



Mwinzi v Kaesa (Suing on behalf of the Estate of Kaesa Kieti (Deceased) (Environment and Land Appeal 2 of 2022) [2023] KEELC 742 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEELC 742 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL 2 OF 2022**

LG KIMANI, J

FEBRUARY 9, 2023

BETWEEN

SAMUEL MUSINGILA MWINZI APPELLANT

AND

**ESTHER MASAA KAESA (SUING ON BEHALF OF THE ESTATE OF KAESA
KIETI (DECEASED) RESPONDENT**

(Being an Appeal from the judgment and decree of the Senior Resident Magistrate Mwingi Law Courts Hon Gichimu W. J (Mr.) delivered on 18th May 2011 in Civil Suit No. 111 of 1988)

JUDGMENT

1. The Appellant was the 3rd Defendant before the Senior Resident Magistrate's Court at Mwingi in Case No. 111 of 1988. He brings this appeal against the judgment delivered on 18th May 2011 and sets forth the following grounds:
 1. That the Learned Resident Magistrate erred in law and in fact by finding that the Respondent had proved her case on a balance of probability.
 2. That the Learned Resident Magistrate erred in law and fact in deciding the case totally against the weight of evidence.
 3. That the Learned Resident Magistrate erred in law and in fact by failing to consider and/or dismissing the Appellant's evidence and counter-claim.
 4. That the Learned Resident Magistrate erred in law and fact in finding that the Appellant (jointly and severally with the other Defendants in the original suit) fraudulently alienated the Respondent's land and subdivided it into two subplots No. 158 & 160- there was absolutely no evidence of fraud whatsoever.



5. The Learned Resident Magistrate erred in law and fact by failing to appreciate that Trust Land within Kitui County Council vested in the said council by virtue of *the Constitution* and the said local authority could deal in the land by virtue of the Local Government Act and the Trust *Land Act*.
6. The Learned Resident Magistrate erred in law and fact in giving probative value to the agreement dated 4/6/1983 contrary to the law and the same was unregistered and was produced without leave being sought and granted.
7. The Learned Resident Magistrate erred in law and fact in failing to appreciate that the Appellant has lawfully acquired Plot No. 160 within Mwingi Town Council.
8. The Learned Resident Magistrate erred in Law and fact in failing to appreciate that the Respondent's further amended Plaintiff was null and void ab initio for non-compliance with the law and therefore no prayers/orders could ensue in a pleading that was a non-starter.

The appellant prays that the trial courts judgment and decree be set aside and be substituted with orders dismissing the suit with costs to the appellant.

2. All the defendants except the 5th defendant entered appearance and filed their respective statements of defence. The 1st defendant did not participate in the hearing and was not represented. The 3rd defendant also filed a counterclaim.
3. On 10th January 2006 interlocutory judgement was entered against the 5th defendant. The Appeal herein is filed by the 3rd defendant and only in respect of plot number 160.

Summary of the case before the Trial Court

The Plaintiffs Case

4. The Respondent herein was the plaintiff in the suit before the trial court where she had sued five defendants. Through a Further Amended Amended Plaintiff filed on 14th April 2004, the Plaintiff claimed that her deceased husband Kaesa Kieti bought the suit plot which measures 100ft X 50ft situate within Mwingi County Council at a price of Kshs 6,000/- from the late Kahunyu Koigi. She claimed that the defendants fraudulently subdivided the plot into two with each plot measuring 50ft x 50ft, gave them plot numbers 158 and 160 and allotted them to the 2nd and 1st defendants respectively. The 2nd defendant subsequently transferred plot No. 158 to the 4th defendant while the 1st defendant transferred plot 160 to the 3rd defendant. She prayed for a declaration that the sub-division of the suit property into plots numbers 158 and 160 was fraudulent and illegal. She contended that and the 1st and 2nd defendants had no good or valid title capable of being transferred to the 3rd and 4th defendants respectively. She thus sought an order of cancelation of the allotments and transfers. She further sought an order directing the demolition of the 3rd defendant's structure on plot No. 160 and a permanent injunction restraining the defendants from interfering with her ownership of the suit property.

The 3rd Defendants (Samuel M. Mwinzi) Defence

5. The 3rd Defendant filed an amended defence and counterclaim dated 2nd September, 2003 where he claimed to be the lawful owner of plot No. 160 Mwingi County Council. He denied the claim that the deceased plaintiff or the alleged seller Kahunyu Koigi ever owned the suit plot or any part of it and claimed that he purchased the same from the 1st defendant and all relevant transfers were carried out. He is thus an innocent purchaser for value without notice of the Plaintiffs claim over the land. The 3rd



defendant further claimed that over a long period of time he had developed the plot No. 160 and no one had raised the claim of ownership. He thus seeks orders declaring him the owner of the said plot as a bona fide purchaser for value without notice.

