



**Kirima & another v Anastasio (Deceased) & another (Appeal  
E024 of 2021) [2024] KEELC 744 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 744 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
APPEAL E024 OF 2021  
CK NZILI, J  
FEBRUARY 14, 2024**

**BETWEEN**

**HELLEN KIRIMA ..... 1<sup>ST</sup> APPELLANT**

**EDWARD KENNETH MUTIGA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FR BERNARD NJERU ANASTASIO (DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**EURODISE NKATHA GITONGA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of P.M Wechulli – SRM  
Tigania delivered in Tigania ELC 58 of 2020 on 17.11.2021)*

**JUDGMENT**

1. The respondents, who were the plaintiffs at the lower court, had sued the appellants through an amended plaint dated 7.10.2020, alleging that they had fraudulently altered the records at the survey and lands offices, to displace and or replace their land parcel L.R. No. Tigania/Antuamburi/11592, with L.R No. Tigania/Antuamburi/13909 on the ground and purported to trespass onto and displace them from their legally obtained land. They sought a permanent injunction restraining the appellants from trespassing or interfering with their land and the rectification of the register of title L.R No. Tigania/Antuamburi/13909, to deregister Edward Kenneth Mutiga as the registered owner.
2. In a statement of defense dated 19.10.2020, the appellants averred it was the respondents who fraudulently doctored the land records for L.R No. Tigania/Antuamburi/11592, by having their title to the land merged with parcels L.R No's.589, 2451, 430, 2435, and 122192, belonging to innocent third parties who were unaware of the fraud.
3. The appellants further averred that they were not the custodians of land records to be in a position to interfere with the locality and acreage of L.R. No. Tigania/Antuamburi/11592. Additionally, the



appellants averred that the sale agreement between them over L.R No. Tigania/Antuamburi/13909 was genuine and legal, given that their land had never belonged to either the respondents or the predecessor of L.R No. Tigania/Antuamburi/11592. They termed their land as distinct, separate and incapable of being confused or mistaken with L.R No. 13909. The appellants averred that the suit disclosed no known cause of action against them.

4. Through a reply to the defense dated 26.10.2020, the respondents averred that they were not privy to the existence or otherwise of the ownership of the purported parcels L.R No's 589, 245, 430, 2435 and 12292. Further, the respondents averred that the appellants had a hand in the alteration of the records for the suit land so as to paint an erroneous picture of the locality of L.R No's. Tigania/Antuamburi/13909 and 11592.
5. The respondents averred, notwithstanding that the 2<sup>nd</sup> appellant was not the registered owner of L.R No. Tigania/Anutamburi/13909, the acreage of his title was at variance with the acreage of the ground. Similarly, the respondents averred the dispute before the court was over the nexus and the locality of the two parcels of land on the ground.
6. At the trial, Fr. Bernard Njuri, who was in charge of St. Massimo Mikinduri Parish, testified as PW 1. After adopting his witness statement dated 31.8.2020 as his evidence, he told the court that together with the 2<sup>nd</sup> respondent, they jointly bought and were transferred L.R. No. 11592, measuring 3.30 acres, by Joseph Kaberia, the then registered owner, through a sale agreement dated 17.8.2020. He said they had conducted an official search and visited the land with a land surveyor to ascertain its locality and status before the sale.
7. PW 1 said they took vacant possession and began clearing the land for cultivation. He said that while working on 27.8.2020, the appellants in the company of hoodlums descended on them, issued threats, and forcefully evicted them from the land. Further, PW 1 said they managed to flee from the land and made a report at Mikinduri Police Station. PW1 said the threats had been ongoing, yet the appellants did not own the land. As a consequence, PW 1 told the court they were apprehensive and lived in fear of an invasion, breach of peace and subjection to chaos. Moreso, PW 1 said they had suffered disarray, loss and damage out of the money and time spent in acquiring and developing the suit land, and unless restraining orders were issued against the appellants, they stood to suffer loss and damage.
8. In support of his evidence, PW 1 produced a copy of the title deed, an official search, a demand letter dated 27.8.2020, a sale agreement dated 25.8.2020, A/R objection proceedings No.3612, 3611 and 3610, Sheet No's 12/15, 17/2, a police O.B. No. 39/1/9/2020, and A/R Adjudication records for P. No. 11592 and P. No. 13909 as P. Exh No. 1-11, respectively.
9. In cross-examination, PW 1 told the court he had no interest in Parcel L.R No. 13909, whose owner was Edward Kenneth Mutiga, the 2<sup>nd</sup> appellant. He also said P. Exh No's. 7 and 8 were clear on the locality of his land and the neighboring parcel number. PW 1 said that before he bought the land, the seller took him to view the suit land, conducted an official search, and established the status on the ground; otherwise, they could not have bought the land had it not been in existence or when the acreage or occupation was in dispute.
10. In re-examination, PW 1 said the seller had been on the land for over ten years with no complaints over the acreage or locality of the parcel number; otherwise, if the title deed for L.R No. 13909 did not agree with what was on the ground, the respondents were not answerable for it. PW 1 said he was handed over vacant possession for the whole of his land by the seller, only for the 1<sup>st</sup> appellant to displace him. He termed P. Exh No's. 7 and 8 as erroneous, misleading, and contrary to the actual position on the



ground. Asked about the letter written by the seller dated 3.6.2020, PW 1 said he had not bought the land then.

