



REPUBLIC OF KENYA



**Ngugi v Nduta (Environment and Land Appeal 37 of 2016)  
[2024] KEELC 540 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 540 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL 37 OF 2016**

**JO MBOYA, J  
FEBRUARY 8, 2024**

**BETWEEN**

**MICHAEL MUKUNDI NGUGI ..... APPELLANT**

**AND**

**NAOMI MWIHAKI NDUTA ..... RESPONDENT**

**JUDGMENT**

**Introduction and Background**

1. The Appellant herein has approached this Honourable court vide the Memorandum of Appeal dated the 29<sup>th</sup> March 2016; and in respect of which same has highlighted and enumerated various Grounds of Appeal, namely; [verbatim]:
  - i. The Magistrate erred in law by failing to properly interpret and held that the Respondent had proved his case to the required standard.
  - ii. The Magistrate erred in law by failing to properly interpret and apply the provisions of the law with respect to fraudulently acquired titles.
  - iii. The Magistrate erred in making a finding that the Respondent had a valid title to Land parcel LR. No. Juja/juja East Block 1/1159 despite the fact that it was demonstrated that the acquisition of the said title was fraudulent.
  - iv. The Magistrate erred in law failing to make any analysis of the Evidence presented by the Defendant with respect to the fraudulent acquisition of the Title Deed.
  - v. The Magistrate failed in the Judgment to address the other attributes of fraud pleaded, particularized and proved at the hearing of the case.
  - vi. The Magistrate erred in law by awarding costs to the Respondent.



2. Though the instant Appeal was filed and/or lodged on the 1<sup>st</sup> April 2016, same did not come up for Directions up to and including the 30<sup>th</sup> October 2023, when directions as pertains to the hearing and disposal of appeal were given, in accordance with the provisions of Order 42 Rule 13(2) Civil Procedure Rules, 2010.
3. For coherence, the advocates for the respective Parties covenanted to have the appeal heard and/or canvassed before one Judge, sitting at Nairobi. Furthermore, it was equally agreed that the appeal be canvassed and ventilated by way of written submissions to be filed and exchanged by the Parties.
4. Arising from the foregoing, the Honorable court proceeded to and issued directions inter-alia, directing that the appeal be canvassed by way of written submissions within set timelines.
5. Suffice it to point out that the advocates for the Appellant thereafter proceeded to and filed two sets of written submissions dated the 9<sup>th</sup> November 2023 and the 6<sup>th</sup> January 2024; whereas the Respondent filed written submissions dated the 23<sup>rd</sup> January 2024.
6. For coherence, both sets of written submissions are on record.

### **Parties' Submissions:**

#### **a. Appellant Submissions:**

7. The Appellant herein has raised various issues at the foot of the written submissions. For clarity, the Appellant has highlighted the following issues for consideration by the Honourable Court;
  - a. That the Learned trial magistrate failed to consider and/or address various attributes of fraud, which had been impleaded, particularized and proved during the hearing.
  - b. That the Learned trial magistrate erred in law in finding and holding that the Respondent herein lawfully and legally acquired title to the suit property.
  - c. That the Learned magistrate adopted a slanted approach and thereby failed to appreciate that the Appellant herein had indeed filed a counterclaim, which counterclaim was neither addressed nor determined by the court.
  - d. That the Learned trial magistrate failed to undertake in-depth analysis and evaluation of the evidence tendered by and on behalf of the respective Parties and thereby arrived at an erroneous Judgment.
  - e. That the Judgment by the Learned trial magistrate offends and/or contravenes Order 21 Rule 4 of the Civil Procedure Rules 2010; and thus same is a nullity.
8. Having highlighted the foregoing issues, learned counsel for the Appellant has submitted that though the Appellant herein filed an amended statement of defense and counterclaim which impleaded particulars of fraud, the learned trial magistrate failed and/or neglected to take cognizance of the said statement of defense and counterclaim whilst crafting her Judgment.
9. Furthermore, learned counsel for the Applicant has also submitted that the learned trial magistrate made and/or committed a grave error when same stated at the foot of her Judgment that the Appellant herein had neither pleaded nor particularized the claims/allegations founded on fraud.
10. Instructively, learned counsel for the Appellant has contended that the said holding by the learned trial magistrate denotes that the court did not appreciate the nature of the pleadings filed by and on behalf of the Appellant, as well as the evidence tendered.