Evidence during trial

6. The Plaintiff called six witnesses while the 2nd 3rd and 4th Defendants testified and called one witness.
7. PW1 Margaret Wangare Kahunyo testified that her late husband Kahunyo Koigi was alive when they bought the suit land and later sold it to Kaesa Kiiti (deceased) by an agreement dated 4th June 1983. The late Kaesa was the original plaintiff before he died and was substituted by his wife Masaa Kaesa, the plaintiff. According to her the land was sold at Kshs 6,000/- , a sum of Kshs 5,000/- was paid to her husband at the time of the agreement and the balance of Kshs. 1,000/ was paid after her husband had died.
8. She led the court to the suit land on a site visit and showed the boundaries and extent of the land. She also showed the court a 3 storied building that was on a portion of the land sold. She also confirmed that her husband sold land to other people and further divided the land and gave portions to her children. On cross-examination, she stated that her husband bought the land from a person named Mbila.
9. PW2, Esther Masaa Kieti, the Plaintiff, testified that she was the administrator of the estate of Kaesa Kieti her deceased husband. She confirmed entering into an agreement of sale over the suit property with Kahunyo Koigi for a purchase price of Kshs 6,000 where they first paid Ksh.5, 000 and later on paid Ksh.1, 000. She stated that the 3rd defendant Sammy Mwinzi began constructing on the land while this suit was pending and that he approached her proposing to buy the plot but never turned up on the material date set for discussions.
10. She also confirmed that she was present during the sale of the land and that the agreement was signed on her behalf by the Chief, one Katee Kaliwa. She stated that Christopher Mutemi Mutio and Sammy Mwinzi had grabbed her deceased husband's land and she prayed for an order that her deceased husband be given back the two plots.
11. PW 3, Francis Kyondo Mulandi a farmer and a business person stated that he was a councilor at the Kitui County Council between 1963 and 1974 and he was elected as the chairman of trade and markets within Kitui District. He confirmed knowing Kaesa Kieti (deceased) and his wife, Esther and that the deceased bought the suit property from Kahunyo. He further confirmed that the land was private land and it did not belong to the county council at the time it was bought. He stated that the people who lived on private lands were allocated parcel numbers to enable them do business and the council collect rates.
12. PW 4 Muthengi Kavuvi testified that he knew PW 2 Esther Masaa Kaesa who is his aunt and the 3rd Plaintiff Samuel Mwinzi his neighbor. He stated that he was present when Samuel Mwinzi wanted to buy the plot from the Plaintiff so that she could withdraw the suit from court. He further stated that he knew that the suit plot belonged to the plaintiff and that the County councils did not have any plots at the place where the plot is. He stated that the practice was that plot owners surrendered their plots to the county council in order to be given numbers.
13. PW 5, Wilson Kamau, stated that he is a licensed land surveyor and consultant in Nairobi. He knew the Plaintiff after her request for his services to give a report on the plot in dispute which he stated measures a quarter of an acre (0.1 ha). He confirmed that the land is within Kanzanzu adjudication area. On cross-examination, he stated that the Adjudication record on the suit property shows that the land was owned by Kahunyo who sold it to Kaesa Kieti (Deceased).



14. PW 6, Mulyungi William Kaesa is a son to the plaintiff. He stated that he was present when his father purchased the land from Kahunyo Koigi. He stated that the land was bought for a total sum of Ksh.6, 000 with Ksh.5, 000 paid first and then Ksh.1, 000 paid later. He was the one who handed over the Ksh.5, 000 to the seller's elders but was not present when the balance was paid. During cross-examination, PW 6 stated that the Agreement was made on 4.6.83 and that the suit property adjacent to the road near Osa Vinya Petrol Station.
15. PW 7 Joseph Ndung'u Kamau, the Land Adjudication officer Mwingi District, gave evidence and confirmed that Kanzanzu adjudication section was declared an adjudication area on 30th September 1990. He stated that he was not familiar with the position of the area prior to 1990. He stated that the subject area had been set aside by Kitui county council and reserved for Mwingi market but he could not tell when it was reserved. He could also not tell if the area was owned by individuals prior to 1988.

The Defence Case

16. The Defence then took over and DW 1, Simon Munyasia Kimangao the 2nd Defendant stated that when he went through his father's documents, he came across a document which showed that he had been allocated a plot by the County Council of Kitui. He denied knowing the Plaintiff and also said that he did not know whether the plot belonged to the plaintiff. He produced the application for transfer of the plot. Upon cross-examination, DW 1 stated that he was allotted the plot on 16.7.85 by the County Council of Kitui when he was still a minor, since he was born in 1973.
17. DW 2 Mulandi Kavali who works with the town council of Mwingi as a market inspector stated that Plot No.160 is situated along the main highway and the council records indicate that the plot is owned by Samuel M.S Mwinzi, having been transferred from Peter Kiiti. He produced a copy of the minutes from Kitui County Council which show the allocation of the plot to the 1st Defendant, on the application dated 9.5.1983.
18. According to DW 2, before the plot was allocated to Peter Kiiti, it belonged to the council. On cross-examination he said that he did not know whether Plot Nos 158 and 160 were as a result of subdivision. He said that there was no record to show that Kaesa Kieti made an application for allocation of a plot.
19. DW 3, Samuel Musingila Simon Mwinzi, the 3rd Defendant and the Appellant herein, stated that Plot No.160 belonged to him, having bought the same from Peter Kiiti for consideration of Ksh.150, 000. He produced the agreement for sale as an exhibit and confirmed that the transfer of the plot was effected, and he had been paying land rates to date. He stated that it took him one year and two months to construct on the plot with no objection no one claim on the plot. He denied using fraud to acquire the plot. Upon cross-examination, he denied knowing of the existence of this case before purchasing the plot and also denied using fraud to obtain Plot No.160.
20. DW 4, Christopher Mutemi Mutuo the 4th Defendant, claimed that he is the owner of Plot No.158 Mwingi Town. He stated that he applied for allocation of the plot from Simon Munyasya, through his father Francis Kimangao (Deceased) for a sum of Ksh.140, 000 but could not trace the agreement. He also stated that he was not aware that the plaintiff is the owner or has seen the owner of the plot. He denied obtaining the plot through fraud and stated that he had been paying rates.