11. Eurodise Nkatha Gitonga testified as PW 2 and associated herself with the evidence of PW 1. Joseph Kaberia testified as PW 3 and adopted his witness statement dated 7.10.2020 as his evidence in chief. He told the court that parcel L.R No. 13909 was a subdivision of parcel L.R No. 31 measuring four acres, which arose out of objections No's 3612, 3611, and 3610, between the 2<sup>nd</sup> appellant's father, the late Alfred Mutiga Interlios, and himself. PW3 said that after successfully defending the objections, he was awarded four acres and took possession until he sold and transferred the four acres to the respondents.
12. PW 3 said that in 2012, the 1<sup>st</sup> appellant sought permission to till the land, which he allowed her to use. Eventually, she requested to buy it for Kshs.1,200,000/=. He said that the 1<sup>st</sup> appellant only paid a deposit of Kshs.120,000 and refused to settle the balance. He said he therefore, asked 1<sup>st</sup> appellant to vacate the land, which she did after harvesting her crops. PW 3 said he proceeded to sell and transfer the land to the respondent, which was then vacant after a county lands surveyor visited the land to verify its extent, locality, and authenticity of the title deed.
13. PW 3 said the title deed held by the 2<sup>nd</sup> appellant for L.R No. Tigania/Antuamburi/13909 had a variance of about 2 acres, as opposed to what was on the ground, which the appellants should explain and or justify. PW 3 said he was still a neighbor of the respondents after he handed over vacant possession to them, who proceeded to clear and till the suit land in anticipation of the then forthcoming planting season.
14. Additionally, PW 3 told the court he was utterly shocked to see the appellants in the company of armed goons trespass onto the land and purport to cultivate it, and after he demanded to know why they turned violent and threatened to harm him. More so after the 1<sup>st</sup> appellant had voluntarily vacated the land before he disposed it off to the respondent.
15. In cross-examination, PW 3 told the court the suit land measuring 35 acres was 5Km's from his home. He also admitted to writing a complaint letter listed in the defense list of documents (1) and (2) after realizing his land was less on the title deed as opposed to what was on the ground. He denied that his land was inclusive of a portion belonging to Mutiga.PW 3 said that after his letter of complaint, his land was adjusted or rectified from 40 points as per P. Exh No. (11). He said he had no interest in Parcel L.R No. 13908, which was different from his land.
16. Hellen Kirima testified as DW 1 and adopted her witness statement and a further statement dated 22.9.2020 and 19.10.2020 as her evidence in chief. Her testimony was that in 2012, the 2<sup>nd</sup> appellant sold to her four acres of his land parcel L.R No. 13909, which she took possession of. She said the land was a share out of the 2<sup>nd</sup> appellant's late father, adjacent to other parcels of land gifted to his brothers.
17. DW 1 denied the allegations leveled against her by PW3 over an aborted sale agreement or lease. She said it was the respondents who illegally entered her land and maliciously cut and cleared her pigeon peas, which she reported to the police. DW 1 also said the two parcels of land were not adjacent to each other, going by the land survey map sheet before the court. Further that the respondents who had trespassed on her land. She denied the alleged attacks, invasion, and or threats, which she termed as false and a red herring after the respondents discovered they were illegally on her land.
18. In the further statement, DW 1 termed PW 3 as a conman who had probably shown or sold to the respondents a non-existent parcel of land on the ground, who unfortunately failed to diligently ascertain its status before buying otherwise, what they were allegedly sold was still being used by PW 3 on the ground. DW 1 said that the respondents were not innocent purchasers since they had schemed with PW 3 to steal her land since what they allegedly sold and transferred was still being utilized by the



- seller, who was not her neighbor as alleged. Further, PW 1 said that since 2012, she had been dealing with the 2<sup>nd</sup> appellant and not PW 3 over the land. She said that after acquiring the land, she planted grevillea trees, now in the maturity stage, and seasonal food crops, from which land the respondents had purported to evict her through court orders.
19. In addition, DW 1 testified that since the respondents knew of these facts, PW3 allegedly applied on 30.6.2020 for the land registrar to rectify the register to reflect the situation on the ground. However, the county land surveyor noted the irregularities, for it touched on other parcels of land belonging to non-parties to this dispute. DW 1 said PW 3 knew the truth going by the land surveyor's report since his land was not adjacent to L.R No. 13909, but borders parcel No.13902 – 13923.
  20. DW 1 termed the respondents as Johnnie -come- late who should swallow their immense pride and settle on parcel No.11592, which should be their land; otherwise, their attempts to pass off Parcel L.R No. 11592 as parcel L.R No. 13909 was taking the mischief too far. Further, DW 1 produced a copy of the letter for L.R No. Tignaia/Antuamburi/13909 sale agreement dated 4.1.2014, copy of survey sheets No. 108/4/17/2 and 108/4/12/15, O.B. reports dated 1.9.2020 and 9.9.2020, photographs, letter dated 30.6.2020 by PW 3, county land surveyors letter dated 8.7.2020, death certificate for Julius Kamungi M'Ambau and bundle of photographs as D. Exh No. 1-11 respectively.
  21. In cross-examination, DW 1 told the court she bought the land in 2012 from the 2<sup>nd</sup> appellant, who narrated its history. She said the sale agreement for 2012 was unavailable, save for the one dated 4.1.2014. Besides, DW1 said the 2<sup>nd</sup> appellant was yet to obtain a land control board consent or transfer the land to her name. She said she was aware that the title deed of the 2<sup>nd</sup> appellant reflected 1.2 acres as opposed to the 4 acres she had bought from him. DW. 1 said she bought the land from the 2<sup>nd</sup> appellant but not his late father, who had two wives.
  22. DW 1 also admitted that in a replying affidavit to the interlocutory application, she had confirmed that the acreage on the title deed and the ground was different. She said she had no claim over L.R No.13592, allegedly capturing other parcels of land as per the county land surveyor report.
  23. Further, DW 1 said that in her two letters dated 1<sup>st</sup> and 9<sup>th</sup> September 2020, her complaint was on an invasion of her land by PW 3. She denied the assertion by PW 3 that they had allegedly entered a lease and a sale agreement, which was aborted after she allegedly breached its terms and conditions. DW. 1 admitted that she had not amended her witness statements or the statement of defence to capture her allegations.
  24. In re-examination, DW1 said her interest was in Parcel L.R No. 13909, which she acquired in 2012 and formalized in 2014. DW 1 also stated that she only reported PW 3 to the police since the respondents had not invaded her land. As to the anomalies on her land acquisition, DW 1 said there was no time limit to apply for the rectification of the title deed. However, DW 1 said the land bought by the respondents from PW 3 was in a different locality far from the land she had occupied since 2012.
  25. Edward Kenneth Mutiga testified as DW 2 and adopted his witness statements dated 22.9.2020 and 19.10.2020, as his evidence in chief. He told the court that after acquiring L.R No. 13909, an error occurred during registration as if it was 0.49 ha, after which he applied for the rectification of the acreage. DW 2 said his child was taken ill, and since he required vast amounts of money, he sought assistance from DW 1 to buy his land for he was in dire need to settle a medical bill for his child. DW 2 said the land was a gift from his father, who had other adjacent parcels of land forming part of the subdivisions out of the initial land. DW 2 said parcel L.R No.11592 was not adjacent to his land parcel L.R No. 13909, nor did it share the same map sheet.



