Kurumah v Teba Limited & another (Environment and Land Appeal 34 of 2021) [2022] KEELC 12742 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12742 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND APPEAL 34 OF 2021

LG KIMANI, J

SEPTEMBER 29, 2022

BETWEEN

MICHEAL KAMAU KURUMAH ..... APPELLANT

AND

TEBA LIMITED ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF KITUI ..... 2ND RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate Hon.. S. Mbungi in Kitui Civil Case No.214 of 2013 delivered on 7th February 2020)

JUDGMENT

1. The appellant appeals to this court from the judgment of the learned Chief Magistrate in Kitui Civil Case No 214 of 2013 delivered on February 7, 2020 and sets forth the following grounds of appeal in their memorandum of appeal dated February 18, 2020:

    1. That the learned trial magistrate erred and misdirected himself both in law and facts by failing to find that the plaintiff in the suit was Faiz Gitau t/a TEBA, a limited liability, which according to the pleadings, was not a short form of any other entity or another limited liability company at all.

    2. That the learned trial magistrate erred and misdirected himself further both in law and fact by failing to note or find that the respondents in the suit were litigating with a person trading as a limited liability company known as TEBA Limited company which was the plaintiff and not any other company or entity.

    3. That the learned trial magistrate erred and misdirected himself both in law and in fact by failing to find that the plaintiff's attempt to amend the plaintiff's name or description at the trial and

during submissions amounts to deviation from the pleadings and introducing a new plaintiff altogether.

4. That the learned trial magistrate erred and misdirected himself both in law and facts by filing to find and appreciate that from the plot allotment committee, the letter of allotment all the way to all other documents held by the local authorities, TEBA Limited was not the name used in all official records, and the one allocated the plot.

5. The learned trial magistrate erred and misdirected himself both in law and in fact by failing to appreciate that the location (registry index map and deed plan) of the plot described as 2/F or 2/159 was heavily disputed and/or contested in the suit and so, the lease without the registry index map and deed plain reference corresponding numbers was not conclusive evidence of the dispute.

6. That the learned trial magistrate erred and misdirected himself both in law and facts by failing to appreciate that, a deed plan must always accompany a title document (lease) to authenticate the title, and in absence of the same, the lease was not conclusive evidence.

7. That the learned trial magistrate erred and misdirected himself both in law and facts by failing to note and find that the controversial lease was spiritedly obtained fraudulently during the trial in order to assist the plaintiff's case.

8. That the learned trial magistrate erred and misdirected himself both in law and facts by failing to find that the plot described as 2/F or 2/159 did not exist on the ground and as such, the purported lease produced in court did not and/or could not be linked up to and/or connected with the plot in dispute.

9. That the learned trial magistrate erred and misdirected himself both in law and facts failing to find that the county government of Kitui ownership documents and the lease produced contradict each other on the actual or existence of the plot No 2/F or 2/159 on the ground, hence rendering the plaintiff's case uncertain in fact.

10. That the learned trial magistrate erred and misdirected himself both in law and facts by failing to find that where the process of obtaining a lease is tainted and/or shrouded in improprieties s 30(3) of *Land Registration Act* No 3 of 2012 is not a savior

2. The appellant prays that the appeal be allowed, the judgment of the lower court be quashed and set aside and be substituted with an order dismissing the plaintiff's case with costs.

Summary of case

3. The plaintiff in the trial court had filed an amended plaint dated August 16, 2013 and amended on October 28, 2014 claiming ownership of plot number Kitui Municipality Block 2/F which is more particularly described in part development plan number KTI/29/97/9 having been allocated the same in 1997 and was at the time of filing the suit at an advanced stage of obtaining a lease. The plaintiff further claimed that the plot had after resurvey been renamed Kitui Municipality Block 2/159. That on or about the July 27, 2013, the 1st defendant with the authority of the 2nd defendant started to put up structures on the plaintiff's plot number KTI/29/97/9-f/2 causing them loss and damage. They therefore prayed for judgment against the 2nd defendants for a declaration that the suit property belongs to them and a permanent injunction barring the defendants from the property.

