Jattani v Jattani (Environment and Land Appeal E009 of 2023)
[2025] KEELC 5019 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5019 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E009 OF 2023

JO MBOYA, J

JULY 3, 2025

BETWEEN

ABDI GUYO JATTANI ..... APPELLANT

AND

GUYO JATTANI ..... RESPONDENT

(Being an appeal from the judgment of Honourable M. S. Kimani (Mr.) the Principal Magistrate Court at Moyale delivered on 12th May 2023 in ELC No. E006 of 2023)

JUDGMENT

1. The dispute beforehand brings to mind the opening remarks in the case of Elizabeth Wambui Githinji & 29 others vs Kenya Urban Roads Authority (KURA) & Another [2019] eKLR where the Court of Appeal [Per Ouko PCA] stated thus;

> In Kenya the attachment to land is passionate, emotional and almost fanatical. Nations, neighbours, siblings, spouses and even strangers fight over land. In some instances, the disputes degenerate into bloodshed and death. This Court in Gitamaiyu Trading Company Ltd v Nyakinyua Mugumo Kiambaa Co. Ltd & 11 others Civil Appeal No. 84 of 2013, explained why land is such an important asset thus;
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> "Land, no doubt, is not only the most important factor of production but also a very emotive issue in Kenya. Land remains the most notable source of frequent conflicts between persons and communities." [Underlining supplied].

2. The instant matter pits a son against the father. The appellant herein is admittedly the son of the respondent. Nevertheless, the disagreement pertaining to and concerning ownership of plot number 212 situated in Moyale town, which is being claimed by the appellant [son] is mind-boggling and fascinating. It is equally unfathomable.

3. The dispute beforehand is not just an ordinary dispute. Suffice it to underscore that the appellant herein has escalated the dispute to a different pedestal which is discernible from the testimonies that were tendered before the trial court. Notably, PW 1 [the respondent herein] adverted to a threat to end his life over ownership of the suit property. Additionally, PW 2, [Fatuma Guyo Jattani] also testified that the appellant herein [who is her younger brother] had threatened to end her life if she [PW 2] testified in the lower court matter on behalf of her father, namely; the Respondent.

4. Other than the threats that were referenced by the respondent and PW 2, it is also worthy to note that during the pendency of the appeal, the Appellant herein is reported to have gone to the offices of the Directorate of Human Resource Management, Development and Administration and issued threats which were captured at the foot of the Letter dated 30th June 2025 addressed to; The Commanding Officer, Judiciary Police Unit. The Letter under reference stated inter alia;

> During the interaction, the individual identified himself as a police officer attached to the Kenya Prisons Service. He issued a threat, stating that there would be serious consequences if his case was not heard on the scheduled date. His exact words were, "Damu Itamwagika" [blood will be shed]. The individual came again today morning for follow-up and was directed to the office of the judiciary Ombuds person for further guidance.

5. In conclusion, the Directorate of Human Resource Management, Development and Administration, stated thus:

> " In light of this, we kindly request your office to deploy armed police officers to Isiolo Law Courts on the 3rd of July 2025. The officers should conduct a thorough security screening of all individuals entering the court premises. Additionally, no persons should be permitted to enter the court while armed. Please note that Isiolo law courts is equipped with an armory for the temporary storage of firearms.
>
> Signed.
>
> Director.

6. The foregoing represents part of the issues surrounding the subject matter. Be that as it may, there is no gainsaying that the determination of matters, the appeal beforehand included, is dependent on the law and the evidence. To this end, no amount of threats; blackmail, inducement, and or intimidation can defraud the cause of justice. Moreover, I beg to remind myself that having taken the oath of office to administer justice according to *the constitution* and the law, and bearing in mind that Judgeship is God's delegated duty, no amount of fear can propel me to do otherwise.

7. In short, threats or no threats, blackmail or no blackmail; the subject matter must be determined on the basis of the law.

   Period!