26. In addition, DW2 said the respondents were the ones who started harassing DW 1 by mistakenly trespassing to her land allegedly believing it was the one sold and transferred to them by PW3. In his further witness statement, D.W. 2 denied that his late father had any pending objection proceedings with DW 3 since he died in October 2019 after sharing his land among his four sons as parcels L.R No's.13902 – 13923, otherwise it was suspicious for PW 3 to wait for his father to die and lodge a claim before the land adjudication committee.
27. D.W. 2 also stated that PW 3 should have restricted his transactions to Parcel L.R No.11592 as it currently exists, for he was not his neighbor given he hails from Kiriene village, about 10 kilometers away from the Kagaene area. He denied that PW 3 was ever an occupant of Parcel L.R No.13909 or any of its resultant subdivisions. He termed PW 3 as a fraudster whom the respondents fell prey to his illegal schemes for not conducting due diligence before the sale and transfer; otherwise, the application dated 30.6.2020 by PW 3 was responded to by the county land surveyor through a visit and a report before the court showing that the two parcels of land were separate and far away from each other. D.W. 2 said his parcel of land's acreage was erroneously indicated in the title deed the same way parcel L.R No.11592 was initially registered, but later on rectified as per the official search dated 14.7.2020.
28. D.W. 2 further testified that the registration errors were a common problem, as evidenced by the two parcels. D.W. 2 said D.W. 1 was occupying parcel L.R No. 12909 as a beneficial owner who bought the land for valuable consideration, pending formal transfer, and should, therefore, not be evicted from the land.
29. Similarly, DW 2 said that the respondents should eat their humble pie, reconcile with the fact that they were duped into buying a different land from the locality that they were shown, and were, therefore, the authors of their own mistake. He termed the claim against him as unsustainable, for he had no interest in parcel L.R No.11592 or L.R No. 13909, after ceding his interests to the 1<sup>st</sup> appellant.
30. In cross-examination, DW 2 said he sold and handed over parcel L.R No. 13909 to the 1<sup>st</sup> appellant in 2012, though he wrote a sale agreement in 2014 capturing 4 acres. DW 2 termed the acreage on his title deed as a mistake for what was on the ground was more than 0.49 ha, which he had sought rectification from the land registrar. Nonetheless, DW 2 was unable to produce any such letter before the court. He said he was born and brought up in parcel L.R No.13909, and his late father never told him of any land dispute with PW 3. Regarding the letter by PW 3, DW 2 said he had no issue with it, for it did not relate to his land. DW 2 told the court that he had no confirmation letter showing him as the recorded owner of parcel L.R No. 13909. Similarly, he said he was not disputing the land surveyor's report dated 8.7.2020, for it did not relate to his land. He denied that he had unjustly taken money from DW 1.
31. In re-examination, DW 2 said the dispute before the court was on parcel L.R No.11592 and not parcel L.R No. 13909, for the two parcels of land were situated in different villages. He said his correct land acreage ought to be 4 acres and not 0.49 ha as reflected in his title deed, which he was planning to apply for rectification since the law has set no time limits.
32. Asked about parcel L.R No.13902, DW 2 said he was not aware that what he sold to the 1<sup>st</sup> appellant was parcel L.R No. 13902 and not L.R No.13909. DW 2 said he acquired his parcel number in 2014 following a scene visit by the land surveyor. He said he did not know PW 3 or the locality of his Parcel L.R No. 11592.



33. With this evidence, the trial court allowed the respondents' claim. The appellants have now appealed to this court by a memorandum of appeal dated 18.12.2020 setting out 20 grounds: In summary, the appellants complain that the trial court:
- i. Allowed the claim which had not been proved.
  - ii. Failed to appreciate that the two parcels of land were separate, distinct, and unique.
  - iii. Disregarded registry sheet maps on the locality of the two parcels of land as relied upon by each of the parties as indicated in the title deed.
  - iv. Failed to allow for a scene visit before the hearing.
  - v. Failed to appreciate that the respondents did not seek and obtain a map sheet before the sale and hence relied on a layman and not a land surveyor.
  - vi. Failed to appreciate their evidence and documents.
  - vii. Relied on unsubstantiated evidence of PW 3.
  - viii. Disregard the appellants' sale agreement, yet it was not contested.
  - ix. Made a finding on fraud, yet the 2<sup>nd</sup> appellant was not a land official, and PW 3 had not contested the locality.
  - x. For failing to appreciate PW 3 would benefit twice if at all he obtained parcel L.R No. 11592, through objection proceedings.
  - xi. For allowing the rectification of parcel L.R No. 13909, yet the respondents had testified on oath that they had no interest in it.
  - xii. For basing the findings on the size of L.R No. 13909, though the evidence showed the title for parcel L.R No. 11592 also had errors, which were rectified in July 2020 before the sale and transfer to the respondents.
  - xiii. For basing his findings on the non-application for rectification of parcel L.R No. 13909 by the 2<sup>nd</sup> appellant yet there are no timelines in law to apply.
  - xiv. For using double standard over the produced map sheets.
  - xv. For not appreciating the sale between the appellant, especially on the issues of land control board consent, yet the same was not the subject matter of the suit, and
  - xvi. Lastly, relying on extraneous evidence of A/R proceedings when none was produced and which proceedings the respondents and the appellants were not parties to.
34. With leave of court, the parties, by consent, agreed to canvass the appeal by way of written submissions dated 18.10.2023 and 2012.2023, respectively.
35. The appellants isolated four issues for the court's determination. On whether fraud was proved, the appellants relied on fraud as defined in Black's Law Dictionary Edition (not indicated) to comprise deceitful practice or willful device resorted to with intent to deprive another of his right or do him an injury positively and intentionally and with a view of obtaining some unjust advantage.