11. Further and in addition, learned counsel for the Appellant has submitted that having failed to appreciate the totality of the pleadings filed by the Parties and having similarly failed to consider and determine the issues raised thereunder, the Judgment by the learned magistrate is therefore deficient and invalid.
12. Premised on the foregoing, learned counsel for the Appellant has thereafter submitted that the impugned Judgment is therefore erroneous and hence same ought to be invalidated. Further and in any event, learned counsel has ventured forward and implored the Honourable court to declare the Judgment as a nullity and thereafter remit the suit back to [sic] the magistrate court for re-trial.
13. In support of the foregoing submissions, learned counsel for the Appellant has cited and relied on the case of National Bank of Kenya Ltd vs Thomas O Ondieki (2016)eKLR, where the Court of Appeal found and held that a Judgment that violates the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010, is a nullity.
14. The second issue that has been canvassed by and on behalf of the Appellant touches on and concerns the validity of the finding of the learned trial magistrate that the Respondent herein acquired a lawful and valid Certificate of title over and in respect of the suit property.
15. It was the submissions of learned counsel that the Certificate of title that was issued to and in favor of the Respondent herein was neither properly nor legally acquired. Furthermore, learned counsel ventured forward to submit that the impugned certificate of title was issued on the 11<sup>th</sup> March 2011, yet evidence abound that the vendor/transferor of the suit property died on the 1<sup>st</sup> April 2010, long before the transfer and registration of the suit property in favor of the Respondent.
16. Additionally, learned counsel for the Appellant has submitted that even the sale agreement that was allegedly entered into between the vendor and the Respondent was wrought and replete with several irregularities and in any event, the said sale agreement was not duly proved before the Honourable court.
17. On the other hand, learned counsel for the Appellant has also submitted that even though assorted evidence was tendered and placed before the Honorable court, which impacted on, inter-alia, the validity of the sale agreement that was entered into between the vendor and the Respondent, the said evidence was neither considered nor analyzed by the learned trial magistrate.
18. Consequently and in view of the foregoing, learned counsel for the Appellant has contended that the Judgment rendered by the learned trial magistrate, which is devoid of analysis of the evidence tendered before the court, is like an answer to a Mathematical problem, albeit without showing the formula deployed towards arriving at the impugned answer.
19. The third issue that has been canvassed and highlighted by learned counsel for the Appellant relates to the fact that the counterclaim which had been duly and lawfully filed by the Appellant was neither considered nor addressed by the Learned trial Magistrate.
20. To start with, learned counsel for the Appellant contended that had the learned trial magistrate appreciated the existence of the counterclaim, same would not have highlighted only one [1] issue for consideration and determination.
21. Furthermore, learned counsel for the Appellant has pointed out that in the body of the Judgment by the learned trial magistrate, same has only alluded to one superficial issue, whether the Plaintiff [read Respondent] has demonstrated a case to warrant the grant of orders of Injunction in the manner sought by the Respondent.



22. Additionally, learned counsel for the Appellant has also submitted that in finding and holding that the Appellant herein had failed to implead fraud or at all, yet the law requires that fraud must be pleaded beforehand, the learned trial Magistrate clearly misapprehended the totality of the pleadings before the court.
23. On the other hand, learned counsel for the Appellant has also submitted that other than failing to appreciate the existence of a Counterclaim filed on behalf of the Appellant, the Learned trial magistrate also failed to consider the evidence that was brought before the Honourable court and in particular, the pertinent evidence tendered by George Thuo Mungai and Evanson Oyori, the latter who was a Finger Print Examiner from the National Registration Bureau.
24. Arising from the foregoing, learned counsel for the Appellant has therefore contended that had the Learned magistrate properly considered the Appellant's case, same would no doubt have come to the conclusion that the Appellant had duly placed before the court plausible, cogent and credible evidence, to demonstrate the fraud that bely the process culminating into the issuance of the Respondent's Certificate of title.
25. Besides, learned counsel for the Appellant has also added that the learned trial magistrate erred in finding and holding that the Respondent herein was a Bona fide purchaser to the suit property, whereas the Respondent did not satisfy the requisite conditions established vide various decisions including inter-alia Lawrence P Mukiri Mungai & Another vs Attorney General & 4 Others (2017)eKLR and Katende vs Haridar & Company Ltd (2008) 2EA 173, respectively.
26. The Fourth issue that has been canvassed and ventilated by learned counsel for the Appellant relates to the question pertaining to the extent and scope of analysis, [if any], undertaken by the learned trial magistrate prior to and before making the final decision.
27. According to learned counsel for the Appellant, the learned trial Magistrate adopted a superficial approach and thus same failed to undertake due interrogation of the evidence [ both Oral and Documentary], tendered by and on behalf of the respective Parties.
28. Pertinently, learned counsel for the Appellant has submitted that had the learned trial magistrate considered the evidence of George Thuo Mungai as against the Evidence of the advocate who allegedly crafted the sale agreement, namely, Jane Wangari, same would have established the discrepancy inflicting the Respondent's case.
29. Besides, learned counsel for the Appellant has also submitted that the learned trial magistrate also failed to consider the import and tenor of the evidence of the Finger Print Examiner, who testified as DW3. For good measure, it was the submissions of learned counsel for the Appellant that the failure to undertake due analysis and consideration of the evidence before the court has culminated into the learned trial magistrate reaching and/or arriving at an erroneous conclusion, which is not supported by the evidence.
30. Lastly, learned counsel for the Appellant has contended that the impugned Judgment by and on behalf of the learned magistrate is ex-facie a nullity and thus ought to be declared null and void.
31. Having raised and highlighted the foregoing submissions, learned counsel for the Appellant has submitted that the various errors highlighted and alluded to, are sufficient to warrant interference with the Judgment of the trial magistrate.
32. Consequently and in the premises, learned counsel for the Appellant has thus implored the court to find and hold that the Appeal beforehand is meritorious and thus deserving to be allowed.



