



**M’Nkoroi v M’Arai & another (Environment and Land Appeal
E087 of 2021) [2023] KEELC 428 (KLR) (1 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 428 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E087 OF 2021
CK NZILI, J
FEBRUARY 1, 2023**

BETWEEN

KAROGO M’NKOROI APPELLANT

AND

NKIROTE M’ARAI 1ST RESPONDENT

KAROGO NKOROI 2ND RESPONDENT

*(Being an appeal from the Judgement of Hon. S.N Abuya (CM)
delivered on the 28th July 2021, in Meru CM ELC NO. 76 of 2016)*

JUDGMENT

1. The appellant through a memorandum of appeal dated 28.7.2021 faults the trial court for:- failing to appreciate the appellant’s long occupation of the suit land since 1960; failing to establish how the 2nd respondent became the registered owner while a minor; failing to appreciate the title deed in issue was investigated by the CID and found wanting; being partial and biased; being casual and making unreasoned holding; finding him a trespasser without any iota of evidence, sound reasons and rationale yet his evidence of the long occupation was clear; failing to consider that the land registrar’s evidence was not definite on who was the registered owner; failing to consider prefix “M” was common among Ameru naming systems and its omission on the title deed must have been an inadvertent error; failing to be guided by the principles of equity that he who was earlier in time was stronger in law and lastly, ignoring all the appellant’s written submissions.
2. This being a first appeal the court is required under Section 78 of the *Civil Procedure Act* to re-hear, re-assess and re-appraise itself on the issues, facts, evidence and the law from the lower court record and come up with its own independent findings while alive to the fact that the trial court had the benefit of seeing and hearing the witnesses first hand and observing their demeanor.



3. In the case of *Selle & another vs Associated Motor Boat Co. Ltd & others* (1968) E.A 123, the court held it was not necessarily bound to accept the findings of facts by the court below but must reconsider the evidence, evaluate it and draw its own conclusions bearing in mind that it never saw or heard the witnesses and should make due allowance in that respect. See also *Peters vs Sunday Post Ltd* (1958) E.A 424.
4. Drawing from the foregoing, the appellant as the plaintiff in the lower court through a plaint dated 11.6.1986 and claiming to be the registered proprietor of LR No. Abothuguchi/Makandune/47 since 1968 sued Nkirote M'Arui, Isaac Mutwiri and Korogo Nkoroi as the 1st, 2nd and 3rd respondents for illegally purporting to sign, transfer and register his land on 12.7.1978. He averred that after realizing the irregularity in 1980, he made report to the police, the 1st respondent was arrested, charged and convicted in Cr. Case No. 609 of 1980. The plaintiff sought for the nullification of the transfer and a retransfer of the land to his name.
5. By a defence dated 1.7.2008, the 1st respondent denied the claim in its entirety. The defendant herein the 2nd respondent filed a defence and a counterclaim dated 1.7.2008 denying that the appellant was ever a registered owner of the suitland since she was the first registered owner with an indefeasible title. She, termed the plaintiff as an impostor and a stranger to her land.
6. By the way of a counterclaim the 2nd respondent averred that in 1996, she allowed the appellant to cultivate on a portion of her land but in 1997, he refused to vacate the land despite a demand to do so. The 2nd respondent prayed for both an eviction and a permanent injunction barring and restraining the appellant from entering, trespassing or in any way whatsoever interfering with the suitland.
7. In a reply to defence and defence to the counterclaim dated 8.7.2010, the appellant averred that the suit land was registered in his name but erroneously the names Karogo Nkori were inserted instead of his real names Karogo Nkoroi M'Nkori. The appellant averred that during the adjudication process, the 2nd respondent was of a tender age and could not have been recorded as a land owner otherwise any such registration was fraudulent, illegal and against the law. Further, the appellant averred that he was the rightful occupant and possessor of the suit land since 1968 and beyond.
8. In a reply to defence to the counterclaim, the 2nd respondent averred that she was the original registered owner of the land; there were no alleged errors in her registration names since though a minor at the time, her late grandfather M'Irai Mutiga who had initially gathered the land caused it to be registered under her name, hence the alleged occupation and or possession by the appellant since 1968 was false.
9. In compliance with Order 11 Civil Procedure Rules, the appellant filed case summaries and issues for determination dated 7.10.2014, while the 1st & 3rd respondents filed case summary and issues for determination dated 7.10. 2014. Similarly, parties filed further issues dated 6.11.2014 and 28.11.2014 respectively.
10. At the hearing, the appellant as PW1 testified that he was the actual owner of L.R Abothuguchi/Makandune 47 as per a green card that he produced as P. Exh No. (1). He said that he gathered some information that the 2nd respondent had allegedly purchased his land and reported to the area chief leading it to the arrest of the 1st respondent and one Isaac Mutwiri for fraud since the 1st respondent stole his title by registering the 2nd respondent, her daughter under names similar to his and hence using the said names to obtain his title deed. He said that the 1st respondent was imprisoned and the title deed returned to the land's office.
11. PW 1 maintained that he had been in occupation of the suit land since 1968 whereas the 1st and 2nd respondents were on a separate land. PW 1 told the court that he acquired his 2nd generation ID card