36. The appellants submitted fraud must be pleaded and strictly proved as held in Dennis Noel Mukhulo Ochwada & another vs Elizabeth Murungari Njoroge & another (2018) eKLR, Evans Otineo Nyakwara vs. Cleophas Bwana Ongaro (2015) eKLR, CBK Ltd vs. Trust Bank ltd & others, Section 107, 109 of the Evidence Act and Moses Parantai & Peris Wanjiku Mukuru vs Stephen Njoroge Macharia (2020) eKLR.
37. To this end, the appellants submitted the respondents failed to prove that they replaced parcel L.R No. 139009 on the ground and interfered with the sheet number by way of a police investigative report or by any other iota of evidence of probative value that the appellants committed any fraud during acquisition of L.R No. 13909.
38. The appellants submitted that it was not expected that they would be sued and to provide evidence against themselves by calling a land surveyor to show where the respondents' land was situated. After all it was the duty of the respondents to conduct due diligence before purchasing the land.
39. Similarly, the appellants submitted that they produced maps of the locality of the two parcels of land, which the respondents did not object to or adduce contrary evidence to challenge the maps; otherwise, the trial court should not have shifted the burden of proof to them.
40. Further to the appellants submitted that the duty to prove a balance higher than in ordinary suit was on the respondents to object to the production of the two area map sheets and have a land surveyor give the exact position and shed more light on the two parcels of land.
41. Given the issuance of a title deed to the 2<sup>nd</sup> appellant on 6.6.2017 and the sale to the 1<sup>st</sup> appellant, the appellants submitted that the trial court was wrong to delve into issues of ownership of the two parcels of land since title to L.R. No. 13909 was not challenged by the respondents under Sections 26 (1) of the Land Registration Act for the court to cancel it.
42. Reliance was placed on Satria Investments Ltd vs J.K Mbugua (2013) eKLR. The appellants submitted that whichever way the trial court's decision was looked at, it violated and discriminated against the appellants' constitutional right to own property under Article 40 of the Constitution and that the evidence by the respondents had no weight to warrant the issuance of the orders on 8.12.2021.
43. On whether the two land parcels are distinct, the appellants submitted certificates of the titles of land before the trial court had features that were distinct and showed the parcel as separate and lying on different registry map sheet numbers or localities. Therefore, it was possible to juxtapose Parcel L.R No. 13909 with the respondents' parcel of land. In any event, the appellants submitted that no evidence was led on juxtaposition, unlike the letters and report by the county land surveyor, which showed a high likelihood that it was the respondents' land that was juxtaposed with other parcels of land. Therefore, instead of relying on the reports and documents produced by the appellants, the trial court was wrong to rely on PW3, a layman's evidence, on the locality of the two parcels.
44. On the merits of the appeal, the appellants submitted they had ably demonstrated the issue before the trial court did not involve whether or not the 1<sup>st</sup> appellant had bought Parcel L.R No.13909 from the 2<sup>nd</sup> appellant but was seeking a permanent injunction and for the deregistration of the 2<sup>nd</sup> appellant's parcel L.R No.13909, on account of an alleged fraud, which was not proved; hence the case by the respondents was misplaced and an afterthought. The appellants urged that the appeal be allowed with costs.
45. The respondents submitted that the grounds of appeal were misplaced and incomprehensive since the appellants failed to defend the claim and therefore, had no basis to challenge the decision. Further, it was submitted that the 2<sup>nd</sup> appellant failed to enter an appearance or file a defense despite service of



- the amended plaint upon him. The respondents submitted that parties were bound by their pleadings and therefore, in the absence of any pleadings to the amended plaintiff, the appellants could not now appeal against a judgment based on the undefended amended plaint.
46. On whether the acreage of 4 acres claimed by the appellants agrees with the acreage in the 2<sup>nd</sup> appellant's title for L.R Tigania/Antuamburi/13909, the respondents submitted the appeal revolves almost on the documents relied on in evidence by the parties. In this instance, the appellants were unable to marry the contents of the title with what was claimed on the ground and therefore, the trial court was correct in finding that the four acres claimed on that ground belonged to the respondents, whose acreage in their title tallied with that on the ground.
  47. As to the 1<sup>st</sup> appellant's claim of purchase of 4 acres, it was submitted that the sale agreement relied on by the appellants was silent on the acreage except to refer to parcel L.R No.1 3909, whose actual acreage was 1.21 acres.
  48. The respondents submitted that notwithstanding, the dispute was alleged to be over the same ground, the appellants did not counterclaim against the respondents for it and only insisted that they had nothing to do with and were not interested in L.R No. Tigania/Antuamburi/11592, but in the appeal, they were now turning around to say that the trial court should have declared the same ground as theirs. In the absence of any such pleadings in the form of a counterclaim coupled with distancing themselves from the disputed ground by stating that they had no interest in it, the court should find the grounds of appeal unmeritorious.
  49. Regarding a site visit, the respondents submitted it was upon the appellants if they so wished for it to have formally moved the court. In this case, the trial court record shows that no such request was made, and even if any had been made, it would not have been helpful.
  50. The respondents submitted that the 1<sup>st</sup> appellant's claim to have bought 4 acres from the 2<sup>nd</sup> appellant was unsustainable since the latter did not have any four acres to dispose of to her. By operation of Section 8 of Land Control Act (Cap 302), any agreement between the appellants became obsolete and of no legal effect after 4.1.2014. Therefore, the only remedy the 1<sup>st</sup> appellant had was a refund of the purchase price from the 2<sup>nd</sup> appellant. The respondents submitted that the 1<sup>st</sup> appellant could not lay a claim on the land based on a non-existent, unlawful, and patently defective agreement of sale. The respondents submitted that the material discrepancies between the evidence of the appellants and the genuineness of the alleged sale agreement had serious material discrepancies.
  51. It was submitted that the 2<sup>nd</sup> appellant was unable to show the source of his alleged 4 acres save to verbally claim that his late father had gifted him the land. Therefore, in the absence of any filed defense, he has no basis to appeal against the decision. On the aspect of proving the claim on a balance of probabilities, the respondents submitted that the trial court analyzed the evidence tendered from both sides and gave a reasoned decision mainly on the legitimacy of the respondents' title deed based on evidence from the lands office, unlike the 2<sup>nd</sup> appellant's title, whose history and records differed with the position on the register and the ground. The respondents termed the grounds of appeal as omnibus as held in Chuka ELCA No. 1 of (2020) (2021) eKLR.
  52. On the aspect of the two land parcels being separate and distinct, the respondents submitted that the trial court was not moved to visit the locus in quo. Since the appellants merely alleged that the two parcels of land were different without calling any further evidence, the alleged survey maps sheets and the county land surveyor's report were unauthentic to be relied upon by the court; otherwise, the appellants should have had survey maps authenticated or produced by the makers and the alleged error of the title deed held by the 2<sup>nd</sup> appellant clarified by a land's official.