8. Back to the facts of the case. The respondent herein [who was the Plaintiff] in the subordinate court filed a Plaint dated 19th April 2021; and wherein same sought various reliefs. The reliefs that were sought at the foot of the Plaint were as hereunder:

   a. A declaration that LR. Plot No. 212.belongs to the plaintiff and that it is only the plaintiff who bears the rights to ownership, operation, management, running and or collection of revenue emanating from the use of the same.

b. A permanent injunction restraining the defendant, whether by himself, his agents and or servants and any or all persons acting/claiming through or in the name of the defendant, from claiming ownership, operating, managing, running and or collecting cash/revenue emanating from the use of plot No. 212.

c. Mesne profits.

d. Costs of the suit and interests thereon at court rates.

e. Any other or further relief that this court may deem fit and necessary to grant.

9. The Appellant duly entered appearance and thereafter filed a Statement of defence dated 12th May 2021; and wherein the Appellant disputed the claim[s] by the respondents. Furthermore, the appellant contended that the documents that were being relied upon by the respondent were forgeries and thus devoid of validity.

10. The suit by the respondent was heard and disposed of vide Judgment delivered on 12th May 2023 and wherein the learned trial magistrate found and held that the respondent had proved his case on a balance of probabilities. To this end, the learned trial magistrate proceeded to and entered Judgment in favour of the respondent.

11. Aggrieved by and dissatisfied with the Judgment and the consequential decree of the court, the appellant herein has now approached this court vide Memorandum of Appeal dated 25th May 2023; and wherein same [Appellant] has highlighted the following grounds:

i. The Learned trial magistrate erred in both law and in fact when he found that the suit property plot No. 212 belonged to the respondent contrary to the overwhelming evidence adduced by the respondent. On account of that erroneous finding, the appellant was illegally deprived of plot No. 212.

ii. The Learned trial magistrate erred in both law and in fact in making a finding of ownership based on assumed long possession, yet the respondent's claim was neither based on adverse possession nor was such a prayer sought in his pleadings.

iii. The Learned trial magistrate erred in both law and in fact in total misconstruing the evidence adduced and failed to appreciate sufficiently and/or at all the appellant's submissions, hence arriving at an erroneous decision.

iv. The trial magistrate totally failed to consider/overlooked the appellant's evidence and submissions and accord them the necessary weight and thus arriving at a wrong conclusion.

v. The trial magistrate erred both in law and fact by shifting the burden of proof to the respondent and proceeded to rule in favour of the respondent despite the respondent not proving his case.

vi. The trial magistrate erred in both in law and fact relied on fraudulent documents to arrive at the impugned decision.

vii. The Honourable trial magistrate erred both in law and fact by relying on extraneous facts thereby arriving at a judgment that is not supported by the evidence on record.

viii. The Honourable magistrate failed to critically scrutinize and analyze the evidence on record, as a result whereof he off -handedly dismissed the appellant's credible Defence.

ix. The Learned trial magistrate erred in fact and law by purporting to descend upon the arena of the dispute contrary to the established role of the neutral arbiter by importing issues and rebuttals on behalf of the respondent suo moto without giving the appellant an opportunity to address with respect to rejection of the photographic evidence whose admission was not objected by the respondent.

x. The Honorable magistrate applied double standards in the scrutiny of documents adduces as evidence by terming the appellants' documents as unsafe to be relied upon while on the other hand admitting the respondent's documents which were also copies.

xi. The Learned Magistrate misdirected himself in law and fact by relying on an allotment letter that did not have part development plan drawn and approved by the commissioner of lands or the minister of lands.

xii. That the Learned magistrate erred in law and facts by failing to recognize that failure by the respondent to enjoin the Chief Land Registrar- Marsabit Government as parties to the suit rendered their suit unproven.

xiii. That the Learned magistrate's exercise of discretion was so injudicious and gravely wrong so as to occasion grave injustice to the appellant, bring law into disrepute and invite anarchy and law of the jungle into disrepute.

12. The Appeal came up for directions on 7th of May 2025; whereupon learned counsel or the Appellant confirmed that same had since filed the supplementary record of appeal containing the typed proceedings of the trial court. Furthermore, learned counsel for the appellant intimated to the court that the record of appeal [the maiden record of appeal and the supplementary record of appeal] contain all the requisite documents and that the appeal was ready for hearing.