## **b. Respondent's Submissions:**

33. Vide written submissions dated the 20<sup>th</sup> December 2023, albeit filed before the court on the 23<sup>rd</sup> January 2024, learned counsel for the Respondent has highlighted, raised and canvassed five [5] salient issues for due consideration by the Honorable court.
34. First and foremost, learned counsel for the Respondent has submitted that the suit property hitherto belonged and was registered in the name of Kiganjo Ranching Company Ltd, which was a Land buying company.
35. Additionally, learned counsel for the Respondent has submitted that just like any other Land buying company, M/s Kiganjo Ranching Company Ltd, bought land for and on behalf of her Members/ Shareholders and thereafter same [Kiganjo Land Buying Co] was obliged to share the land to and in favor of her members in accordance with their respective shares.
36. Consequently and in this regard, learned counsel for the Respondent has thus submitted that M/s Kiganjo land Buying Company Ltd, duly proceeded to and shared a portion of her land to and in respect of one Mary Wambui Mungai, who was one of her members.
37. Furthermore, learned counsel for the Respondent has submitted that upon the share belonging to Mary Wambui Mungai being allocated unto her, the said Mary Wambui Mungai, [ now Deceased], became entitled to and acquired ownership rights to the suit property.
38. Secondly, learned counsel for the Respondent has submitted that subsequently the land which was shared to and in favor of Mary Wambui Mungai was subjected to the registration process culminating into a Certificate of title being issued in favor of Mary Wambui Mungai.
39. Furthermore, learned counsel has submitted that upon being issued with a Certificate of title, Mary Wambui Mungai became the lawful and legitimate proprietor of the suit property and thus same accrued legitimate rights in accordance with the law.
40. In any event, learned counsel for the Respondent has also submitted that the fact that the suit property was duly and lawfully registered in the name of Mary Wambui Mungai has been documented and has been established vide a copy of the Green card, which was tendered and adduced before the court on behalf of the Respondent.
41. Thirdly, learned counsel for the Responded has submitted that upon being registered as the proprietor of the suit property, Mary Wambui Mungai, [ now Deceased], became vested with the requisite rights over the suit property including the right to sell, dispose off and/or alienate the suit property.
42. In respect of this submissions, learned counsel for the Respondent has invited the Honourable court to take cognizance of the import and tenor of the provisions of Section 24 of the [Land Registration Act, 2012](#).
43. Lastly, learned counsel for the Respondent has submitted that the fact that the Appellant summoned and called an Expert witness, does not mean that the evidence tendered by the Expert, would trample upon the rest of the evidence tendered and adduced before the court.
44. Furthermore, learned counsel for the Respondent has submitted that it is incumbent upon the court to evaluate and consider the evidence of the Expert vis a viz the rest of the Evidence on record and where appropriate, to give due weight to each set of evidence tendered.



45. To buttress the submissions pertaining to and concerning the manner of treating the evidence by the Expert, learned counsel for the Respondent has cited and relied on the holding in the case of Black Trap Products Ltd vs Mavoko Land Development company Ltd & 3 Others (2022)eKLR.
46. In a nutshell, learned counsel for the Respondent has submitted that the Appeal by and on behalf of the Appellant is devoid of merits and hence same ought to be dismissed with costs.

#### **Issues For Determination:**

47. Having reviewed the Memorandum of appeal, the pleadings on record, the evidence tendered before the Trial court and finally the written submissions filed on behalf of the respective Parties; the following issues are discernable and in any event, do emerge and thus worthy of determination;
  - i. Whether the Appellant herein filed a Counterclaim which impleaded and particularized fraud and if so, whether the plea of fraud was considered by the Learned trial magistrate.
  - ii. Whether the Judgment by the Learned trial magistrate violates and/or contravenes the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010; and if so, whether such breach would automatically render the Judgment a nullity.
  - iii. Whether the Appellant herein acquired any lawful rights and/or interests over the suit property or better still; whether the Appellant ought to be declared to be the owner of the suit property.
  - iv. Whether the Respondent acquired lawful rights and/or title to and in respect of the suit property; and if so, whether same is entitled to the protection of the court.