53. On the allegations that the trial court failed to consider the uncontested letter dated 30.6.2020 by PW 3, the respondents submitted that there was no PW 3 in the lower court and that a reply to that letter from the land's office was not produced. In the absence of a joinder of the land office to the suit or the filing of a defense and counterclaim and an application for the rectification of the acreage to his title, the respondents submitted the 2<sup>nd</sup> appellant's alleged letter was a mere coverup which could not sway the mind of the trial court.
54. Regarding due diligence the respondents submitted, there was no requirement in law to buy an area map before purchasing land. In any event, no such issues were raised in the cross-examination of the respondents. On the question of calling evidence of the land surveyor, the respondents submitted that it was the appellants who should have called the land surveyor to sustain their defense that the ground claimed was where their land was.
55. On the evidence of Joseph Kaberia (PW 3), the respondents submitted that the grounds of appeal did not stem from the judgment and should, therefore, not be entertained. On the submissions that the trial court should not have based its judgment on the sale agreement entered into in 2012 and formalized in 2014, allegedly not contested at the trial, the respondents submitted that the trial court was bound to look into it for it was produced by the appellant who cannot now distance themselves from it if it worked against them. Further, it was submitted that since the appellants failed to avail the earlier agreement of 2012, which was intentional, they cannot base their appeal on such documents, which read together with the one of 2014, the acreage was missing and had not sought to incorporate the contents of the earlier one of 2012.
56. On fraud, the respondents submitted that the trial court was correct to reach a finding against the appellants in view of variance of the acreage, lack of action against the lands office to correct or rectify it, or evidence of the alleged reduction of his title deeds acreage to 1.25 acres and therefore making a false claim of 4 acres in excess of the acreage on his title.
57. On the question of objection proceedings between Joseph Kaberia and the 2<sup>nd</sup> appellant's late father, the respondents submitted that the appellants never cross-examined them on such issues or availed any legible copies to court despite opportunities being availed to do so. Therefore, the respondents submitted the said objection proceedings, which did not form part of the trial court record and should not form a basis of a ground of appeal. Reliance was placed on E.O vs COO (2020) eKLR on whether the court should have ordered the rectification of the 2<sup>nd</sup> appellant's title. Since no defense was offered against the amended plaint, the 2<sup>nd</sup> appellant was estopped from picking such a ground of appeal, and in any event, the trial court had no basis to deny the respondents that relief.
58. On whether the trial court was wrong to base its findings on the size of the parcel L.R No. 13909, the respondents submitted that there was an admission of errors in the 2<sup>nd</sup> appellant's acreage to his title and what was on the ground as opposed to the title held by the respondents. Therefore, if the land office had not acted upon the 2<sup>nd</sup> appellant's letter dated 30.6.2020, the wisest thing for the 2<sup>nd</sup> appellant was to join the lands office and or sue them by way of a counterclaim.
59. On delay in seeking rectification of the acreage, the respondents submitted the 2<sup>nd</sup> appellant, while aware of the anomaly to his title deed over the years, gave no explanation for the delay or failure to apply for it but only rushed to write a letter after getting wind of the impending action by the respondent. It was submitted that it was typical knowledge that any landowner keen on protecting his land could not choose to sit on his rights for decades without taking action.
60. On whether the trial court adopted double standards over the sheet maps it was submitted that the trial court only said it could not rely on unauthenticated map sheets produced by the appellants, which



could not be used to explain the source and genesis of the 2<sup>nd</sup> appellant's land. Reliance was placed on Avenue Car Hire and another vs. Slipha Wanjiru Muthegu C.A No. 302 of 1997, Jeniffer Kaindi Kithure vs Magondu M'Igweta & 2 others (2021) eKLR, Mugi & others vs Maina & another (2022) KEELC 2718 (KLR) 19<sup>th</sup> May (2022) (Judgment).

