basis of the foregoing, the counterclaim also fails at the hurdle of Limitation of Actions Act, Chapter 22 Laws of Kenya.

### Issue Number 3

Whether the defendant has proved the counterclaim and is thus entitled to the Reliefs sought thereunder.

75. It is common ground that the defendant was the sole witness who testified in respect of the subject matter.
76. On the other hand, it is also appropriate to recall that the defendant was also not cross examined and hence the evidence tendered and the statement relied upon were not impeached vide cross examination.
77. Nevertheless, it is trite and established law that even when the evidence by a litigant is not subjected to cross examination or even where the matter proceeds on the basis of formal proof, the claimant is still enjoined to prove his/her case to the requisite standard, established by Law.
78. It bears repeating that the burden of proof lies on the person, who seeks to attract a positive finding in his/her favor as pertains to the issue in dispute. Consequently, the Burden of Proof in respect of the subject matter fell on the defendant.
79. However, the question begs the answer is; whether the defendant discharged the burden of proof as required under the law. See Section 107, 108 and 109 of the Evidence Act chapter 80 Laws of Kenya.
80. To my mind, having reviewed the totality of the evidence tendered and the pertinent issues of law, most of which have been enumerated elsewhere herein before, I come to the conclusion that the defendant has fallen short of the burden placed on him.
81. Without belaboring the point that even when the claimant is not subjected to cross examination or is tendering evidence in a matter of Formal proof, same is still obligated to prove his case, it is appropriate to restate the dictum of the Court of Appeal in the case of Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi & another [2014] eKLR, where the court observed as hereunder;

“On perusing the judgment and hearing Mr. Mwangi, what comes through clearly and was repeated several times over, was the position that since the appellant did not deny the facts stated in the affidavits of the 1<sup>st</sup> respondent then he was deemed to have admitted those facts. With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1<sup>st</sup> respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand section 108 of the Evidence Act to be demanding of a party like the 1<sup>st</sup> respondent that:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”



82. In view of the foregoing, it is not enough to merely throw evidence on the face of the court and imagine that because the claim is not opposed, the court is enjoined, without much ado, to allow the claim, irrespective of whether or not proof has been supplied.
83. It is sufficient to underscore that before a court of law can return a favorable verdict, the Party chargeable with the burden of proof, must meet and/or discharge same, to the requisite standard, namely, on a balance of probabilities.
84. Short of that, the end result, must no doubt be a dismissal.

**Final Disposition:**

85. Having considered the counter-claim mounted by and/or on behalf of the defendant and having taken into account the relevant applicable law, it must have become obvious that the counterclaim by and or on behalf of the defendant herein, is not only misconceived and Statute barred, but same also is legally untenable.
86. Consequently and in the premises, I am minded to make the following orders;
- i. The counterclaim by the defendant be and is hereby dismissed.
  - ii. No orders as to costs.
87. Nevertheless, to the extent that the plaintiffs' suit had been hitherto been dismissed for want of prosecution with costs, the defendant herein shall still be entitled to the costs attendant to the dismissal of the plaintiffs' suit.
88. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF AUGUST 2022.**

**OGUTTU MBOYA**

**JUDGE**

**In the presence of;**

**Joan court assistance**

**Mr. Mburu for the Defendant.**

**No appearance for the Plaintiffs.**