13. Additionally, Learned counsel for the appellant proposed to canvass the appeal by way of written submissions. Suffice it to posit that learned counsel for the respondent concurred with the proposition and thus the court ventured forward and issued directions. Moreover, the court also circumscribed the timelines for the filing and exchange of the written submissions.

14. The appellant filed written submissions dated 14th May 2025; and wherein same has raised and canvassed five [5] salient issues, namely; whether the respondent adduced sufficient evidence proving ownership; whether the trial court shifted the burden of proof to the appellants; whether failure by the respondent to sue the Chief Land Registrar or Marsabit County Council was fatal; whether the learned trial court exercise of discretion was injudicious, biased and based on extrinsic issues and therefore arriving at a wrong conclusion; and whether the plaintiff is entitled to the prayers sought.

15. Regarding the first issue, learned counsel for the appellant has submitted that the learned trial magistrate failed to properly evaluate and scrutinize the documents that were tendered by the respondents towards proof of ownership of the suit plot. Furthermore, it was submitted that had the learned trial magistrate addressed his judicial mind to the documents in question, same [trial court] would have appreciated the numerous contradictions bedeviling the respondent's evidence. In particular, it was submitted that the respondent's claim to the suit property was not established.

16. Additionally, learned counsel for the appellant has submitted that the letter of allotment, which was tendered by and on behalf of the respondent, had also lapsed for non-compliance with the conditions contained thereunder. In this regard, it was posited that the impugned letter of allotment could not, therefore, find a basis to declare the respondent as the lawful owner and or proprietor of the suit property.

17. To support the submissions that the letter of allotment had lapsed and thus became extinct for non-compliance with the conditions thereunder, learned counsel for the appellant has cited and referenced inter alia Mbau Saw Mills Ltd vs The Attorney General [sued on behalf of the commissioner of lands] and 2 others (2014) eKLR; Njoroge vs Kiarie & 63 others (2022) KEELC.

18. Turning to the 2nd issue, it has been submitted that the learned trial magistrate erred in law in shifting the burden of proof to the appellant, yet it is the respondent who had filed the claim, contending to be the lawful owner and or proprietor of the suit property. Furthermore, it was submitted that the learned trial magistrate also erred in shifting the burden of proof to the appellant to show that same was born in 1972 as opposed to the respondent's assertion that the appellant was born in 1973. In any event, it was contended that the respondent herein tendered and produced questionable documents in his endeavor to demonstrate that the appellant was born in 1973, which position, it is contended, is erroneous and misleading.

19. Regarding the third issue, it was submitted that the respondent's case was to the effect that the appellant herein had illegally and fraudulently caused the registrar of lands, Marsabit County, to doctor its records by including the name Abdi ahead of Guyo Jattani, in an endeavor to defraud the respondent. To this end, the appellant submitted that in so far as the alleged fraud is stated to have been committed by and or with the assistance of the registrar of lands, it was incumbent upon the respondent to implead and join the said registrar.

20. Nevertheless, it was submitted that having failed to implead and or join the chief land registrar, and the registrar of lands – Marsabit County, the respondent's suit ought to have failed. To this end, learned counsel for the appellant has contended that the non-joinder negated the respondent's claim and or plea of fraud and illegality.

21. To buttress the foregoing submissions, learned counsel for the appellants has cited and referenced the decision in the case of Onyancha vs Republic [Criminal Appeal E019 of 2023] [2024] KEHC 7671, where in it is indicated that the learned judge held that a failure to call a witness from the ministry of lands [land registry] is fatal in an endeavor to impeach title.

22. As concerns the fourth issue, learned counsel for the appellant has submitted that the learned trial magistrate incorrectly and improperly exercised his discretion in returning a finding that plot No. 212 is the same as unsurveyed plot No. 406. Furthermore, it was submitted that the learned trial magistrate also improperly exercised his discretion in finding that the respondent had proved the plea of fraud, whereas the pleadings before the court did not supply the requisite particulars in accordance with the law.