#### **Analysis And Determination**

##### **Issue Number 1 Whether the Appellant herein filed a Counterclaim which impleaded and particularized fraud and if so, whether the plea of Fraud was considered by the Learned trial magistrate.**

48. Before venturing to interrogate the issues herein before, it is appropriate to state and underscore that this is a first appeal and by virtue of being a first appeal, this court is vested with the requisite Jurisdiction to interrogate, re-evaluate and analyze the totality of the evidence tendered before the trial court and thereafter to arrive at an independent decision, based on the evidence of record.
49. Nevertheless, it is not lost on this court, that in an endeavor to arrive at an independent conclusion, the court is reminded to exercise due caution and necessary circumspection, taking into account that the court [appellate court], did not view the witnesses as same testified and hence the appellate court is not in a position to speak to the credibility and demeanor of the witness.
50. For coherence, the court is reminded, that same [court] must give due deference to the trial court, who had the occasion to hear/view the witness as same testified and hence was placed in a better position to form an opinion as pertains to the demeanor and credibility of the witness.
51. Be that as it may, there is no gainsaying that where the appellate court finds and holds that a finding by the trial court is manifestly at variance with the evidence tendered, or where the conclusion arrived at is contrary to law or better still, where the Judgment is based on no evidence, then the appellate court is obligated to interfere with the Judgment of the learned trial magistrate.



52. To buttress the foregoing observation, it suffices to cite and adopt the ratio decidendi in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...” [ See also the Decision in the case of *Gitobu Imanyara versus Attorney General* [ 2016] eKLR]

53. Having taken cognizance of the established principles, [details in terms of the preceding paragraphs], it is now appropriate to venture forward and to interrogate the issues before mentioned.

54. To start with, there is no gainsaying that the Appellant herein previously filed a statement of defense dated the 17<sup>th</sup> January 2012, but which Statement of Defense was subsequently amended on the 6<sup>th</sup> September 2013. In this regard, the operative pleading that guided the Appellant’s case was the amended statement of defense and Counter-claim dated the 6<sup>th</sup> September 2013.

55. Furthermore, it is evident and apparent that at the foot of the counterclaim filed by and on behalf of the Appellant, same impleaded fraud and thereafter supplied the requisite particulars of fraud thereunder.

56. Other than the foregoing, it is also important to point out that upon being served with the Amended Statement of Defence and Counter-claim, which impleaded fraud, the Plaintiff [ now Respondent] duly filed a Reply to the Amended Statement of Defence and Defence to the Counter-claim.

57. To the extent that the Appellant herein raised the plea of fraud and thereafter supplied particulars underpinning the plea of fraud, it was therefore erroneous and misleading on the part of the learned trial magistrate to hold that the Appellant had neither impleaded nor supplied particulars of fraud.

58. To be able to appreciate the finding and holding by the learned trial magistrate which has provoked the complaint under reference, it is imperative to reproduce the excerpt of the Judgment to that effect.

59. Same are reproduced as hereunder;

“The court has ruled that though the Defendant has called DW3, a Finger print examiner, in their pleadings they did not plead fraud (sic) are based by their pleadings. It is still law that fraud must be pleaded and same be particularized in the pleadings”.

60. Though the excerpt is not entirely clear and is wrought with some contradictions, what the learned trial magistrate seems to have been alluding to is that Parties are bound by their pleadings and to the extent that the Appellant had neither impleaded fraud nor supplied particulars thereof, same was therefore barred from canvassing a cause of action based on fraud.

61. As pertains to the validity of the statement by the learned trial magistrate, I beg to highlight and underscore that same was in tandem with the obtaining Jurisprudence. For good measure, any litigant, the Appellant not excepted, who seeks to implead fraud is bound to comply with the provisions of Order 2 Rules 4 & 10 of the Civil Procedure Rules 2010.



62. Further and in any event, the legal position that requires the plea of fraud to be impleaded and thereafter particulars be supplied, has been amplified in various decisions of inter-alia the Court of Appeal, as well as the Supreme Court of Kenya.

63. Without belaboring the point, it suffices to take cognizance of the holding in the case of Fanikiwa Limited versus Sirikwa Squatters Group & 20 others (Petition 32 (E036) & 35 (E038) of 2022 (Consolidated)) [2023] KESC 58 (KLR) (16 June 2023) (Ruling), where the court held as hereunder;

(82) We are unconvinced that such vague particulars of fraud were proved to the required standard going by the absence of any serious attempt to table concrete evidence to prove the subject allegations to the required degree. Our appellate court has over the years developed settled jurisprudence on the requisite standard of proof for allegations of fraud which we endorse. In *Central Kenya Ltd v. Trust Bank Limited & 4 Others*, Civil Appeal No. 215 of 1996; [1996] eKLR the appellate court determined:

“The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case.” [Emphasis added]

(83) Further, in *Vivo Energy Kenya Limited v. Maloba Petrol Station Limited & 3 Others*, Civil Appeal No. 21 of 2014; [2015] eKLR, the appellate court delivered itself thus:

“Where fraud is alleged, it must be specially pleaded and particulars thereof given. That is what is required by Order 2 rule 10 of the Civil Procedure Rules, 2010. Way back in the 19th Century, Lord Penzance stated the principle thus, in *Marriner V. Bishop Of Bath And Wells* [1893] P. 146:

‘The court will require of him who makes the charge that he shall state that charge with as much definiteness and particularity as may be done, both as regards time and place.’