- in 1980 though had no registration records to that effect. In his view, his name was Karogo Nkoroi but when he sought for the replacement of the ID he used the names Karogo M’Nkoroi as per MFI P (1) (a) dated 20.7.2007. PW 1 admitted that he had no the first green card or a copy of the register to show that he was registered as the 1st owner in either in 1966, 1968 or 1978. He denied the alleged entry into the land in 1996 by virtue of license from the 3rd respondent. PW 1 admitted that no report had been made to the police against the 3rd respondent’s alleged fraud to register and acquire an ID card with similar names as his.
12. Further, PW 1 denied ever swearing an affidavit for the change of his names to reflect the name in the title deed. PW 1 told the court that his land was next to the land belonging to the respondents. He further denied that it was the 2nd respondent’s grandfather one M’Irai who caused the registration in favour of the 2nd respondent while she was a minor. Similarly, PW 1 denied that he engaged in tricks to enter into and stay on the suit land. PW 1 said that he was the only person in the area known as Karogo Nkoroi.
 13. PW 2 was Justus Muthamia; he told the court that he was a one-time chairman of the land adjudication committee during the adjudication process in the year 1970-1974. His evidence was that the 1st respondent colluded with the area chief and her daughter the 3rd respondent who was only 14 years in 1986 to acquire an ID with similar names as with a view of stealing the appellant’s land. He denied that the 2nd respondent was known as Riungu Karogo Nkoroi but Kananu. He said that title deeds in the area were issued in 1978. PW2 alleged to have been the one who showed the appellant his land during the adjudication process.
 14. PW 3 was Mwirigi M’Mugambi, a former demarcation officer Makandune Adjudication Section between 1970 – 1975. He produced the gathering list to confirm that the demarcation process started in 1970. He said that he never saw the 1st and 2nd respondents during the adjudication process unlike the appellant whose names were entered in the record of existing rights which had no single name of a woman.
 15. The list was marked as MFI P (2). He could not however confirm the maker of the list though signed by him and the land adjudication officer. It lacked an official office stamp. PW 3 confirmed that women and children at the time could be recorded as land owners at the time.
 16. PW 4 was Geoffrey Makara Rubarua, a nephew of the appellant. He confirmed that the 1st respondent’s land arose out of the subdivision of his late father M’Irai. He insisted that the 1st respondent was allegedly arrested and convicted after using the names of the appellant and giving the 2nd respondent an ID with a name similar to that of the appellant with a view of defrauding him of his land. PW 4 confirmed that it was the appellant occupying the suit land.
 17. DW 1 was Stephen M’Mwirichia M’Twamwari and also known as M’Ruricha M’Twamwari. He told the court that his uncle the late M’Irai was the one who recorded the land into name of the 2nd respondent his grand-daughter and left him with the land and a piece of paper bearing the parcel number. He confirmed that Karogo Nkoroi was a name of a woman and that the appellant’s real name was Japhet M’Iruma who owned no land in the area yet he had chased the 1st & 2nd respondents from their land.
 18. DW 1 was emphatic that the appellant never owned the land in the area and that the 2nd respondent was named after her grandmother, a wife of the late M’Irai.