23. In support of the submissions, that fraud was not properly pleaded and proved, learned counsel for the appellant has cited and referenced various decisions including Paul Muira & another vs Jane Kendi Ikinyua & 2 others (2014) eKLR, Musonga vs Nyati (1984) KLR and Koinange vs Koinange & 13 others (1986) eKLR, respectively.

24. Flowing from the foregoing, learned counsel for the appellants has therefore invited the court to find and hold that the decision by the learned trial magistrate was replete with errors and thus vitiated. To this end, the appellant has invited the court to find and hold that the appeal is meritorious.

25. The respondent filed written submissions dated 3rd June 2025 and wherein same has responded to the submissions by the appellant sequentially. The respondent has endeavored to respond to the appeal by addressing the issue[s] according to the grounds that have been raised by the appellant.

26. Firstly, learned counsel for the respondent has submitted that the appellant herein participated in the proceedings before the trial court and conceded the production of the various documents that were produced on behalf of the respondent. In particular, it was submitted that the appellant was indeed party to the production of the letter of allotment and hence the submission by the appellant seeking to impugn the validity of the letter of allotment is misconceived and born out of afterthought.

27. Secondly, it was submitted that the appellant herein did not challenge the validity of the letter of allotment and the various documents that were produced by the respondents. In this regard, it has been posited that the appellant cannot now seek to bring forth submissions in an endeavor to plug the loopholes that were not covered/addressed during cross-examination. In any event, it has been posited that submissions cannot be deployed to take the place of evidence.

28. In support of the foregoing submissions, learned counsel for the respondent has cited and referenced the decision in Ogado vs Watu Credit Ltd & another (2024) KEHC wherein the court held that submissions cannot be deployed to fill in the gaps left by the evidence.

29. Thirdly, learned counsel for the respondent has submitted that the respondent herein tendered and produced before the court credible evidence to demonstrate ownership of the suit property. In this regard, it was posited that the judgment of the learned trial magistrate is founded on credible evidence which was tendered and produced before the court.

30. Finally, it was submitted that the contention that the failure to join the Chief Land Registrar or the Land Registrar Marsabit County negated the respondent's suit is premised on a misapprehension of the law. To this end, learned counsel for the respondent has invited the court to take cognizance of the provisions of Order 1 Rule 1 of the Civil Procedure Rules 2010, which stipulates that no suit shall be defeated by reason of misjoinder or nonjoinder of parties.

31. Premised on the foregoing, learned counsel for the respondent has invited the court to find and hold that the appeal beforehand is bereft of merits and thus same ought to be dismissed with costs to the respondent.

32. Having reviewed the record of appeal; the evidence tendered [both oral and documentary] and upon taking into account the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the subject appeal turns on three key issues, namely; whether the respondent herein tendered and produced before the court credible evidence to demonstrate ownership of the suit property; whether the respondent proved fraud as against the appellant or otherwise; and whether the appellant herein proved that same was entitled to the suit property on the basis of [sic] gift inter-vivos.

33. Before venturing to analyse the thematic issues highlighted in the preceding paragraph, it is imperative to observe that what is before me is a first appeal from the subordinate court.

34. Being a first appeal, this court is vested with the jurisdiction to undertake exhaustive review, appraisal, re-evaluation and scrutiny of the entirety of the evidence tendered before the trial court and thereafter to form an independent conclusion arising out of the evidence on record. Nevertheless, it is imperative to observe that even though this court has the jurisdiction to depart from the factual conclusions and finding[s] of the trial court, such departure must only be undertaken when it is evident that the trial court either acted on a misapprehension of evidence on record; acted on no evidence; where the finding is perverse to the evidence on record, or where it is shown that there exist[s] a demonstrable error of principle, which vitiates [negates] the finding[s] of the trial court.