61. The role of an appellate court of the 1<sup>st</sup> instance is to reconsider the evidence, evaluate it, and draw one conclusion while mindful that it has neither seen nor heard the witnesses. Further, in *Peters vs Sunday Post Ltd* (1958) E A 424, the court observed that if there was no evidence to support a particular conclusion or if the trial court failed to appreciate the weight or bearing of circumstances admitted or proved or had plainly gone wrong, an appellate court would not hesitate to decide.
62. In this appeal, I think the issues calling for my determination are:
  - i. Whether the respondents pleaded and proved ownership of L.R No. Tigania/Antuamburi/11592 measuring approximately 1.35 ha, situated within Mikinduri area Tigania Central sub county.
  - ii. Whether the respondents proved any alteration of survey and land records by the appellants displacement, interference, misrepresentation of facts using documents, drawing and backdating of agreements of sale, and or intention to take over of the suitland from its original location on the ground and purported replacement with L.R No. Tigania/Antuamburi/13909 measuring 0.49 ha.
  - iii. If the respondents proved trespass onto their land and eviction therefrom by the appellants.
  - iv. If the respondents suffered any loss or damage out of the appellants' acts.
  - v. If the appellants were justified in threatening, trespassing, evicting, or interfering with the respondents' right to use, own, and utilize the suit land.
  - vi. If the respondents were entitled to the reliefs sought.
  - vii. What is the order as to costs?
63. The respondents moved the trial court through a plaint dated 31.8.2020 and amended on 7.10.2020 to include the 2<sup>nd</sup> appellant. The 1<sup>st</sup> appellant entered appearance through a memorandum of appearance dated 8.9.2020 and filed a statement of defense dated 22.9.2020, denying any alleged trespass onto L.R No. Tigania/Antuamburi/11592 or interest thereof. On the contrary, she averred it was the respondents who forcefully attempted to occupy her land L.R No. Tigania/Antuamburi/13909 as if it were L.R No. Tigania/Antuamburi/11592. The 1<sup>st</sup> appellant termed the suit as disclosing no cause of action as scandalous, vexatious, and an abuse of the court process.
64. Following this defense, the plaint was amended by an amended plaint dated 7.10.2020 to introduce the 2<sup>nd</sup> appellant as a party and to jointly claim against the two over trespass, falsification of documents to aid in the displacement of the suit land from its locality, and replacement as if it was L.R No. Tigania/Antuamburi/13909, owned by the 2<sup>nd</sup> appellant, interference with the location drawing and backdating of false agreement in order to take over the land, destruction, and an attempted eviction of the respondents from their land. An additional list of documents & witness statements of Joseph Kaberia accompanied the amended plant. The 2<sup>nd</sup> appellant filed a notice of appointment dated 12.10.2020.



65. The 1<sup>st</sup> and 2<sup>nd</sup> appellants filed a defense to the amended plaintiff dated 19.10.2020. Even though the 1<sup>st</sup> appellant had filed a statement of defense alluded to above, the defense dated 12.10.2020 was filed as if none existed at the time filed by the 1<sup>st</sup> appellant. Be that as it may, the appellants denied any falsification of the land records for L.R No. Tigania/Antuamburi/13909, as alleged in paragraph 3 (a) of the amended plaintiff. Instead, they averred it was the respondents who had fraudulently doctored the record of L.R No. Tigania/Antuamburi/11592 to have it merged with parcels L.R No's 2451, 430, 2435, and 12292 belonging to third parties.
66. The appellants denied that they were the custodians of the survey and land records to interfere with the location and acreage of the respondents' land, which they termed as distinct, separate, and unique from each other. They termed the suit as disclosing no cause of action against them. The statement of defense was accompanied by a further list of documents and witnesses' statements.
67. By a reply to the defense dated 26.10.2020, the respondents averred that they were not privy to the existence or otherwise the ownership of parcel L.R No's.589, 245, 430, 2435, and 12292. The respondents averred that the appellants had a hand in the alteration of the record for the suit land to paint an erroneous picture of the exact locality of L.R No's.13909 and 11592. The respondents averred that even if the 2<sup>nd</sup> appellant was the registered owner of L.R No. 13909, its acreage did not merge with the acreage on the disputed locus, and therefore, the dispute was about the nexus between L.R No's. 11592 and 13909 on the ground.
68. It is trite law that parties are bound by their pleadings and issues for the court's determination flow from them. See *Raila Odinga & others vs IEBC & others* (2017) eKLR. Similarly, it is trite law that a party may not raise new issues at an appellant stage that were never before the trial court.
69. In the statement of defense filed by the appellants, the source, manner of acquisition, locality, occupation, mistaken identity, size and the developments made on the land, errors or anomalies of the acreage, and disposal of the land measuring 4 acres by the 2<sup>nd</sup> appellant to the 1<sup>st</sup> appellant in 2012 and 2014 as well as the taking of vacant possession was never pleaded by the appellants.
70. The purpose of pleadings is to ensure that no party is taken by surprise at the hearing. In *Galaxy Paints Co. Ltd vs Falcon Guards Ltd C. A No. 219 of 1998*, the court observed that unless the pleadings were amended, the trial court may only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. In *IEBC & another vs Mutinda Mule* (2014) eKLR, the court cited *Malawi Railways Ltd vs Nyasulu* (1998) MWSC 3 that each party is left to formulate his case his way, subject to the rules of pleadings for the sake of certainty and finality. Further, it was held a party cannot be allowed to raise a different or fresh case without an amendment and that the pleadings also bind a court which should adjudicate upon the specific matters in dispute as in an adversarial system, the parties are the ones who set the agenda with no room for any other business.
71. In *Abdala Majid Suleman vs Nyaki Farmers' Cooperative Society Ltd* (2015) eKLR, the court said issues for determination must always emanate from the pleadings filed or evidence adduced by the parties.
72. In this appeal, the respondents, to sustain their amended plaintiff, relied on the list of witness statements and documents dated 31.8.2020 and an additional list of documents and witness statements dated 7.9.2020. On the other hand, the appellants relied on a list of witness statements and documents dated 22.10.2020 and a further list of documents and witness statements dated 19.10.2020.