4. The 1st defendant filed a defence dated August 20, 2013 where he denied starting construction on the plaintiffs plot. He contends that he is the owner of plot number e granted by Government of

the republic of Kenya through the former Municipal Council of Kitui and claimed that he had been developing the plot since 2008 and that he had constructed the building to the lintel stage without any objection from anyone.

5. The 2nd defendant filed a defence and denied the plaintiffs claim. The 2nd defendant claims that it has always operated within the law and any approvals given by its officers for construction were given after the developer furnishes sufficient proof of ownership of the subject property.

6. The trial magistrate found that the plaintiff had, on a balance of probability proved its case and delivered judgment in favour of the plaintiff. Aggrieved with the outcome, the defendant in the trial court filed the appeal herein.

Summary of evidence before the Trial Court,

7. The court gave pre-trial directions by consent of the Advocates for all the parties on April 20, 2014 that the "director of surveys Kenya to verify and authenticate the positions of plot Nos 2/F or 2/159 and No e on the ground within Kitui township and file a report within sixty (60) days."

8. The parties were not satisfied with the report filed necessitating further pre-trial directions which were given on June 30, 2015 by consent of the advocates for the parties where it was directed as follows:-

    i. "Surveyor and planners from the office of physical planning Kitui county, in conjunction with the surveyors from the lands, Infrastructure and Urban County Government of Kitui to visit, verify and authenticate the positions of plot Nos 2/F or 2/159 and No e on the ground within Kitui township on the ground and location.

    ii. That the parties be, and it is hereby ordered that they be allowed to avail to the officers all the relevant documents relating to the ownership of their respective plots for purposes of verification and authentication.

    iii. That parties be, and it is hereby ordered that they be accorded a fair hearing, time and opportunities to ventilate their ownership legend.

    iv. The findings and the report be and it is hereby ordered to be filed within forty five (45) days from today by the chief officer, lands , infrastructure and urban development County Government of Kitui."

9. In support of the plaintiffs case, PW 1 Faiz Gitau Mbugua testified as one of the directors of the plaintiff Teba Limited. He relied on his witness statement dated May 21st , 2018. He stated that the company applied for a plot within Kitui Town in 1997 and was allocated plot number Kitui Municipality Block 2/F by the plots allocation committee on May 27, 1997 who issued letter of allotment dated July 1, 1997. He claimed that the plaintiff paid all dues for allotment including stand premium, rent, survey fees and other charges. The plaintiff subsequently obtained a lease from the government of Kenya.

10. PW1 stated that on or about October 27, 2013 he found some workers constructing on the plot who told him that the 1st defendant was the owner of half of the plot. He reported the matter to the municipal council and the 1st defendant was issued with a letter but did not stop the construction so he proceeded to file this suit.

11. PW 1 further testified that in the year 2015, the court ordered a surveyor to identify the plot and the beacons of the plot and a survey report was filed in court showing their plot turned out to be plot no 159 where the defendant had been constructing. On November 9, 2015, the county report from the director of survey stated that the defendant had encroached 30% into his plot and 70% on a road reserve. He also stated that he eventually got a lease certificate.

12. On cross-examination, PW 1 confirmed that the certificate he had submitted as an exhibit is named Tana estuary beach adventure limited and not Teba limited. He also stated that he had not filed memorandum or articles of association of Teba limited to show that it dealt with real estate. Further, that he has not given the full copy of the minutes of the meting which allocated land to him and he stated that the company was not given a letter of notification of allotment but was only given a letter of allotment.

13. PW 1 also stated that the defendant had applied for necessary construction approvals. He denied knowing whether the 2nd defendant used to send officers to inspect the progress of the construction. He confirmed paying for the survey after filing the suit stating that it was not a mistake to fast track the process of the lease certificate even if there was a dispute as to the owners of the plot.