Summary of trial court Judgement

21. The trial court found that the plaintiff and her husband purchased the suit plot from Kahunyo Koigi and that plot numbers 158 and 160 were the same ones that the Plaintiff and her deceased husband



bought. The court found that the plaintiff had proved her case on a balance of probabilities and that the defendants, jointly and severally fraudulently alienated the plaintiff's land, subdivided it into two plots no. 158 and 160 and had it allocated to the 1st and 2nd defendant who in turn transferred the same to the 3rd and 4th defendants.

22. The Trial Court issued orders that the suit land be consolidated and registered in the name of the Plaintiff and an order be issued directing the demolition of the 3rd Defendant's structure being erected on Plot No.160 and vacant possession to be delivered to the plaintiff as well as a permanent injunction restraining the defendants from the suit property.

The Appellant's Submissions

23. The Appellant's Counsel filed written submissions that the sale agreement relied upon by the Respondent was not proved. None of the witnesses were called to testify. Pw1 Margaret Koigi who is purported to have signed the agreement did not know how to read or write in 1983. Counsel further submitted that at the time of the sale agreement both the seller and buyer were deceased and the agreement was signed on their behalf. Counsel relied on his submissions before the trial court in support of the appeal.
24. Counsel submitted that the particulars of fraud were not proved but that what was proved was that the Respondent herein never owned any plot in Mwingi township as alleged. The appellant thus submitted that two of the four witnesses appearing in the purported sale agreement were not called to testify and their whereabouts were not explained. The appellant stated that the sale agreement was a forgery. The Appellant submitted that the son of the Deceased Vendor, Peter C. Kahunyu, who signed the Agreement on his behalf, was not called to testify.
25. On the other hand, the appellant submitted that his ownership of Plot No.160 is well documented in the exhibits produced showing the approvals by the District Commissioner, Mwingi Urban Council, Mwingi Town Council and the then Kitui County Council. They also submitted that payment of rates was also documented. They also stated that the granting of consents by the relevant authorities and construction of a three storey building was not done overnight and nobody else claimed ownership at that time.
26. The Appellant claimed that Mungai Koigi made an application claiming compensation for his plot that was acquired during the construction of the Mwingi-Garissa Road and tabulated it at Ksh. 3,810.80.00. This indicated that neither Mungai Koigi nor Kahunyu Koigi ever owned Plot No.160 at Mwingi Market since it was taken up by the road construction. It is their submission that according to the evidence of DW 2, the suit property belonged to the Council before it was allocated to Peter Kiiti.
27. In view of the ownership documents and approvals from the relevant authorities, the Appellant submits that the Trial Magistrate erred in making the final judgment in favour of the respondent and that there was no basis for disallowing the counter-claim.

The Respondent's Submissions.

28. Counsel for the respondent reiterated the matters contained in the pleadings as well as the testimony of witnesses. In dealing with grounds 1, 2 and 3 of the memorandum of appeal, the respondent relied on the agreement of sale and the evidence of witnesses to state that the suit premises did not belong to the county council of Kitui but the same was private land. He referred to the evidence of PW 3 Francis Kyondo who was a councilor at Kitui County Council from 1963-1974 who stated that the suit premises was not part of the county council land and that the area constituted private land.