Even where a plaintiff has properly pleaded fraud, he or she is required in addition to prove it beyond a mere balance of probabilities. In *R. G. Patel Vs Lalji Makanji* [1957] EA 314, at page 317 the former Court of Appeal for Eastern Africa stated that: \

‘Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.’

And in *Richard Akwesera Onditi V. Kenya Commercial Finance Co. LTD*, CA No 329 of 2009 this Court expressed itself on the issue as follows: ‘Needless to say, fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability, and the bare allegations put forward by the appellant do not therefore avail him.’

(See also *Gudka V. Dodhia*, CA No. 21 of 1980 and *Koinange & 13others V. Koinange* (1996) KLR 23).



Regarding prima facie proof of fraud, this Court stated thus in *Central Kenya Ltd V. Trust Bank Ltd & 4 Others*, CA No 215 of 1996:

‘The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.’

We would also wish to point out, as this Court stated in *Westmontpower Kenya Ltd V. Frederick & Another T/a Continental Traders & Marketing* [2003] KLR 357, albeit in the context of an application for summary judgment, that issues of alleged fraud can only be determined with finality during a proper trial and not on conflicting affidavit evidence.”

64. Other than the foregoing decision, the manner of crafting pleadings relative to the plea of fraud was also considered and elaborated upon the Court of Appeal in the case of *Kuria Kiarie versus Sammy Magera* (2018)eKLR, where the Court stated and held thus;

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

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.

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

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

27. We have examined the appellants' amended defence for any pleading on particulars of fraud or illegality but there is none. The claims were therefore stillborn and no evidence could be tendered. Even if it was open to tender



evidence on fraud and illegality, the mere allegation that a sale agreement and a Consent for transfer cannot be obtained on the same day is well below the standard of proof set under the authorities cited. We need not belabour this issue as we are satisfied that it was neither properly pleaded nor strictly proved. That ground of appeal fails too.

65. Suffice it to point out that the law requires that the plea of fraud, must not only be pleaded, but the particulars attendant to same, must be availed and/or supplied, with a degree of precision and clarity.
66. Nevertheless, the gravamen of the Appellant's complaints relates to the contention that the learned trial magistrate fails to appreciate and comprehend the substance of the counterclaim, which evidently impleaded fraud, and thereafter supplied the requisite particulars thereof.
67. Quiet clearly, the learned trial magistrate did not appear to understand the operative pleadings that were filed by and on behalf of the Parties; and more particularly, the Appellant herein.
68. To my mind, the finding by the learned trial magistrate that the Appellant had neither pleaded nor particularized fraud, [ despite the Amended Statement of Defence and Counter-claim], was misconceived and erroneous.
69. Consequently and in this regard, I am in total agreement with the Appellant and his Learned Counsel that the learned trial magistrate did not appreciate the totality of the pleadings filed and hence arrived at an erroneous conclusion.

**Issue Number 2 Whether the Judgment by the Learned trial Magistrate violates and/or contravenes the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010 and if so, whether such breach would automatically render the Judgment a nullity.**

70. Other than the question pertaining to non-comprehension of the totality of the pleadings that were filed by and on behalf of the Parties, learned counsel for the Appellant has also contended that the learned trial magistrate also did not consider and address all the issues that were canvassed by the Parties.
71. Firstly, learned counsel for the Appellant submits in the body of her Judgment, the learned trial magistrate only isolated and identified one [1] issue for determination, namely, whether the Plaintiff has demonstrated her case to warrant the grant of orders of Injunction as sought by the Respondent.
72. In this regard, learned counsel for the Appellant has contended by highlighting only one [1] issue, the learned trial magistrate failed to appreciate the numerous issues that were attendant to and raised vide the Pleadings filed by the respective Parties.
73. Secondly, learned counsel for the Appellant has also contended that by failing to discern the existence of the counterclaim which was filed by and on behalf of the Appellant, the learned trial magistrate therefore failed to interrogate, consider and determine the plea/grievances raised and canvassed by the Appellant.
74. Thirdly, the learned counsel for the Appellant has also submitted that though various issues were raised vide the evidence by the Parties and their witnesses, the learned trial magistrate paid scant respect/ regard to the evidence and thus failed to analyze same or at all.
75. Fourthly, learned counsel for the Appellant has submitted that even though the Appellant summoned and called a Finger Print examiner, who is an Expert, the learned trial magistrate failed to consider the evidence tendered by the witness and even the Report tendered by the said witness.