14. PW 1 further stated that when the director of survey was making his report, all parties were present for the meetings. The report did not indicate the location of plot no E and the report had also said that the construction of the plot had encroached onto his plot by 27%. He stated that plot no E did not exist.

15. Upon re-examination, PW 1 confirmed that TEBA is short form for Tana Estuary Beach Adventure Company Limited. He confirmed that Olivia was allocated Plot no E and doesn't know whether she sold it to the 1st defendant and stated that he had no issue with that plot. He confirmed that there was no court order stopping him from following up on his lease. The plaintiff then closed its case.

16. On the defence case, DW 1, Michael Kuria gave his sworn evidence that he is a business man from Kitui and knows the plaintiff. He relied on his witness statement and bundle of documents. He stated that he was a bona fide purchaser of plot no e (E) from Olivia Mawia Nzuku who was beneficiary of a grant from the Government of Kenya through the former Municipal Council of Kitui. That the said Olivia was allotted the plot vide a letter of allotment dated July 7, 1999 and was transferred to his name. He was given a Part Development Plan (PDP) in 2009 indicating the position of the plot. He stated that by the time the case was filed he had already put up the building and was in the process of getting a Lease.

17. The 1st defendant claims that he started construction of residential phouses on the plot in 2010 and the construction was under constatnt inspection by relevant officers from the council and the building was at an advanced stage. He further states that plot number F and plot e (E) are different and their locations are different and that the problem was with the County Government officers who were not able to locate plot no F and have misled the plaintiff to believe that the location of plot F is the same as plot e (E). Further that as per the minutes of the District allocation committee of May 27, 1997 both plot F and e (E) appear where plot e (E) was for compensation to the seller.

18. That on July 20, 2013 long after he had started construction with approval from municipal council and physical planning department he got a letter from the clerk of the council indicating that the plaintiff had complained that it owned the plot. The 1st defendant further claimed that while the suit was still pending before court, the plaintiff with the help of other land agencies obtained a lease over the disputed plot.

19. The 1st defendant complained that when the plaintiffs plot was being allocated it was clearly plot F but it was transferred into plot no Kitui Municipality Block 2/159 all in order to validate the claim that the location of the said plot is where plot number e is located.

20. The defendant claimed that the letters that the plaintiff produced in court were not genuine and that the plaintiff's land did not exists since a lease certificate can't be issued to two people over the same land. He stated that the plaintiff's plot and his plot are in different locations. Upon cross-examination, he confirmed that buying the plot from Olivia Mawia and produced a sale agreement between her father

and himself for Ksh 300, 000. He had done a search before buying the plot and was given him the minutes of the Council showing that the Plot no E had been allocated to her and an allotment letter dated July 7, 1999 and produced them as exhibits. He stated that he paid stamp duty to the government and that he paid for the building approvals. Further, it was his statement that the surveyor put up beacons but did not give him a beacons certificate. He disagreed with the report that stated that he had encroached onto Plot no F.

21. On further cross-examination, he confirmed that he had put up the building in Plot no E but not plot no F. He stated that he got all the building approvals and that the municipal officers would come and inspect the progress. On re-examination he reiterated his statement and stated that the court did not stop him from putting up the building. He accused the plaintiff of faking the documents produced before the court and noted that he had produced a PDP showing that he was allowed to put up the building in Plot no E.

22. DW 2 Julius Muvithi Nzuki stated that he is a retired man who was working as a district surveyor in Kitui from 1973. He stated that he was conversant with plots location in Kitui Town. He recalled Plot no F councilor Kivilo came to his office and requested him to point out Plot no 7 on the ground and that initially, the plot was known as Plot no E. It was later allocated to him and Olivia Muimi Nzula is his daughter. He sold the plot to the 1st defendant. He stated that Plot F is not the same as Plot E. He further stated that the plot does not belong to the plaintiff and that the plaintiff does not know the location of his plot. Upon cross-examination, DW 2 stated that he was a member of the plot allocation committee and that his daughter was registered as the owner of the plot though in actual fact it was his plot because at the time of allocation she was not yet 18 years old. According to him, he sold plot no E to the 1st defendant and does not know whether it was merged with Plot f. He did not know whether the 1st defendant was given approval by the municipal council for construction.