29. He further submitted that the learned trial magistrate considered the probative value of the evidence and documents adduced in court and analyzed the issues and the reasons for his decision. That even though the Appellant claimed to have bought the plot from the 1st defendant the said defendant did not participate in the trial to support the appellants claim and to rebut the Respondents claim of fraudulent acquisition of his plot. He relied on the case of *D.T. Dobie & Co. Ltd v Wanyonyi Wafula Chebukati* [2014] eKLR.
30. Grounds 4 and 7 of the Memorandum of Appeal, states that the trial magistrate erred in finding that the defendants fraudulently alienated the respondent's land. The respondent submitted that the 2nd defendant (DW 2) was unable to prove how he acquired the plot number 158, which was later transferred to the 4th defendant. In addition to this, the respondent submitted that the 4th defendant, DW 4 failed to produce any receipt to show that Plot No.158 was transferred to him by Francis Kimangao, father of the 2nd defendant for the sum of Ksh.140, 000.
31. It is the Respondent's submission that their allegations of fraud remained unchallenged and the appellant could not give the history of the plot; hence his defence could not stand. They pointed out that it was only the 1st Defendant who could answer to the serious allegations of fraud but he chose not to defend the suit. He relied on sections 107, 108 and 109 of the *Evidence Act* CAP 80 and submitted that the Respondent duly discharged her burden of proof that the Appellant had obtained the suit property fraudulently but the Appellant failed to rebut the Respondent's evidence. They relied on the authority of *CMC Aviation Ltd v Kenya Airways Ltd(Crusair Ltd)* [1978]eKLR where the court held that pleadings are not evidence unless proved or disproved as well as *Kenneth Nyaga Mwigie v Austin Kiguta & 2 others* [2015] eKLR.
32. The Respondent also referred to the case of *Gateway Insurance Co. Ltd v Jamila Suleiman & Another* [2018] Eklr (Civil Appeal No. 227 of 2017) where Justice GV Odunga upheld the authority that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements.
33. Submitting on ground number 5 of the Memorandum of Appeal, Counsel stated that the Learned Trial Magistrate failed to appreciate that trust land within Kitui County Council vested in the council and the said local authority could deal in the land. The Respondent submitted that according to the corroborating evidence of the Plaintiff witnesses, the suit premises was at no time a property of the Kitui County Council. According to the Respondent, their evidence that the property was private property bought by the plaintiff from the late Kahunyu Koigi remained unchallenged.
34. On Ground No. 6 of the Memorandum of Appeal regarding the Trial Magistrate's admission of the Agreement for the sale of land dated 4/6/1983, the Respondent submitted that the said agreement met all the conditions required for an agreement for the sale of land. The Respondent submitted that there is no legal requirement that such an agreement ought to be registered for it to be enforceable. The Respondent submitted that the Trial Magistrate could not be faulted for relying on the agreement as they cited the case of *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR.
35. Finally, the Respondent submitted on ground number 8, stating that they were granted leave to further amend her Amended Amended Complaint on 14th April 2004 and that the challenge to the amendment could only be raised at the trial court and cannot be raised as a new issue at the appeal stage. He relied on the holding on *Wanga & Company Advocates v APA Insurance Company Limited* [2014] eKLR.

Analysis and Determination.

36. I have considered the grounds of appeal in the Memorandum of Appeal, the record of appeal, the submissions by counsel for the parties and the authorities cited.



37. As the first appellate court, this court has the duty to re-evaluate the trial while at the same time appreciating that the Trial Court is the one that had the opportunity of actually hearing the testimonies of witnesses and seeing the evidence. This duty was succinctly stated by the Court of Appeal in *Okeno v Republic* [1972] EA 32 as follows: - “An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant’s court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate’s findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
38. In the matter before the trial court the Magistrate that heard the suit and rendered judgement did not hear all the witnesses but only heard the testimony of plaintiffs witnesses PW 5 to PW 7 and defence witnesses DW 1 to DW 4. The other witnesses were heard by other judicial officers who were transferred before the suit was concluded and the parties opted to proceed with the suit.
39. The appellant has set out eight grounds of appeal in his Memorandum of but I will summarize and merge related issues for determination as hereunder:
- 1) Grounds 1, 2 and 3 are summarized and dealt with together as follows:-
 - 2) Ground 4 and 7 are summarized and heard together
 - 3) Ground 5, 6 and 8 to be heard each separately.
40. In my view the above consolidated grounds of appeal will be dealt with in answer to the question whether the learned trial magistrate made the wrong decision in finding that the respondent had proved her case on a balance of probability while dismissing the appellant’s counterclaim despite the evidence adduced.
41. The trial court set out the following as the two issues for determination
- i) Whether plot no. 158 and 160 Mwingi township belonged to the Plaintiff
 - ii) Whether the said plots were illegally and/or fraudulently allotted to the 1st and 2nd defendants and subsequently transferred to the 3rd and 4th defendants.
42. The Appellant has challenged the legality of the sale agreement dated 4th June, 1983 relied on by the respondent by claiming that the same is a forgery 1) If plots 33 and 34 mentioned in the agreement had numbers why did the suit plot not have a number 2) The purported seller Peter C. Kahunyu was not the seller but a son of Kahunyu Koigi and the purported seller was not present at the sale. 3) At the time the purported agreement was entered into the seller and purchaser were long dead 4) PW1 Margaret Wangari Kahunyu did not sign the agreement as she stated she did not know how to read and write.)
43. I have considered the evidence adduced in support of the respondent’s claim starting with agreement dated 4th June, 1983. PW1 Margaret Kahunyu confirmed that at the time of signing the sale agreement her husband Kahunyu Koigi was alive and present when the purchase price was paid to him by Kaesa save for a balance of Kshs 1,000/= The sale agreement itself was a confirmation that the seller was alive at the time of the agreement as he confirms sale and receipt of the sale price. The Plaintiff and PW 6 Mulyungi Kaesa confirmed that the seller was present during the sale. The purchaser Kaesa Kieti was clearly also alive at the time of the sale agreement. Indeed the is the one who commenced the suit herein and died while the suit was pending and was substituted by his wife Esther Maasa Kaesa.