35. Suffice it to posit that the Jurisdictional remit of the first appellate court was recently re-visited by the Court of Appeal in the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment) where the court stated thus;

> 37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows:
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> "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...
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> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the

> advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

36. Bearing in mind the principles espoused by the Court of Appeal in the decision [supra], I am now disposed to revert to the subject matter and to discern whether the impugned judgment is well grounded or otherwise. Notably, I shall address the issues herein before mentioned sequentially, starting with whether the respondent established his claim to ownership of the suit property or otherwise.

37. Back to the issues for determination. Regarding the first issue, it is worthy to recall and reiterate that the dispute beforehand touches on and concerns ownership of plot No. 212 [the suit property]. On one hand, the appellant contends that the suit plot previously belonged to his [appellants] grandmother and was thereafter gifted to the appellant's mother who ultimately gifted the suit property to the appellant. To this end, the appellant posited that same is therefore the lawful owner of the suit property and not the respondent herein.

38. On the other hand, the respondent contended that the suit property was lawfully allocated unto him by Marsabit County Council [now defunct] in the year 1972. Furthermore, the respondent has averred that upon being allocated the suit property same has been in occupation thereof for more than 50 years.

39. It was the further testimony of the respondent that same has since developed the suit property and that the suit property is currently rented out to various tenants who pay rents to the respondent. Besides, the respondents averred that the appellant herein was born on 30th September 1973 and thus same [appellant] could not have been allocated the suit plot in 1972, long before same [appellant] was born. Furthermore, the respondent produced before the court assorted documents demonstrating the manner in which the suit property was allocated unto him.

40. The learned trial magistrate reviewed the totality of the evidence that was tendered before him and thereafter came to the conclusion that the respondent had duly proved his case. For good measure, the learned trial magistrate found and held that the claim by the appellant to the suit property was not legally tenable. In any event, it was held that the appellant herein cannot purport to have been gifted the suit property in the year 1972, long before same was born.

41. I have reviewed the evidence that was tendered before the learned trial magistrate and I beg to state that the learned trial magistrate deployed the correct approach in evaluating and appraising the totality of the evidence tendered by the parties. Thereafter, the learned trial magistrate came to the correct conclusion that the suit property belongs to the respondent.

42. To my mind, the manner in which the learned trial magistrate evaluated the evidence accords with the prescription espoused in the case of Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School (Civil Appeal 64 of 2014) [2023] KECA 371 (KLR) (31 March 2023) (Judgment) wherein the Court of Appeal stated as hereunder;

> We will next address the pertinent issue regarding the existence of two titles in respect of the same parcel land. The best evidence of ownership of immovable property is the title deed to it and that is why the question of the root of title is important. Root of title is the deed to which title to a property is ultimately traced to prove that the owner has good title. Accordingly, when there are competing interests as in this case, the parties are required to

give evidence of title starting with a "good root of title." A good root of title and an unbroken chain of ownership is required. To be a good root of title, a document must satisfy each of the following requirements:

(a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question;

(b) it must contain a recognizable description of the property;

(c) it must not contain anything that casts any doubt on the title.

43. To my mind, the conclusion that was arrived at by the learned trial magistrate and in particular, the finding that the suit property lawfully belongs to the respondent, is well grounded.

44. Turning to the second issue, namely; whether the respondent proved fraud as against the appellant, the appellant contended that the respondent herein had neither pleaded the claim pertaining to fraud in the manner required by the law. Furthermore, it was contended that the respondent also did not tender and or adduce credible evidence to warrant a finding of fraud. In any event, it was posited that the respondent's evidence [both oral and documentary] was wrought with discrepancies, which were not accounted for.

45. Moreover, the appellant herein contended that the documents that were being relied upon by the respondent in his endeavor to prove fraud were themselves forged and thus devoid of probative value. Simply put, learned counsel for the appellant submitted that the finding of the learned trial magistrate that fraud had been proven was born out of an injudicious exercise of discretion by the trial court.

46. Additionally, learned counsel for the appellant has also submitted that the gist of the respondent's claim was to the effect that the appellants colluded with the land registrar and the county officials of Marsabit to alter and or doctor the records pertaining to the suit property. Nevertheless, it was posited that despite the foregoing averments, the respondent did not implead and or join the Chief Land Registrar or the Land Registrar- Marsabit. In this regard, learned counsel submitted that the plea of fraud was therefore premature, misconceived and in any event not proven.