23. The trial Magistrate found that the plaintiff had proved his case on a balance of probabilities and entered judgement in his favour as prayed in the Plaint.

Appellant's written submissions

24. The appellant consolidated and submitted on grounds 1,2,3 and 4 that TEBA Limited is not described in the pleadings as the short form of Tana Estuary and Beach Adventures Limited and therefore nothing should be inferred or assumed in that name more than was described in the pleadings since it is trite in law that parties are bound by their pleadings. According to them, the Trial Court was well aware of this while allowing the misdescription of parties. They relied on the authorities of *Fort Hall Bakery Supply Co v Frederick Muigai Wangue* (1959) EA 474 at page 475 and *Housing Finance Company of Kenya Ltd v Embakasi Development Project* (2004) 2KLR at page 554where it was held that a non-existent person cannot sue and the court cannot allow the action to proceed once it is aware of this.

25. The appellant noted that even after amending the plaint, the 1st respondent failed to rectify its pleadings to tally with its evidence and proceeded as Faiz Gitau t/a TEBA Limited. The appellant cited order 2 rule 6 of the *Civil Procedure Rules* which provides that no party may in any pleading make an allegation of fact or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit. The appellant relied on the authority of *David Sironga Ole Tukai v Francis Arap Muge & 2 others* Civil appeal no 76 of (2014)eKLR where the court held that parties to litigation cannot be allowed to raise a different issue from that which it has pleaded without due amendment being made. The appellant also quoted from the case of *Libyan Arab Uganda Bank For Foreign Trade and Development & Anor v Adam Vassiliadis*(1986) UG CA which cited the dictum of Lord Denning in *Jones v National Coal Board* (1957) 2QB 55 while faulting the trial court for allowing the purported short form without amendment.

26. The appellant pointed out that in all the documents produced by the 1st respondent in support of its case, the company was known as Tana Estuary Beach Adventures Limited so the plaintiff in the trial court and the lease holder are two different personas.

27. On Grounds 5 and 6, the appellant submitted that the 1st respondent's claim was for Kitui Municipality Block 2/f described in PDP number KTI/29/97/9. However, the plaintiff amended the plaint and claimed that the disputed plot had been resurveyed and named Kitui Municipality Block 2/159 but it was not disclosed under which Deed Plan or PDP or survey plan was the resurveying done. The appellants submitted that the said plot's location on the ground could not be ascertained at the time of hearing.

28. On grounds number 7, 8, 9 and 10, the appellant submitted that the Trial Court failed to appreciate that the lack of the Registry Index map and Deed Plan of the plot described as 2/F or 2/159 was heavily disputed and contested in the suit. Further, that the 1st respondent did not produce a cadastral survey documents to show that the plot was resurveyed while quoting from the case of Nelson Kazungu Chai 7 9 others v Pwani University (2014)eKLR. The appellant stated that they had written a letter to the National Lands Commission questioning how a certificate of lease was issued to the 1st respondent when there was an ongoing case. The appellant also relied on section 26 of the *Land Registration Act* citing the instances where a certificate of title would come into question.

29. It is the appellant's submission that the 1st respondent failed to tender to court the circumstances under which it obtained the certificate of lease and as such the same must be deemed to be through fraudulent means according to them.

30. On whether the certificate of lease issued during the pendency of a suit is valid or null, the appellant relied on the case of *Ali Gadaffi & another v Francis Muhia Mutungu & 2 others*(2017) eKLR who addressed the doctrine of Lis Pendens. The appellant submitted that the steps taken by the 1st respondent in obtaining a certificate of lease when the case was still ongoing was prejudicial to the appellant and that it was a nullity. The appellant prayed that the appeal be allowed with costs.