44. On the question of the reason why the suit plot did not have a number yet the plots 33 and 34 mentioned in the agreement had numbers the trial court was satisfied with the explanation that the area was declared an adjudication area on 30th August 1990 while the agreement was entered into on 4th June 1983 and that it is during the process of adjudication that the land would have been given a number. I am satisfied with the said explanation and find no good reason to depart from the finding of the trial court on that issue.
45. On the issue of signatures on the sale agreement, it must be noted that the parties were drawing the agreement for themselves with no legal representation involved and it may not be very uncommon or unimaginable for the son to sign the agreement on behalf of parents who could not write as is said to have happened in this case. I am satisfied that the sale agreement was duly entered into signed and witnessed and the land given to the Respondent by the seller.
46. On cross-examination Margaret Kahunyu stated that initially she owned a large parcel of land but the same was distributed to her children by her husband while a part of it was sold to various people and she named a few of them. This witness further took the court to the site and identified the suit plot in great details pointing out the boundary features, buildings, and the road. She further pointed out the three story building that was standing on the suit property. She stated that she had a three bed roomed house on the land which was demolished when the Mwingi –Thika road was under construction but for which she was compensated. In my view the evidence of PW1 is cogent, clear and very detailed. She was not shaken on cross-examination and she confirmed that her husband sold the suit parcel of land to the Plaintiff's husband Kaesa Kieti. As the widow of the seller Kahunyo she was not claiming back and/or reneging on the sale by her husband but she confirmed the same. No probable reason has been given as to why she would attend court and lie concerning sale of the land.
47. I note that witnesses Pw 3 Francis Kyondo Mulandi and PW4 Muthengi Kavuvi who were not present when the agreement was signed confirmed that they knew that the plot belonged to the Respondent.
48. The Trial Court found that Plot Nos 158 and 160 consist of the same land that the Plaintiff and her deceased husband bought as per the sale agreement dated 4/6/1983 due to the fact that the witnesses were able to point out the exact position of the plots on the ground.
49. From the totality of the evidence adduced before the trial court I agree with the trial courts finding that there was evidence that the Plaintiff did purchase the suit plot from the deceased Kahunyu Koigi, that both the seller and the buyer were alive at the time of the agreement.
50. On the other hand, the appellant gave evidence showing proof of ownership of Plot No.160 having purchased it from the 1st defendant; Peter Kiiti Ngui the original allottee. The application for a plot by the 1st defendant for the purpose of building a general shop was made by an application form dated 9th May 1983 and was approved by the Town Planning, Markets and Housing Committee on 20th May, 1983 and by the full council meeting of 2nd June 1983. The letter of allotment was issued dated 2^{5th} July, 1983 by the Clerk County Council of Kitui. Further the appellant exhibited a letter communicating approval by the Town Clerk Mwingi Town Council of application to transfer the plot to him by Peter Kiiti dated 16th February, 1999. The said approval had been made by the Town Planning, Markets and Housing Committee at a meeting held on 1^{4th} February 1999 and a full council meeting of the same date. He further produced receipts for payment of rates for plot 160 to Mwingi Town Council and a sale agreement for the plot between Samwel Musingila Simon Mwinzi and Peter Ngui at Kshs. 150,000/= dated 5th November, 1997. The appellant further produced in evidence a valuation report by Wamae Muriithi & Associates showing the kind of building he had constructed on the plot whose value was shown as Kshs. 7,100,000/-.



51. It is indeed the said evidence as adduced by the Appellant that leads him to submit that the conclusion of the court that the plaintiff had proved her case on a balance of probabilities was made against the strength of the evidence that he adduced.
52. It is the Court's view that at the heart of this dispute and the question posed by the appellant is the issue of the root title to the land in dispute. What right or interest did Kahunyu Koigi have to the land in dispute that was capable of being passed on to the purchaser Kaesa Kiiti. If we go back a little further in time what right or interest in the suit land did the person by the name Mbila who is said to have sold the land to Kahunyu Koigi have that he was capable of passing to the said Kahunyu?
53. Conversely the question for determination is what rights and/or interests did the County Council of Kitui have in the suit plot when it issued the 1st defendant in the trial Court Peter Kiiti Ngui an application form for a plot and when they received the said form dully completed applying for a plot in Mwingi Market and processed it through the Town Planning, Markets and Housing Committee and the full council which approved the allocation and issued a letter of allotment? Did the County council of Kitui have a legal right or interest in the said plot capable of being allocated to Peter Kiiti Ngui? Further, what right or interest did the Town Council of Mwingi have in the suit plot for it to approve the transfer of plot No. 160 from Peter Kiiti Ngui to Samwel S. M. Mwinzi the appellant herein on 14th February, 1999?
54. In examining the above issues, I have considered the evidence of PW 5 Wilson Kamau, the land surveyor and PW7 Joseph Ndungu Kamau the land adjudication officer who stated that the subject land was located within Kanzanzu Adjudication area which was declared an adjudication area on 30th August 1990. PW 7 further stated that the subject area had been set apart by Kitui county council and reserved for Mwingi market.
55. For land to be declared an adjudication area, it must have been trust land. The legal regime for regulation of trust land at the time of declaration in 1990 was the Repealed Constitution of Kenya, the [Land Adjudication Act](#) CAP 283 and the Repealed Trust [Land Act](#) CAP 290 Laws of Kenya.
56. Section 114 of the Repealed Constitution dealt with trust land and describes what trust land is. Section 115 provides that;
- “All Trust Land shall vest in the County Council within whose area of jurisdiction it is situated.”
- Subsection (2)
- “Each County Council shall hold in trust land vested in if for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests and other benefits in respect of the land as may, under the African Customary Law for the time being in force and applicable thereto, vested in any tribe, group, family or individual.”
- (4) Subject to this chapter, provision may be made by or under an Act of Parliament with respect to the administration of Trust land by a County Council.”
57. My interpretation of the evidence adduced in court and the provisions of Section 115 of the repealed constitution is that prior to declaration of the subject area as an adjudication area the subject land was trust land vested in the county council of Kitui and held in trust for the benefit of the persons ordinarily resident on that land. The council was under an obligation to give effect to such rights, interests and other benefits in respect of the land as may, under the African Customary Law for the