47. Having taken into account the submissions by learned counsel for the appellants as pertains to the question as to whether or not the plea of fraud was proven or otherwise, I beg to address the issue in a four-pronged manner. Firstly, even though the appellant has contended that fraud was not sufficiently pleaded, it is evident that the respondent herein duly captured at the foot of the Plaint the plea of fraud. For good measure paragraph 4 of the Plaint stated as hereunder;

> " Sometime in 2021, the plaintiff discovered that the defendant, who is his biological son had illegally and fraudulently caused the registrar of lands Marsabit County to enter its records and add the name Abdi to the name Guyo Jattani which was in the register and thereby causing the record to appear as though the defendant was the owner of plot No. 212.
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> [emphasis supplied].

48. To my mind, the excerpt reproduced in the preceding paragraph clearly captures the plea of illegality and fraud. For good measure, fraud has been pleaded with the requisite clarity. In this regard, I am unable to agree with the submissions by learned counsel for the appellant that fraud was not pleaded, or sufficiently pleaded by the respondent.

49. Secondly, it is also apparent that other than pleading illegality and fraud, the respondent also ventured forward and highlighted the perspectives/particulars pertaining to what same [respondent] construed

to amount to fraud. Though not particularized sequentially, it is apparent that the respondent adverted to the insertion of the name Abdi in front of the Guyo Jattani, such as to reflect that the plot in question belonged to Abdi Guyo Jattani and not Guyo Jattani.

50. In my humble view, the contents of paragraph 4 of the Plaint [whose details have been highlighted elsewhere herein before] capture[s] both the plea of fraud and the requisite particulars of fraud. To this end, I hold the position that the pleadings by the respondent were sufficient in nature to underpin the claim/cause of action of fraud. In any event, particularity must not be confused with exactitude.

51. Thirdly, there is the question as to whether the learned trial magistrate improperly/injudiciously exercised his discretion in finding and holding that the respondent had proven the plea of fraud. To start with, the finding and holding pertaining to fraud was not arrived at on the basis of the exercise of discretion. On the contrary, the said finding was arrived at upon assessment of the evidence that was tendered by the respondent and the appellant herein. Simply put, the decision pertaining to proof of fraud was one based on the calibration of the totality of the evidence on record. In this regard, the submissions premised on the exercise of discretion are not only mistaken but also anchored on misapprehension of the law.

52. Fourthly, it is important to recall and reiterate that fraud is quasi-criminal in nature. To this end, whenever a claimant, the respondent not excepted, seeks to prove fraud, same is enjoined to lay before the court clear, consistent, plausible and credible evidence. The question is, did the respondent meet and or satisfy the requisite threshold [standard of proof].

53. To start with, the respondent tendered evidence to demonstrate that the suit plot, namely; plot number 212 Moyale, was allocated unto him in the year 1972. Furthermore, the respondent called various witnesses, including PW 2, namely Fatuma Guyo Jattani, who confirmed that the plot in question belonged to her father [the respondent].

54. Other than the foregoing, the respondent also testified that the appellant herein was not born by the time the plot in question was allocated unto him [respondent]. For good measure, the respondent testified that the appellant herein was born on the 30th September 1973, whereas the plot was allocated unto him in 1972. Instructively, the respondent tendered and produced a copy of the appellant's national identity card showing the appellant's date of birth.

55. In an endeavor to controvert the evidence that same [appellant] was not born in 1973, the appellant contended that his identity card was applied for by the respondent [his father]. Furthermore, the appellant contended that it is his father who supplied the incorrect date of birth as 1973.

56. Perhaps, it is important to reproduce verbatim the evidence of the appellant who testified as DW 1. In response to the evidence that same was born in 1973, the appellants testified as hereunder;

> " The contention that I was born in 1973 is incorrect. I believe the year 1973 came about as the plaintiff applied national identity card for his children. I was born in 1972 and when my father was applying for my national identity card, he stated my year of birth to be 1973. I insisted that this information should not be changed".