73. At the hearing, the respondents called three witnesses. PW 1 was Fr. Bernard Njeru, who produced the two bundles of documents as P. Exh No's. 1-11. He also adopted his two witness statements as his evidence in chief. Eurodise Nkatha Gitonga and Joseph Kaberia testified as PW 2 and 3, respectively. Regarding the appellants, Hellen Kirima testified as DW 1 and produced her two sets of the list of documents as D. Exh No. 1-11, respectively. DW 2 was the 2<sup>nd</sup> appellant.
74. Arising from the evidence tendered by the parties, none objected to the production of exhibits by the other. It is one thing to produce exhibits and another when the court puts its mind on them as to their veracity, authenticity, relevance, and probative value to each of the parties' respective claims.
75. Any exhibits produced must be subjected to the rules of evidence. It is upon a party producing exhibits to ensure that they comply with the rules of evidence as to the production of primary and secondary evidence. A party must lay material on the authenticity of the exhibits produced. It does not matter that the other side has not objected to its production.
76. In the suit before the trial court, the burden was upon the respondents to prove that they owned L.R No. Tigania/Antuamburi/11592. The respondents tendered and produced evidence on both locality acreage, source and boundaries to the suit land. PW 1 produced a copy of the title deed, certificate of official search, demand letter dated 27.8.2020, photographs, A.R. objection proceedings, sheet No 13/15 & 17/2, police abstract, A/R adjudication records Parcel L.R No's. 11592 and 13909.
77. From the exhibits produced by PW 1, the history of L.R No's.11592 and 13909 was traced right from the adjudication record. PW 3 testified that he was a party to the A/R objection with the 2<sup>nd</sup> appellant's late father. No. Specific questions were raised or put against PW 3 that he was fraudulent, a conman, an imposter, a land grabber, was mistaken as to the identity and locality of his land, and that he had duped, misled, and or defrauded the respondents' money for a non-existent parcel of land.
78. DW 1 failed raise to any specific questions that PW 3 was a liar, had not transacted with him, was not her neighbor, and that his land was from a different locality away from L.R No. 13909. Further, PW 3 was not cross-examined on the legality, authenticity, and the unprocedural manner in which his title deed had been procured and or was inclusive of other parcels of land.
79. More importantly, the appellants did not cross-examine PW 3 on matters that DW 1 had been in occupation and possession of L.R No.13909 on the same locality on the ground as the land, PW 3 was claiming to have been his and which he had purportedly sold and transferred to the respondents.
80. The primary issue raised by the respondents in their pleadings was that the land they held title to was clearly registered, identified, lawfully acquired, and handed over to them at the time of the sale and transfer only for the appellants to trespass into it, purport to possess documents similar to L.R No.13909 and hence prayed for permanent injunction barring and restraining the appellants from encroaching, trespassing or in any way whatsoever interfering with the land situated in Mikinduri.
81. Further, the respondents prayed for rectification of parcel number 13909 under Section 26 (1) of the *Land Registration Act*; a certificate of title is to be taken as a prima facie evidence of ownership of the person indicated therein in the absence of any adverse claim on account of illegality, unprocedural means in procuring it or fraud and having been obtained through corrupt means. In *Munyuu Maina vs Hiram Gathiha* (2013) eKLR, the court observed that it was not enough to waive an instrument of ownership. A party must establish that the same was obtained formally, legally, and procedurally.
82. In this appeal, the respondents traced their ownership of the suit land through the documents held by PW 3, before the land became registered. They equally produced a title deed and area map sheets. They produced the sale agreement for both. PW 3, who also produced the A/R objections proceedings and



- the A/R records. The evidence of PW 3 and the documents held by him were authentic, truthful and believable. The appellants did not shake them through cross-examination and or through production of contrary documentation.
83. Order 2 Rule 4 of the Civil Procedure Rules provides that after a statement of plaint, a party must plead specifically any fact showing illegality. The appellants did not plead illegality, irregularity, and or unprocedural means of acquisition of L.R. No. 11592 to the extent that it covered L.R No. 13909 on the ground.
  84. Parties are bound by their pleadings. Particulars of fraud or illegality over L.R No.11592 were not set out in the defense to the amended plaint. Witness statements are not pleadings. The 2<sup>nd</sup> appellant knew that the respondents were seeking the rectification of the register for his parcel of land on account of purporting to include their parcel on the ground. The 2<sup>nd</sup> appellant did not plead that his application for rectification of the acreage was pending at the land registry. Adjudication records had been produced showing that his land at the adjudication record stage was 2 acres or there about and not 4 acres allegedly sold to the 1<sup>st</sup> appellant. His basis for claiming that his land was more than reflected in his title deed was not borne by any material before the trial court. His reluctance or delay to seek correction or rectification of the title to reflect the correct acreage since issuance on 6.6.2017 was not explained at all.
  85. Similarly, the sale agreement between him and the 1<sup>st</sup> appellant lacked vital and cardinal information on the exact land that he had sold to the 1<sup>st</sup> appellant. The agreement dated 4.1.2014 did not include the locality of the parcel of land sold. The description of the property was L.R Antuamburi/13909. So, it was not indicated as parcel No. Tigania/Antuamburi/13909, as of the date of the sale agreement, the 2<sup>nd</sup> appellant had been issued with any title deed.
  86. The title deed for the respondents was indicated as falling under Registry Map Sheet No. 108/4/12/15, while that of the 2<sup>nd</sup> appellant was on Registry Map Sheet No. 108/4/17/2. The 2<sup>nd</sup> appellant did not produce any evidence to show that he had by 2012 or 2014 been issued with any adjudication records under his name, reflective of ownership of land equivalent to 4 acres situated in the locality claimed by the respondents.
  87. The A/R Objection proceedings and demarcation record showed that PW 3 was recorded as the owner of Parcel No.11592, measuring 4 acres, following the decision in the A/R objection made on 25.1.2011. If the appellants were of the considered view that PW 3 was an untruthful witness and that his A/R Objection proceedings and records were erroneous or forged, the easiest thing would have been to object to the production of the exhibits and insist on their makers to attend court for cross-examination. Similarly, suppose the appellants were of the firm view that the title deed issued to the respondents and its root was illegal, irregularly obtained, and fraudulent, in that case, they should have started with a defense with particulars of illegality, fraud, irregularity, and mistake, followed by tangible and cogent evidence that the title deed was impeachable in law.
  88. It was the appellants who alleged that the respondents' land was not in the locality as alleged in the amended plaint and or occupied on the ground. The burden of proof is on he who was likely to lose if specific facts were not established. See Raila Odinga & others vs IEBC (supra). Cases are tried and determined based on pleadings. See Anthony Francis Warehem t/a Wareham & others vs Kenya Post and Office Savings Bank Civil Application NO's Nai 5 & 48 of 2022 Consolidated.
  89. The respondents had pleaded trespass to a specific parcel of land in a specific locality, which the appellants had invaded. Once the respondents produced documentary evidence on ownership of the land, its size, locality, the legality of acquisition, and entitlement, on account of Order 40 of the Civil