1st respondent's written submissions

31. The 1st respondent stated that they object on a point of law that the appeal as drawn is incompetent and ought to be struck out for the reason that the decree appealed against was not filed with the memorandum of appeal or in the record of appeal. The 1st respondent pointed out that the appellant attempted to cure the omission by inclusion of an uncertified order in the supplementary record which was filed without the leave of the court. In support of this, the 1st respondent relied on the authority in Kiambu HCCA no 31 of 2018 *Racheal Wambui Ng'ang'a & another v Rahab Wairimu Ng'ang'a* (2020) eKLR.

32. On grounds 1-4 of the memorandum of appeal, the 1st respondent submitted that the heading of the appeal is deliberately erroneous because the parties before the subordinate court were as contained in the amended plaint dated 28th October 2014 contained in the Record of appeal at page 76-78 as TEBA LIMITED and nor Faiz Gitau.

33. The 1st respondent noted that Plot Number 2/F-Kitui Municipality was allocated to TEBA LIMITED which is an acronym of Tana Estuary Beach Adventures Limited and annexed the Lease to the submissions stating that the appellant deliberately omitted it from the record of appeal. They relied on the holding of Gikonyo in Nairobi HCCC no 222 of 2012 *-LUBULELLAH-ASSOCIATES-RULING.pdf Fubeco China Fushun v Naiposha Company Limited and others*(2014)eKLR where the

court held that such misdescription of the plaintiff is not fatal to the proceedings and does not defeat a party's cause of action.

34. Submitting on grounds 5 and 6 of the memorandum of appeal, the 1st respondent stated that the principal dispute before the subordinate court was the actual location of plot number 2/E and 2/F on the ground and whether the appellant had trespassed onto the 1st respondent's plot. This is the reason why the court on June 30, 2015 ordered the Chief Officer-Lands, Infrastructure and urban Development-Kitui Government to visit, verify and authenticate the positions of the two plots and file a report to the court. The report indicated that the appellant had trespassed onto the appellant's land and built on 0.012 ha of the suit plot and according to the 1st respondent, the report was not contested this is what informed the judgment of the subordinate court.

35. Lastly, submitting on grounds 7-10, the 1st respondent quoted section 26(3) of the *Land Registration Act* submitting that a title can only be challenged on grounds that it was obtained fraudulently, illegally or through a corrupt scheme. They relied on Justice Angote's breakdown of the procedure of allocation of government land as set out in the case of *Nelson Kazungu Chai and others v Pwani University*(2014) eKLR. Stating that the 1st respondent has followed the process that took thirteen years and was issued with a lease in December 2015 where there was no fraud, misrepresentation, illegality or shortcuts.

36. The 1st respondent states that the appellant on the other hand does not appear to have done anything to obtain a lease for his plot no 2/E and was content to build on the 1st respondent's plot no 2/F even after the report. The 1st respondent therefore submits that the Judgment should be upheld and the appeal struck off or dismissed with costs to them.

Analysis and Determination

37. The role of an appellate court was stated in the case of *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] e KLR, with regard to the duty of the first appellate court;

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

38. Before dealing with the issues for determination, we must address the 1st respondent's assertion that the copy of the Decree did not accompany the memorandum of appeal.

Order 42 rule 2 of the *Civil Procedure Rules*; provides as follows: -

> "Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such a time the court may order, and the court need not consider whether to reject appeal summarily under section 79B of Act until copy is filed".

39. I note that the appellant did file a copy of the decree on page 24 of the supplementary record of appeal, albeit without leave of the court. However, the copy of the Decree is not certified Maraga, J (As he then was) in *Shashikant C Patel v Oriental Commercial Bank* [2005] eKLR held inter alia;

> " ...we should never lose sight of the fact that rules of procedure, though they may be followed are the handmaids of justice. They should not be given a pedantic interpretation which at the end of the day denies parties justice."