time being in force and applicable and vested in any tribe, group, family or individual. This land did not therefore belong to the council and the council could not deal with it as it wished without considering the interests and rights of the persons described in the constitution.

58. In the present case the plaintiff's evidence was that Kahunyu Koigi had an interest in the subject land acquired through purchase and which he sold to her deceased husband Kaesa Kieti on 4th June, 1983. Evidence on record shows that the rights and interests went beyond Kahunyu Koigi to the person named Mbula who sold the land to him. In my view there is no evidence to show that the 1st defendant had any interest in the land prior to his application for allocation of the land to the county council of Kitui.
59. The repealed constitution provides for ways of dealing with trust land which are in my view relevant for purposes of this case. According to PW 7 Joseph Ndungu Kamau the Land Adjudication Officer stated that the subject area had been set apart by Kitui county council and reserved for Mwingi market. Under section 117 of the repealed Constitution of Kenya a County Council is allowed to set apart an area of trust land for use and occupation for following listed purposes;
- “(a) by a public body or authority for public purposes; or
 - (b) for the purpose of the prospecting for or the extraction of minerals or mineral Oils; or
 - (c) by any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that county council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof, and the Act of Parliament may prescribe the manner in which and the conditions subject to which such setting apart shall be affected.
- (2) Where a county council has set apart an area of land in pursuance of this section any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished.
 - (3) Where a county council has set apart an area of land in pursuance of this section, it may, subject to any law, make grants or dispositions of any estate, interest or right on or cover that land or any part of it to any person or authority for whose use and occupation it was set apart.
 - (4) No setting apart in pursuance of this section shall have effect unless provision is made by the law under which the setting apart takes place for the prompt payment of full compensation to any resident of the land set apart who-
 - (a) under the African customary law for the time being in force and applicable to the land, has a right to occupy any part of the land;
 - (b) is, otherwise than in common with all other residents of the land, in some other way prejudicially affected by the setting apart.



(5) No right, interest or other benefit under African customary law shall have effect for the purposes of subsection (4) so far as it is repugnant to any written law.”

60. The defendants have claimed that the suit land was part of land set apart by the council of Kitui for purposes of Mwingi market. However as PW7 stated he did not know when the setting apart was done and he did not know the status of the land prior to the 1990 declaration of the area as an adjudication area.
61. The evidence of PW 3 Francis Kyondo Mulandi a former councilor at the Kitui County Council between 1963 and 1974 and chairman of trade and markets within Kitui District confirmed that the subject land was private land and it did not belong to the county council at the time it was bought. He confirmed knowing where the plot was and that it was outside the boundary of council plots. He further stated that at the time when he left the council there were no more county council plots.
62. The witness further stated that people who lived on private lands next to council plots would apply to the county council for allocation of numbers for purposes of construction. This was a way of ensuring those carrying on business were known by the council and they paid rates. This procedure was confirmed by the evidence of PW4 Muthengi Kavuvi who stated that he used the same procedure in obtaining a number for a plot which he had purchased. He further stated that the council did not have plots but at some point people were asked to surrender to the council so that they get plot numbers and he surrendered his. The numbers would assist the plot owners get loans from banks. However it was because the Plaintiff did not surrender her plot that she did not get a number.
63. From consideration of the law, setting a part of trust land and reserving the same for use as provided under section 117 of the repealed constitution is a formal process that extinguishes the rights and interests of the occupants of the land and persons with rights and interest in the land proposed to be set apart and the process is regulated and controlled by statute. Of importance is Section 117 (4) of *the constitution* which provides for the prompt payment of full compensation to any resident of the land set apart. Section 13 of the Trust *Land Act* also provides the detailed procedure for setting apart land which involves notified persons in the areas concerned and recording representations of concerned persons. A gazette notice is published and compensation of persons whose land is affected is made.
64. Further, it is my view that the issue of whether or not the suit land was set apart was an issue that the 5th defendant and to a lesser extent the 1st defendant could have answered. The 5th defendant would have been able to show the extent if any of the boundaries of the land set apart for Mwingi market and the formalities followed in the said setting apart. The two defendants chose not to participate in the proceedings. The 1st defendant filed a statement of defence dated 6th July, 1989 and the same consisted of general denial of the plaintiffs claim while the 5th defendant did not enter appearance or file a defence. It follows that the 1st defendant's defence remained mere allegations. That means that not only does the evidence rendered by the plaintiff's before the trial court stand unchallenged but also that the claims made by the Defendant in his Defence are unsubstantiated. The Court of Appeal decided on this issue in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997* [1997] eKLR, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.
65. The court went on to state that;

“The respondents filed a defence in which they denied the appellant's claim and averred that the accident was caused by the appellant's own negligence in that he suddenly ran across the



road and in the process was hit by the motor vehicle. The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother.”