57. On cross-examination by the learned counsel for the Plaintiff [now the respondent], the Appellant testified as hereunder;

> "I have my national identity card with me in court. The date of birth is 1973. This date of birth is not correct. I have not brought my certificate of birth. I was born on 1st January 1972".

58. It is instructive to recall that the appellant herein continues to hold and bears the national identity card which shows that same [appellant] was born in 1973. Furthermore, it is common knowledge that before a national identity card is issued, the applicant [in this case, the appellant] is called upon to fill a statutory form wherein the various information is keyed in. additionally, there is no gainsaying that the statutory forms contain a segment where the applicant is called upon to sign a declaration confirming that the information [data] supplied are correct.

59. On the other hand, it is not lost on me that the applicant for a national identity card supplies the information, believing and trusting same to be correct. In any event, there is no gainsaying that any incorrect information constitutes perjury. [See Section 114 of the penal code, Cap 63 Laws of Kenya].

60. With the foregoing in mind, the question that does arise is whether the appellant herein could have been registered as the owner/proprietor of the suit plot in 1972. Sadly, a plot and or landed property can only be registered in the name of an existing entity. To this end, one must be born before same can acquire property rights. [See the holding of the Court of Appeal in the case of Nelson Kazungu Chai and 9 Others versus Pwani University College [2027] eklr- paragraph 22 thereof]

61. Furthermore, there is also the question as to whether a minor [assuming that the appellant was born in 1972] could be registered to own property. I am afraid that a minor cannot and could not be registered to own a property.

62. To my mind, the totality of the evidence that was tendered before and considered by the court demonstrated fraud. I beg to underscore that, having reviewed the entirety of the evidence, I come to the same conclusion that the respondent proved the plea of fraud to the requisite standard or proof.

63. Before concluding on this issue, there is one aspect that merits mention and a short consideration. The aspect herein relates to the contention that the failure to join the Chief Land Registrar or the Registrar of lands – Marsabit county, negated the respondent's cause of action or fraud. To this end, my short answer is to the effect that non-joinder or misjoinder of a party does not negate a case. [See Order 1 Rule 9 of the Civil Procedure Rules]. [See also the decision of the Supreme Court in Dina Management Ltd vs The County Government of Mombasa & 7 others (2023) KECS at Paragraphs 109 & 110 thereof].

64. In a nutshell, I find and hold that the learned trial magistrate correctly appreciated the law as it pertains to fraud as well as the standard of proof attendant to fraud. [See the decision of the Court of Appeal in the case of Kuria Kiarie vs Sammy Magera (2018) eKLR; Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR and Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment).

65. Next is the issue as to whether the appellant herein proved his claim to the suit property on the basis of gift inter vivos. Instructively, the appellant herein had contended that the suit property previously belonged to his grandmother, who thereafter gifted same to the appellant's mother. Furthermore, the appellant averred that the suit property was ultimately gifted unto him by his appellant's mother. However, there is no gainsaying that the appellant herein did not tender and or produce before the court any evidence that the suit property ever belonged to his grandmother. Furthermore, it is not lost

on the court that the appellant did not tender and or produce any evidence of gift inter vivos or at all from his grandmother to sic his mother.

66. Moreover, having contended that the suit property was gifted unto him by his mother, it also behooved the appellant to tender before the court evidence of the gift inter vivos underpinning the bequest of the suit property unto him. Quite clearly, the burden of establishing the gift inter vivos rested with the appellant. [See the Court of Appeal decision in the case of Daniel Toroitich Arap Moi vs Mwangi Stephen Murithi (2014) eKLR].

67. On the other hand, it is also worth recalling that the appellant herein called one witness, namely; Duba Kuse Happi. Same testified as DW 2. It was the testimony of the said witness that the suit plot bears the name of Abdi Guyo Jattani. Furthermore, the witness averred that the plot was allocated in 1972.

68. To be able to appreciate the substratum of the evidence of DW 2, it is imperative to reproduce the pertinent aspects thereof. To this end, I beg to reproduce the salient features of the evidence captured while the witness was being cross-examined by counsel for the Plaintiff [now respondent].