40. In my opinion, since a copy of the decree as well as the judgment have been produced in the record, the court will exercise its discretion and overriding objective to proceed to hear and determine the appeal.

41. Having considered the grounds of appeal, the proceedings and ruling of the trial court, submissions of counsel for the appellant, the respondents and the authorities relied on i will consider and determine the grounds of appeal as combined and dealt with by counsel for the appellant as hereunder:-

a) Ground 1, 2, 3 and 4

b) Ground 5 and 6

c) Grounds 7-10

a) Ground 1, 2, 3 and 4

42. According to the appellant, TEBA Limited is not described in the pleadings as the short form of Tana Estuary and Beach Adventures Limited and therefore nothing should be inferred or assumed in that name more than as it was described and that this was a non-existent entity. During the hearing of the suit, PW 1, a director of the 1st respondent confirmed that TEBA Limited was a short form of Tana Estuary and Beach Adventures Limited. A look at their bundle of documents in the trial court shows that the Letter of Allotment for Residential Plot no F- Kitui Municipality on attached plan no KTI/29/97/9 as well as the rates clearance refers to TEBA Limited. The certificate of incorporation and lease on the other hand, refer to Tana Estuary and Beach Adventures Limited. In my opinion, it is clear that they are one and the same.

43. In *-lubulellah-associates-ruling.pdf Fubeco China Fushun v Naiposha Company Limited and 11 -lubulellah-associates-ruling.pdf Oth-lubulellah-associates-ruling.pdf Ers* ML HCCC no 222 of 2012 [2014] eKLR, relied upon by the 1st respondent, Gikonyo J, expressed as follows, which view I agree with:

> " The use of Fubeco China Fushun as the plaintiff, at worst, is a misdescription of the party, that is, China Fushun no 1 Building Engineering Company Limited. Such misdescription of the plaintiff is not fatal to the proceedings and does not defeat a party's cause of action. in taking this decision, the court is guided by the constitutional desire to serve justice which is the very reason why courts have been given unfettered discretion in ordering an amendment in such case in order to reflect and have the correct parties before the court. Under that power, the court would still allow the amendment to correct the misdescription. I so order for the avoidance of doubt. I hold and find that this is not a case of non-existent or faceless entity that would invariably be incapable of suing or being sued."

44. TEBA Limited being the short form of Tana Estuary & Beach Adventures Limited is not a non-existent party as was the case in *Housing Finance Company of Kenya Limited v Embakasi Youth Development Project* (2004)eKLR cited by the appellant since the 1st respondent does exist and was issued with

documents in the name of TEBA Limited. It is important that justice be administered without undue regard to procedural technicalities as enshrined under by article 159(2)(d) and the Trial Magistrate took note of PW 1's statement that TEBA limited is an acronym for Tana Estuary and Beach Adventures Limited. He therefore did not err in this regard.

b) Ground 5 and 6

45. The appellant has also submitted that the Lease belonging to the 1st respondent was highly contested and should have been accompanied with a PDP, Deed Plan and a Registry Index Map. In *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR the court held that:

> " It is trite law that under the repealed government lands act, a part development plan must be drawn and approved by the commissioner of lands or the minister for lands before any unalienated government land could be allocated. after a part development plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees.
>
> "It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co Ltd v The Hon AG*, Mombasa HCCC no 276 of 2013 where Njagi J held as follows:
>
> > "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot."

46. The court notes that the plaintiff did plead in the amended plaint that he was allocated plot no 2-F particularly described in PDP no KTI/29/97/9. The same PDP no is reflected in the minutes of the Kitui District Plots Allocation Committee meeting held on May 27, 1997 where plot number E was allocated to Olivia Mawia and plot number F was allocated to TEBA Ltd. The submission of the appellant that there was no part development plan.