76. Based on the foregoing, learned counsel for the Appellant has therefore contended that the impugned Judgment by the learned trial magistrate does not comply with and/or adhere to the statutory requirements underpinned by the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010.
77. For brevity, the provisions of Order 21 Rule 4 [supra] are reproduced as hereunder;  
[Order 21, rule 4.]  
Contents of Judgment.
4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.
78. Notably, the provisions alluded to in terms of the preceding paragraphs are crystal clear and explicit. For coherence, it is incumbent upon every Judicial officer and/or Judge, to ensure that same addresses and/or adverts to all the pertinent issues canvassed by the Parties.
79. In any event, the text of the law as espoused in the provision [supra], is coached in mandatory terms and hence it behooved the learned trial magistrate to address all the pertinent issues that arose vide the pleadings filed by the Parties.
80. Unfortunately, the learned trial magistrate adopted a slanted approach and thereby failed to appreciate, discern and/or decipher the salient issues that were raised before her and hence the complaint by learned counsel for the Appellant is meritorious.
81. Before departing from this issue, it is imperative to observe that the requirement to comply with the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules , 2010; has variously been underscored and elaborated upon in a legion of decisions.
82. Notably, the significance of Order 21 Rule 4 of the Civil Procedure Rules, 2010; was highlighted and elaborated upon in the holding in the case of South Nyanza Sugar Co. Ltd vs Omwando Omwando (Supra) where the Leaned Judge stated:

“In a rather skimpy superficial and one page judgment, the trial Magistrate held: “...I have carefully appraised the evidence on record. On a balance of probabilities, I believe the plaintiff was injured. He produced a delivery note in the name of the defendant bearing his name. The contractor was never enjoined as a party. I hold the defendant liable. I will however apportion liability at 80% to 20% in favour of the plaintiff. In view of the injury sustained and considering that it healed well, I will assess general damages at Kshs.80,000/- which will work down to Kshs.64,000/-. The plaintiff has exhibited a receipt for Kshs.3,000/- in support of the specials. I will award this sum...”

I do not think that, the judgment as crafted by the learned Magistrate really qualifies for a valid judgment. Ordinarily and in law a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provisions of order 21 rule 4 of the Civil Procedure Rules which provide that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision. In the circumstances of this case, it cannot be said from the extract of the judgment I have set out above the trial magistrate complied with this mandatory provisions of the law. The trial magistrate by not setting out points for determination and reasons for his decision contrary to the aforesaid provisions of the law abdicated his judicial responsibility. As a judicial officer he was under a duty to state in writing the reasons which



made him arrive at a particular decision on liability and the apportionment thereof. It could not have been done in vacuo.

Any judgment that does not contain the aforesaid essential ingredients is not a judgment and an appellate court will frown at such a judgment and indeed impugn it as I hereby do. This ground alone would have been sufficient to dispose of the appeal.

83. The auxiliary issue that also arises is whether the failure to comply with and/or abide by the provisions of Order 21 Rule 4 of the Civil Procedure Rule 2010; should as a matter course, culminate into re-trial, either in the manner adverted to by Learned Counsel for the Appellant, or otherwise.
84. Suffice it to point out that where the trial court does not analyze and address all the issues espoused by the pleadings and the evidence tendered by the Parties, such a failure would indeed, call for setting aside and variation of the Judgment of the trial court.
85. Furthermore, once an Appellate court finds and holds that the impugned Judgment, which is the subject appeal did not advert to all the issues canvassed, the Appellate court [ this Court], is at liberty to re-appraise, evaluate and render effective determination, premised on the totality of the pleadings and the evidence tendered.
86. Be that as it may, learned counsel for the Appellant has invited the court that subject to finding and holding that the impugned Judgment did not accord with the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010; then the court should order a re-trial.
87. Be that as it may, I am afraid that the plea for retrial is made on quick- sand and is in any event, legally untenable. For good measure, there is no Complaint that the trial and the attendant proceedings suffered from any illegality or infirmity, which would invalidate the proceedings to warrant a re-trial.
88. In a nutshell, my answer to issue number two [2] herein is three-fold. Firstly, the impugned Judgment by the learned trial magistrate violated and or contravened the provisions of Order 21 Rule 4 of the Civil procedure Rules, 2010.
89. Secondly, even though the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010; were contravened, however, the contravention complained of does not ipso facto found a basis to order a re-trial.
90. Thirdly, even though the Appellant herein in the body of the submissions has implored the court to order a re-trial, it is common ground that the Appellant is bound by the pleadings filed before the court and in this case, the Memorandum of appeal dated the 29<sup>th</sup> March 2016, which did not implead a prayer for re-trial.