- Procedure Rules, Article 40 of the Constitution and Section 26 (1) of the Land Registration Act, then it was upon the appellants to show justification, consent or authority either from the owner of the land or out of superior rights enabling them to dislodge the respondents or remain on the suit land.
90. Trespass under Section 3 (3) of the Trespass Act refers to entry into private land without approval, consent, or authority of the actual owners. Trespass to land is actionable per se without proof of damages. See *KPLC vs Ringera*, KECA 104 (KLR) 4<sup>th</sup> February 2022 (Judgment).
  91. The respondents had pleaded that the justification by the appellants to enter, occupy, and remain on their land was based on falsified ownership documents, which they claimed were prepared using false, backdated, and fraudulent sale agreements, registry map sheets, and reports from the survey and lands office. Fraud consists of misrepresentation and concealment of material facts with a view of making someone act to his detriment or take advantage of. See *Wambui vs Mwangi* (2021) KECA 144 (KLR) 19.11.2021 (Judgment).
  92. The respondents had pleaded particulars of illegality, irregularity, false and unprocedural manner of issuance of the documents held by the appellants to lay a claim on their land parcel L.R No.11592. The appellants, submitted that the trial court relied on evidence of the respondents and in particular PW 3 on the locality of the suit land as opposed to the survey maps they had relied upon. On the other hand, the respondents have submitted the said documents were not authentic.
  93. It was upon the appellants to produce a registry index map, which was used to register their parcel of land. The Director of Surveys is the one responsible for the production of topographical maps. In *Azzuri Ltd vs. Pink Properties Ltd* (2017) eKLR, the court said the role of a registry index map was crucial and showed clearly on the ground where a parcel of land was situated its boundaries, and the exact locality.
  94. The map sheets relied upon by the appellants were not from the Survey of Kenya. They had no publication year, date, number, code, or stamp. See *Stephen Onyango Oloo vs Nelson Makhohha Kaburu & others* (2015) eKLR.
  95. The appellants did not bother to call the makers of the registry map sheets to produce them and ascertain their averments that Parcel L.R No.11592 was lying elsewhere than what the respondents had alleged to be on the ground, as opposed to genuine or official survey and land office records.
  96. Section 32 of the Survey Act, 2010 provides that no land shall be deemed to have been surveyed or resurveyed until the plan thereof has been authenticated by the signature of the Director or of a government surveyor authorized in writing by the Director on that behalf or by the affixing of the seal of the survey of Kenya.
  97. Therefore, the trial court was not bound to accept unauthenticated map sheets. Title deeds are registered with a known registry index map number similar to the one indicated in the title deed held by the respondents. The appellants did not expect the trial court to rely on an unauthenticated map to impeach the title held by the respondents. It was the appellants who held those maps and wished to rely on them. The burden was over them to prove the legality of the said map sheets as to the locality of the respondents' land away from the locality of L.R No.13909. The respondents had termed the title deed by the 2<sup>nd</sup> appellant as erroneous to the extent that it was being used to claim more land than was indicated on it, primarily on the ground of the land belonging to them.
  98. The respondents had averred that the documents held by the appellants were fake, faulty, erroneous, mistaken, and false. The particulars were pleaded in the amended plaint. The appellants did not specifically deny the particulars. In *Prafulla Enterprises Ltd vs Norlake Investment Ltd & another*



(2014) eKLR, the court said that the fact that documents were produced by consent was not itself proof of the contents of the documents. Using the same reasoning, the fact that the map sheets and the surveyors report were produced before the trial court, did not absolve the appellants from authenticating the documents and proving the facts through those documents. So, the trial court, whether the documents were admitted in evidence, did not mean it was precluded from determining the consistency, reliability, and truthfulness of the appellants under Sections 6 and 153 of the Evidence Act. As held in *Prafulla Enterprises Limited vs Morlake Investments Limited* (supra), a court of law does not act on the whims and beliefs of a party but on tangible evidence to prove facts. Be that as it may, I do not think the respondents proved a claim based on fraud to the required standards. Falsity of the documents equally required the respondents to prove culpability or collusion on the part of the appellants, who had pleaded that they were not the custodians of land records.

99. The claim based on trespass to land was, however, proved to the required standards. The appellants were unable to show any justification in law or otherwise why they held a better title to the suit land or that the respondents were mistakenly holding onto land that was not theirs as per authentic documents held at the land registry.
100. A court does not need to suo moto attend a scene visit. In an adversarial system, it is the parties who prove their claims through evidence. A court is not a fact-finding facility to aid parties to look for evidence once they have filed their claims. In the absence of justification for trespass, the respondents were entitled to the reliefs sought.
101. As to the relief of rectification, as indicated above, the 2<sup>nd</sup> appellant did not plead a superior title for 4 acres. His basis was that the land he had sold to the 1<sup>st</sup> appellant was yet to be rectified to reflect his correct acreage as per the ground. In this appeal, the court has found that the alleged entitlement by the 2<sup>nd</sup> appellant was not traceable to the adjudication records. The delay in seeking correction was unexplained. Similarly, the delay in seeking the transfer of that land to the name of the 1<sup>st</sup> appellant was and remains unexplained. Again, the authenticity, legality, and enforceability of the sale agreement dated 4.1.2014 between the 1<sup>st</sup> and 2<sup>nd</sup> appellants was not proved.
102. In a claim for trespass and impeachment of title, every paper trail towards the acquisition of a title comes under scrutiny. So, the trial court was justified in determining who had a superior title to the land between the parties by looking at the veracity, legality, and probative value of their respective documentary evidence to their respective claims and defenses.
103. The upshot is that I find the grounds of appeal lacking merits. The appeal is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

**ON THIS 14<sup>TH</sup> DAY OF FEBRUARY 2024**

**In presence of**

C.A Kananu

Gatwiri Mwiti for Ndubi for the respondent

**HON. CK NZILI**

**JUDGE**

ELCA E024 OF 2021 - JUDGMENT	0
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