66. Further it was stated in the case of *CMC Aviation Ltd v Crusair Ltd (NO.1)* [1987] KLR 103 as follows:-

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”

67. The mere fact that the 1st defendant in the trial court applied for a plot and the same was allocated does not of itself confer the initial allottee and Appellant as subsequent allottee the title to the land. Further the presence of the records adduced by DW 2 Mulandi Kavali from the town council of Mwingi on the suit plot does not of itself confer title to the said plot.

68. I do find that no evidence was adduced to show that the suit parcel of land was part of land reserved for the Mwingi market and that the 5th defendant had a right to allocate the same to the 1st defendant as it did or to approve the transfer to the 3rd defendant/appellant as it did.

69. From evaluation of the evidence on record I am satisfied that the suit plot was private land and the council adopted the practice that persons whose private land was near council plots were required to surrender them to the council for purposes of issuance of numbers. This enabled the council to collect rent and rates and as stated by PW 4 it enabled owners to get loans from banks. In my view the fact that the Respondent did not surrender her plot to the council did not divest her of her rights and interests in the plot and the county council had no right to allocate the said plot to someone else without following due process.

70. As stated earlier the second way of dealing with trust land would have been under section 116 of the Repealed Constitution applicable then wherein the County Council is empowered to apply the land consolidation or the *Land Adjudication Act* to an area of Trust land. The said section provides as hereunder;

“(1) A county council may, in such manner and subject to such conditions as may be prescribed by or under an Act of Parliament, request that any law to which this subsection applies shall apply to an area of Trust land vested in that county council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the county council it shall cease to be Trust land.

(2) The laws to which subsection (1) applies are-
SUBPARA (a)

the *Land Consolidation Act* and the *Land Adjudication Act*; and

(b) any other law permitting the registration of individual titles to estates, interest or rights in or over land that, immediately before registration, is Trust land (except so far as the law permits the registration of estate, interests or rights vested in persons or authorities for whose use and occupation the land has been set apart under this Chapter)”



71. It is therefore my finding that the evidence by the respondent that the suit land was private land that her husband purchased had greater weight than the evidence by the appellant that the suit land belonged to the county council of Kitui and which it allocated to the 1st defendant before the trial court. I further find that the 5th defendant in the trial court did not have a right to allocate the plot to the 1st defendant and the 1st defendant had no right to sell the said land to the 3rd defendant/appellant herein and the said sale conferred no title, right or interest in the said plot.
72. These two grounds relate to the question whether;
- Ground 4 and 7: the Learned Trial Magistrate wrongly find that the Appellant (jointly and severally with the other Defendants in the original suit) fraudulently alienated the Respondent's land and subdivided it into two subplots No.158 & 160 and failed to appreciate that the Appellant had lawfully acquired Plot. No. 160.
73. Order 2 Rule 10(a) of the Civil Procedure Rules (2010) provides that particulars of misrepresentation, fraud, and breach of trust, willful default or undue influence must be listed. It was held by the Court of Appeal in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR that:
- “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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett* [1878] 7 Ch. D 473 at 489.”
74. The further amended plaintiff gave particulars of fraud by the various parties to the initial suit. The trial Court noted in its judgment that the Respondent did not surrender her plot to enable it to be issued with a plot number as PW 3 and 4 had testified. The allegation of fraud by way of subdivision of the initial plot and allotment of the same to the 1st and 2nd defendants was never denied by the 5th Defendant, county council of Kitui who did not defend the suit. The 1st defendant did not participate in the hearing as well. The claims of fraud as relates to the two plots 158 and 160 were closely intertwined at the stage of subdivision and the initial allotment. The Court observed that the 2nd Defendant in the Trial Court was allotted the plot when he was still a minor and the court found it to be irregular as a minor can only hold property through a guardian. The trial court further found that the allegations of fraud relating to plot number 160 were made against the 1st and 5th defendants who did not deny the said claims and as found earlier the evidence of the plaintiff with regard to this issue stands unchallenged. It was found by the trial court that the 3rd defendant could not tell the history of the land during and prior to the allocation to the 1st defendant.
75. I do also find that the evidence of DW 2 Mulandi Kavali that prior to the allotment of the land to the 1st defendant the land belonged to the council was not substantiated. This is especially taking into account the earlier finding of this court on the detailed formalities of setting apart and reservation of trust land for any purpose.
76. Further it is to be observed that the suit plot was transferred to the appellant by the 1st defendant when this suit was still pending in court. He claims that the 1st defendant did not disclose the fact that there was a pending suit relating to the plot. In my view this was a transaction that was meant to defeat the rights of the respondent in the suit land by the 1st defendant divesting his interest in the land in order to defeat the ends of justice. This goes against the doctrine of *lis pendens* which controls transactions dealing with property that is the subject of pending litigation and prohibits a party from giving to



others pending the litigation rights to the property in dispute so as to prejudice the other. The said doctrine has been addressed by superior courts in many decisions including in the case of *Ruthi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR, where the Court of Appeal had the following to say;

“Black’s Law Dictionary 9th edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in *Bellamy v Sabine* [1857] 1 De J 566 held as follows;

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

That in the case of *Mawji v US International University & Another* [1976] KLR 185, Madan, J.A. stated thus;

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

In the same case it was observed inter alia that;

“Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendente lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

I therefore agree with the trial court that the claim of fraud as particularized in the plaint was proved.