69. The witness stated thus;

> " The name on top of the entry is Abdi Guyo Jattani.
>
> The year of allocation is 1972. Measurement is 100 x 50.
>
> I see no tampering in this register.
>
> I do not know or I am not aware if the defendant told this court that he inherited the plot from his mother.
>
> There should be an indication in the register if the land is inherited. There is usually a process of transfer by way of transmission.
>
> There is no history of transfer in this case. It is a first registration and there is nothing.
>
> I am not aware of the defendant's date of birth.
>
> Assuming the defendant was born in 1973 then there would be no logic that he was allocated land in 1972.
>
> It is not possible for land to be allocated to an unborn person.

70. The foregoing represents verbatim the testimony of DW 2 who averred that same is the town administrator – Moyale sub-county. What becomes apparent is that the suit property is purported to have been allocated to the appellant in 1972. Furthermore, it is also evident that the appellant is purported to be [sic] the first allottee, taking into account that the entry of sic his name is shown to be at the top of the card.

71. Various questions do arise. Firstly, could the appellant have been allocated and registered as the owner of the suit plot prophetically long before same was conceived and born? The answer is obvious.

72. The other question that comes to the fore is how the appellant [sic] becomes the first allottee, yet in his evidence, he averred that the suit plot belonged to his grandmother and was thereafter gifted to his mother, who ultimately gifted the suit property unto him [appellant]. To my mind, if the testimony of the appellant was to hold sway, then the purported plot card and ownership documents ought to have demonstrated the chain of events resting with the transfer in favour of the appellant.

73. Surely, the evidence that was placed before the trial court by the appellant herein cannot even convince an apprentice or novice, let alone a learned trial magistrate, correctly appreciating the facts.

In my humble view, time is nigh for litigants to appreciate that the end does not justify the means. Instructively, the reverse suffices. Simply put, the means justifies the end and thus procurement of a certificate of title or plot registration card by and of itself does not confer entitlement. There must be proof of the root of the Title.

74. Without belabouring the point, I beg to highlight that the appellant herein, despite the hue and cry [perhaps, the cry in the wilderness] has not proven that the suit property was gifted unto him. Suffice it to underscore that it is the appellant who had propagated the cause of action/claim based on gift inter vivos and thus same bore the onus of proving same. [See Sections 107, 108 & 109 of the *Evidence Act*, cap 80 Laws of Kenya]. [see also Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR at Paragraphs 132 & 133 thereof.

75. Flowing from the foregoing, my answer to issue number 3 is to the effect that the appellant herein did not establish and or prove his claim of ownership to the suit property. Moreover, it is not lost on me that proof of claims is not dependent on cosmetic submissions filed by the learned counsel but on the credibility of the evidence [if any] tendered by the litigants. [See the decision of the Court of Appeal in the case of General & another v Hussein & 3 others (Civil Appeal 100 of 2018) [2025] KECA 1022 (KLR) (5 June 2025) (Judgment) where court of appeal expounded on the provisions of section 3 of the *evidence act*, Chapter 80 laws of Kenya]. See also the decision in *Ogando V Watu Credit Limited & Another (Civil Suit E098 of 2022*) [2024] KEHC.

Final Disposition:

76. Having analyzed the three [3] thematic issues, which were captured in the body of the Judgment, it must have become crystal clear that the appeal beforehand is devoid and bereft of merits. Despite the threats, blackmail and intimidation [whose details were highlighted earlier in the body of the Judgment] the appeal courts dismissal.

77. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder;

    i. The Appeal be and is hereby Dismissed.

    ii. The Judgment of the trial court delivered on 12th May 2023 be and is hereby affirmed.

    iii. Costs of the Appeal be and are hereby awarded to the respondents.

    iv. The Costs in terms of clause (iii) shall be taxed by the Deputy Registrar of the court.

78. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 3RD DAY OF JULY 2025

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Mutuma/Mukami – Court Assistants

Mr. Mwirigi Brian for the Appellant

No appearance for the Respondent.