47. In my view the argument that would have held water would have been that the PDP that would have shown the specific location of all the plots allocated and especially that allocated to the 1st respondent was not attached and/or produced in evidence. However this issue was resolved by the parties themselves when the court gave pre-trial directions with the agreement of the advocates for all the parties on April 20, 2014 and June 30, 1015 that the surveyor and planners from the office of physical planning Kitui county, in conjunction with the surveyors from the Lands, Infrastructure and Urban County Government of Kitui to visit, verify and authenticate the positions of plot Nos 2/F or 2/159 and no e on the ground within Kitui Township on the ground and location. Secondly, the parties were directed to avail to the officers all the relevant documents relating to the ownership of their respective plots for purposes of verification and authentication. Thirdly, the parties were to be accorded a fair hearing, time and opportunities to ventilate their ownership legend. Fourthly, the findings and the report were to be filed within forty five (45) days by the chief officer, lands, infrastructure and urban development county government of Kitui."

48. The report was filed in court on November 19, 2015 and also attached to the plaintiffs Lists of documents dated May 21, 2018. I am satisfied that the said report was obtained by the parties with the

intention that the same was to be utilized by the court concerning the issues that were to be addressed in the report. The contents of the report show that the 1st respondent submitted its ownership documents for verification and authentication while the appellant did not submit his ownership documents as required by the court. It was therefore not possible to verify his documents. Among the documents that were presented by the plaintiff was a part Development Plan Ref KTI/29/97/9 dated June 23, 1997 approval no 87. There was also attached to the report a letter from the National Land Commission dated September 5, 2013 addressed to the director of survey confirming allocation of the plot herein to the respondent vide letter Ref. no 35382/X dated July 1, 1997 and its PDP number KTI/29/97/9 approved on June 23, 1997 and requesting for submission of a signed sealed and amended RIM to facilitate processing of title.

49. From the report filed in court and the documents submitted it is clear that the PDP KTI/29/97/9 was prepared and approved long before the suit was filed in court. According to the report the surveyors visited the site and after carrying out ground work and ascertaining the location of parcel Kitui Municipality 2/159 they confirmed that there was encroachment on the said parcel. They confirmed that the appellant had partly built on the said plot to the extent measuring 0.012 Ha. The trial court found that the appellant did not offer an alternative report by a surveyor that contradicted the findings of the report filed and thus the trial court was not wrong in finding in accordance with the report.

50. The other contention that the appellant had is that the Certificate of Lease being obtained during the pendency of the suit offended the doctrine of lis pendens, and was therefore fraudulent. In the case of *In Re Estate of Solomon Muchiri Macharia* [2016] eKLR the court noted thus:-

> " The common law doctrine of lis pendens effectively provides that during the pendency of a suit in which any right to immovable property is in question, the property cannot be transferred by any party to the suit so as to affect the rights of other parties.
>
> The Black's Law Dictionary, defines lis pendens as the jurisdiction, power or control acquired by a court over property while a legal action is pending..... Lis pendens, literally meaning "litigation pending," originally referred to the common law doctrine that a buyer takes real property subject to the result of any pending litigation regardless of whether he knows of the lawsuit.' The doctrine prevented a property owner from frustrating the administration of justice by selling property which was the object of litigation"

51. The *Black's Law Dictionary* defines lis pendens as the jurisdiction, power or control acquired by a court over property while a legal action is pending. The Supreme Court of India in the case of KN Aswathnarayana Setty (D) Tr. LRs & Ors v State of Karnataka & Ors stated that the doctrine of lis pendens is based on legal maxim 'ut lite pendente nihil innovetur' (During a litigation nothing new should be introduced). The principle of 'lis pendens' is in accordance with the equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee pendente lite is bound by the decree just as much as he was a party to the suit.

52. In the present case it is noted that the 1st respondent did not sell or transfer the land in dispute to a third party. Further it is noted that the application of the doctrine of lis pendens does not require that mere pendency of a suit should prevent one of the parties from dealing with the property constituting the subject matter of the suit. The law simply postulates a condition that the alienation will, in no manner, affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court.