Ground 6: Did the Learned Trial Magistrate fail to appreciate that Trust Land within Kitui County Council vested in the said council by virtue of *the Constitution* and the said local authority could deal in the land by virtue of the Local Government Act and the Trust *Land Act*?

77. This ground of appeal was exhaustively dealt with when dealing with grounds 1,2 and 3 I do find that the county council of Kitui could deal in trust land only as far as was provided for under Chapter IX of the repealed Constitution of Kenya and the Acts of parliament created there under. As discussed, it has been found that in the circumstances of this case the county council of Kitui had no right to deal with the suit plot in the way that it did by allocating the same to the 1st defendant in the trial court and effecting transfer of the same to the 3rd defendant/appellant herein.
78. In my view the Trial Court was not wrong in faulting the 5th defendant for allocating the suit plot as it did.



Ground 7. Did the Learned Trial Magistrate err in law and fact in giving probative value to the agreement dated 4/6/1983 contrary to the law and the same was unregistered and was produced without leave being sought and granted?

79. Section 3(3) of the Contract Act CAP 23 Laws of Kenya stipulates that:

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

80. The Agreement for the sale of land that the Plaintiff produced as her evidence contained all the above three elements. In my view there is no requirement in law that such an agreement must be registered or stamped. Indeed I have looked at the trial court record and note that there were various objections raised by counsel for the defendants on production of documents. However, the objection on production of the sale agreement dated 4th June 1983 related to the witness producing the same not being the maker thereof and on the issue of handwriting. No objection was raised on whether the same was registered or stamped. The said objection cannot be taken on appeal when the parties and the court had no opportunity to deal with it.

81. The other contention by the Appellant is that the Agreement was signed after the vendor and the buyer were already deceased has been dealt with earlier while dealing with grounds 1, 2 and 3. According to the evidence of the Plaintiff and PW 1, the wife of the deceased seller, the agreement existed and was only reduced into writing at the indicated time. In the English case of *Yaxley v Gotts & Another*, [2000] Ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel. The court held that:

“an oral agreement whereby the purchaser of a house promised to grant another, in exchange for materials and services supplied an interest in the property, though void and unenforceable under Section 2 of the Act of 1989, was still enforceable on the basis of constructive trust and Section 2 (5) in circumstances where, previously, the doctrine of part performance or proprietary estoppel might have been relied upon ...”

On his part Beldam L. J. said at p. 193 para D

“In my view the provision that nothing in Section 2 of the Act of 1989 is to affect the creation or operation of a resulting, implied or constructive trusts effectively excludes from operation of the cases in which an interest in land might equally well be claimed by relying on constructive trust or proprietary estoppel.”

82. In my view not only did the agreement between the deceased parties have legal force but it also gave rise to a trust and was solidified by the written agreement later on. In my opinion, even if per chance the written agreement was not signed by the vendor and purchaser thereto, it is still enforceable as an oral agreement.



Ground 8:- Did the Learned Resident Magistrate err in Law and fact in failing to appreciate that the Respondent's further amended Plaintiff was null and void ab initio for non-compliance with the law and therefore no prayers/orders could ensue in a pleading that was a non-starter.

83. The last issue that the Appellant raised in his Memorandum of Appeal is that the Learned Resident Magistrate erred in Law and fact in failing to appreciate that the Respondent's further amended Plaintiff was null and void ab initio for non-compliance with the law and therefore no prayers/orders could ensue in a pleading that was a non-starter. The Appellant did not point out any non-compliance with the law of the Plaintiff in his submissions; therefore there is no need to address this issue.

84. In my opinion, the Appellant produced documents of ownership of Plot No. 160 Mwingi Market issued by the county council of Kitui and the Mwingi town council but did not satisfy the court that the said county councils had any interest and/rights to the suit plot capable of being allocated to either the 1st defendant before the trial court and transferred to the Appellant herein. On the other hand, the respondent proved that the suit land was private land that was purchased for valuable consideration and had not been legally acquired by either the county council of Kitui and/or the town council of Mwingi for it to be available for allocation to the 1st defendant before the trial court and transferred to the appellant herein. I therefore find no reason to interfere or overturn the judgment of the Trial Court. The Court of Appeal in *Kneller & Hancox Ag JJA in Mkube v Nyamuro* [1983] KLR, 403-415, at 403 stated as follows: -

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

85. I find that the grounds of appeal advanced by the Appellant have not been proved and I dismiss the appeal with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 9TH DAY OF FEBRUARY, 2023.

HON. L. G. KIMANI

.....

ENVIRONMENT AND LAND COURT JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgement read in open court and virtually in the presence of;

Musyoki - Court Assistant

No attendance for the Appellant

Kimondo Mubea for the Respondent