**Issue Number 3 Whether the Appellant herein acquired any Lawful rights and/or interests over the suit property or better still; whether the Appellant ought to be declared to be the owner of the suit property.**

91. The Appellant herein filed a statement of defense and counterclaim and in respect of which same contended, inter-alia, that he [Appellant] entered into a sale agreement with one George Thuo Mungai over and in respect of the suit property.
92. Furthermore, the Appellant contended that upon entry into and execution of the sale agreement, the vendor, namely, George Thuo Mungai took the Appellant to the offices of Kiganjo Ranching Company Ltd, whereat the suit property was transferred to and registered in the name of the Appellant. In any event, the Appellant added that thereafter same was issued with a share certificate relating to the suit property.



93. Other than the foregoing, the Appellant has contended that prior to and before entering into the sale agreement with George Thuo Mungai, same (Appellant) undertook due diligence at the offices of M/s Kiganjo Ranching Company Limited, and indeed authenticated that the suit property belonged to George Thuo Mungai.
94. First forward, the Appellant further contended that even though the suit property was lawfully sold unto him, the Respondent herein raised a claim as pertains to ownership of the suit property. In particular, the Appellant contended that the Respondent was claiming to be the owner of the suit property.
95. Arising from the foregoing, the Appellant now contends that the transfer and registration of the suit property in favor of the Respondent was informed by fraud perpetrated by the Respondent.
96. In particular, the Appellant herein adverted to and highlighted the particulars of fraud alluded to at the foot of paragraphs 14 and 15 of the Amended Statement of Defence and Counter-claim counterclaim dated the 6<sup>th</sup> September 2013.
97. Nevertheless, it is imperative to point out that the Appellants herein admits and acknowledges that the suit property hitherto belonged and was registered in the name of Mary Wambui Mungai, now deceased.
98. On the other hand, the Appellant herein concedes that the person who entered into and executed the sale agreement in his favor over the suit property, namely, George Thuo Mungai, had neither procured nor obtained Grant of Letters of administration over and in respect of the Estate of Mary Wambui Mungai.
99. On the other hand, evidence abound that the Estate of Mary Wambui Mungai, Deceased, was only succeeded to and a Grant of Letters of administration issued on the 5<sup>th</sup> September 2012 and thereafter confirmed on the 3<sup>rd</sup> October 2012.
100. Arising from the foregoing, two pertinent issues do arise and which require due examination and analysis.
101. To start with, it is evident that the Appellant herein entered into and executed a sale agreement over and in respect of the suit property, with a person who was devoid of the requisite locus standi. In this regard, the agreement being relied upon by the Appellant is illegal and invalid.
102. Furthermore, the impugned agreement violates the provisions of Sections 45 and 82 of the [Law of Succession Act](#), Chapter 160 Laws of Kenya.
103. Secondly, it is evident that by the time the Appellant was entering into and executing the sale agreement with George Thuo Mungai, the suit property had long been registered and a certificate of title issued in favor of Mary Wambui Mungai, now Deceased. Consequently, no transactions touching on and/or affecting the suit property could be carried out and/or undertaken at the offices at Kiganjo Ranching Company Ltd.
104. To my mind, the Appellant herein as well as George Thuo Mungai, engaged in paper transaction which were devoid of any legal basis or at all.
105. Lastly, the Appellant herein is not Administrator of the Estate of Mary Wambui Mungai, now deceased; and to the extent that same is not the appointed Administrator, the Appellant cannot be heard to complain that the transfer of the suit property has interfered with and disenfranchised the Estate of the deceased.



106. In my humble view, the Appellant's claim to and in respect of the suit property are misconceived and legally untenable. In any event, there is no denial that the Appellant herein does not hold any Certificate of title to and in respect of the suit property.

**Issue Number 4 Whether the Respondent acquired lawful rights and/or title to and in respect of the suit property; and if so whether same is entitled to the protection of the court.**

107. On her part, the Appellant herein tendered evidence to the effect that same entered into and executed a sale agreement with Mary Wambui Mungai, now deceased, who was the registered proprietor of the suit property. In this regard, the Respondent tendered before the trial court a copy of the sale agreement and the Green card in respect of the suit property.

108. Furthermore, it was also evident that the suit property was transferred and registered in the name of Mary Wambui Mungai, now deceased on the 14<sup>th</sup> September 1989. Consequently, there is no gainsaying that Mary Wambui Mungai was the lawful and registered proprietor of the suit property.

109. Moreover, the Respondent also procured the attendance of the advocates, namely, M/s Jane Wangare, who is the one who crafted the sale agreement and thereafter attested same.

110. Pertinently, Jane Wangare, advocate testified as PW3; and same confirmed having witnessed Mary Wambui Mungai affix her thumb print on the sale agreement, in her presence.