53. Further it was the appellants contention in his defence that he was building on his own plot number e and not on the 1st respondents plot and that there was no dispute as to ownership of the two plots e and F. The trial court indeed properly directed itself that the issue in contention was the location of the two plots. In my view the 1st respondent did nothing wrong in obtaining the Lease and neither did the 2nd respondent in processing the Lease. However it is noted that the lease held by the respondent would be subject to the findings of the court with regard to the issues at hand. The doctrine of lis pendens provides for the jurisdiction, power and control acquired by a court over property while a legal action is pending. In the present case the power of the court was not affected by the act of the plaintiff processing and obtaining a lease over the specific suit property since the issue for determination was not a dispute over ownership and title of the property but of the location of the property. The lease in any event remained in the name of the plaintiff and was at all times still subject to the jurisdiction, power and control of the court.

c) Grounds 7-10

54. The appellant alleges fraud on the part of the 1st respondent in obtaining the Lease document for plot no Kitui Municipality Block 2/159. However, the challenge to the title on the ground of fraud was not pleaded in the defence. The appellant had the opportunity to amend his defence when the he became aware that a title deed had been obtained. From the record I do find that no evidence was placed before the court to prove that the Lease was obtained fraudulent apart from stating that it was obtained during the course of the trial which as we have seen above, the 1st respondent was not prevented from doing. In the case of *Vijay Morjaria v 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."

55. The Court in *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR discussed the burden of proof as follows:

> "The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant. It was upon the appellant to prove that he did not affix his signature on the transfer of the suit premises in favour of the 1st respondent."

56. In my opinion, the 1st respondent produced documents of ownership of what was initially plot number 2F which later became Kitui Municipality Block 2/159 and a Lease over the said property in its name issued under Section 30(3) of the *Land Registration Act*. The appellant then had the evidential burden in proving that the Lease was obtained fraudulently and in my view he did not discharge this burden before the trial court. There is no evidence of fraudulent dealings by the 1st respondent. The trial

magistrate therefore did not err in holding that the plaintiff had proved their case on a balance of probabilities.

57. It is also the appellant's contention that there was no consensus as to the actual existence and location of the suit property on the ground. However, as earlier found, counsel for the parties agreed to have a report from the surveyor and planners from the office of physical planning Kitui County, in conjunction with the surveyors from the Lands, Infrastructure and Urban County Government of Kitui to visit, verify and authenticate the positions of plot Nos 2/F or 2/159 and no e on the ground showing the boundaries of the plots in dispute. The report confirmed that indeed the suit property Parcel No Kitui Municipality Block 2/159 was encroached onto. The survey report confirmed the existence of the plots and ground location and boundaries. Supported by this report and other evidence adduced during the trial, the trial court arrived at its judgment. The trial court noted that even though the 1st defendant disagreed with the report, he did not avail any other expert report stating otherwise. The court found that:

> " ....no evidence has been brought forward by the defendants to show collusion between the plaintiff and the experts such that the court can doubt the reports."

58. In the case of *Christopher Ndaru Kagina v Esther Mbandi Kagina & another* (2016) eKLR, the Court stated that: -

> " Under the common law, for an expert opinion to be admissible it must be able to provide the court with information which is likely to be outside the courts' knowledge and experience, but it must also be evidence which gives the court the help it needs in forming its conclusions...The duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise. This is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions.

59. I agree with the trial court that there was no other expert evidence brought forth to indicate that the appellant had not encroached onto the 1st respondent's suit property. In the absence of such a report, the trial court relied on the 2nd respondent's expert opinion from the department of survey and i do find that the trial court was right in doing so.

60. For the foregoing reasons I find that the appeal herein lacks merit and the same is hereby dismissed with costs to the respondents.

DELIVERED, DATED AND SIGNED AT KITUI THIS 29TH DAY OF SEPTEMBER 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgment read in open court in the presence of-

C. Nzioka Court Assistant

Kilonzi Advocate for the appellant

No attendance for the 1st respondent

Mwalimu Advocate for the 2nd respondent