111. Other than the foregoing, it is also not lost on the court that the transaction between Mary Wambui Mungai and the Respondent herein, required land control board consent. In any event, it suffices to point out that the Respondent also tendered before the court a copy of the Land control board consent duly certified by the District Officer Thika Municipality on the 30<sup>th</sup> June 2015.

112. Additionally, the Respondent herein tendered evidence that same paid all the consideration attendant to the sale agreement and that thereafter the vendor, now deceased, executed all the requisite instruments towards the transfer and registration of the suit property in his (Respondent's) name.

113. In view of the foregoing, it is my finding and holding that the Respondent herein acquired lawful rights to and in respect of the suit property. Furthermore, the Respondent bought and purchased the suit property from the legitimate and proprietor thereof.

114. Consequently and in view of the foregoing and having taken due analysis of the evidence tendered [both oral and documentary], I come to the conclusion that the Respondent has duly justified the process leading to the acquisition, transfer and ultimate registration of the suit property in his name.

115. By virtue of being the registered proprietor of the suit property, there is no gainsaying that the Appellant is thus entitled to enjoy and partake of the privileges attendant to such registration. For coherence, the scope and extent of the privileges that accrue in favor of a land owner are underpinned by the provisions of Section 24 and 25 of the *Land Registration Act*, 2012.

116. In any event, the nature, extent and scope of the rights of a land owner have been elucidated in various decisions. Pertinently, the decision in the case of *Mohansons (Kenya) Limited v Registrar of Titles & 2 others* [2017] eKLR, is instructive.

117. For coherence, the court stated and held as hereunder;

(18) As held by the Court of Appeal for East Africa held in *Moya Drift Farm Ltd. v. Theuri* (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not



have possession of the property. Spry, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held –

“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”

Sir William Duffus, P. *ibid* at p.117 agreed with Spry, JA as follows:

“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”

- (19) Similarly, in *Park View Shopping Arcade v. Kangethe & 2 Ors.* (KLR) (E&L) 592, Ojwang, Ag. J. (as he then was) considered the rights of a registered proprietor under section 23 of the Registration of Titles Act and held that-

“*The Constitution* safeguards the sanctity of private property. It was not proper for the defendants to forcibly occupy the plaintiff’s land and then plead public interest in environmental conservation to keep out registered owner. The effect of their action was to deprive the owner of his land without full and fair compensation.”

118. Seized of the requisite certificate of title, the Respondent herein, no doubt is entitled to exclusive possession and occupation of the suit property and hence the learned trial magistrate did not err in granting an Order of permanent injunction.
119. Before departing from this issue, it is worthy to point out that the Appellant herein made heavy weather of the fact that the Certificate of title to and in favor of the Respondent was issued on the 11<sup>th</sup> March 2011, long after the death of the transferor. However, the critical point is not when the effective transfer was actualized, but when the sale transaction between the transferor and the Respondent was concluded and the Transfer instrument executed.
120. To my mind, the transfer and issuance of Certificate of title in favor of the Respondent on the 11<sup>th</sup> March 2011, does not ipso facto and without more, constitute fraud. Invariably, upon the execution of the Instrument of Transfer and surrender of the Completion Documents, the Transferor, divested herself of any Rights over and in respect of the Suit Property.
121. At any rate, it is not lost on this court that the allegations of fraud, if any, which the court has found not to have been proved, cannot also be ventilated by and on behalf of a busybody.
122. In view of the foregoing, it is my finding and holding that the Respondent truly and lawfully purchased, acquired and is therefore the legitimate owner of the suit property and thus deserving of the protection of the court.
123. In short, my answer to issue number four [4] is in the affirmative.



**Final Disposition:**

124. Having reviewed and analyzed the pertinent issues attendant to the subject appeal, it is crystal clear that the Appellant has failed to demonstrate his entitlement to the suit property.
125. On the contrary, the court has found and held that the Respondent truly and lawfully acquired the suit property and is thus entitled to partake of and benefit from the ownership rights attendant thereto.
126. Be that as it may, whilst discussing the issues highlighted in the body of the Judgment, the court has established that there were aspects of erroneous conclusions by and on behalf of the Trial court.
127. However, it is pertinent to underscore that the Appellant herein has only succeeded on two [2] pertinent issues.
128. In view of the foregoing, the court comes to the conclusion that the appeal by and on behalf of the Appellant is devoid of merits and same be and is hereby dismissed.
129. As concerns costs, I am inclined to award 50% [Half], costs to the Respondent to be agreed upon and in default to be taxed by the Deputy Registrar of the court in the usual manner.
130. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF FEBRUARY 2024.**

**OGUTTU MBOYA**

**JUDGE**

In the Presence of;

Court Assistant: Travis/ Benson.

Mr. Echessa for the Appellant.

Mr. Wachira h/b for Mr. Kanyi Kiruchi for the Respondent.