19. DW 2 was Kenneth Muriungi M'Mburugu. He told the court that the appellant's real name was Japhet M'Iruma Nkoroi. He said that the 2nd respondent was the registered owner of the suit land initially owned by her grandfather M'Iria Mutiga, who used to own a large shamba in the area.
20. DW 3 was the 1st respondent Susan Nkirote M'Irai the mother to the 2nd respondent. She confirmed that the land was registered under her daughter's name while a minor by the late M'Irai Mutiga, at the time when she was married in Kisumu. She denied the allegations that she had allegedly befriended an area chief to have her daughter acquire an ID. She confirmed that it was the appellant who caused her arrest. She denied that her daughter was also known as Kananu since she was named after her late mother Rebecca Kagurukia who gave her the name Karogo which in Kimeru refers to fencing.
21. DW 3 confirmed that the appellant made an entry into the farm after her said arrest and chased them away from the land. DW3 also said that they were currently occupying their parents land. She confirmed that by 1979, the 2nd respondent was aged 13 years of age.
22. DW 4, a land registrar Meru central told the court that the appellant's name did not feature in the copy records of the suit land, which file was first registered on 24.9.1997. He denied that the suit land was registered under the appellant's name in 1968. The witness said that the land register did not indicate the gender of the recorded owner.
23. Similarly, DW 4 told the court that the said copy of the register had no ID card number. except an address while the 2nd entry was a land certificate issued on 12.7.1998, followed by two cautions registered by Isaac Mutwiri on 17.1.1986 another one on 3.5.2017 by one James and lastly, a restriction registered on 13.4.2018 in Civil Suit No. 76/16. DW 4 produced a copy of the register as D. Exh No. (2). In cross examination, DW 4 confirmed that a minor could in law be registered as land owner.
24. DW 5 was the 2nd respondent Karogo Nkoroi. She told the court that she was the registered owner of the suit land. She confirmed that registration happened when she was a minor and that she collected the title deed in 1978. The 2nd respondent told the court her mother was arrested in 1980 while trying to sell the land to the 2nd defendant. She denied ever being arrested for selling the land or on account of allegedly falsifying land or identity card records.
25. DW 5 said that after the release of her mother, the appellant requested for a place to farm which she obliged but then declined to vacate the land only to come back with alleged ownership claims or documents in 2007 and ordered her out of the land, only for her lawyer to establish that there was a pending suit. She produced an affidavit dated 24.7.1985 as D. Exh No. (3) and urged the court to allow her defence and counterclaim. DW5 stated that the appellant and his son attempted to harm her hence the reason she left the suit land.
26. DW 5 denied the allegations of forgery of the title deed. She produced as P. Exh No. 4 a title deed, copy of her ID card as P. Exh No (5), records from the register of persons and a letter dated 16.8.2007 as P. Exh 6 (a) & (b), letter and report dated 20.7.2001 as P. Exh No. 7 (a) & (b). She confirmed her year of birth as 1962 meaning that by 1986 she was 24 years old and not 15 years as alleged.
27. DW 5 said that she went with her maternal grandfather M'Irai to get the title deed at the age of 18 years in 1980. DW5 stated that the appellant was unable to produce PMF 1-2 the court records for Cr. Case NO.609/1980 as well as the land records to substantiate his claim. She denied that her name was Kananu, since her father was Celesio Nkoroi. DW 5 said that she was currently residing with her mother on a land bordering the suit property where her late grandfather used to live.
28. DW 5 told the court that while collecting the title deed, she signed on the register and indicated her ID card number. Similarly, DW 5 said that her mother was allegedly arrested for selling someone's land,



- the complainant being one Japheth M'Iruma, where after the original title deed was confiscated by the police. She said she was unable to complete the sale agreement or refund the deposit to the buyer the 2nd defendant after the complaint arose. DW 5 denied any alleged fraud for she was lawfully registered as the owner and issued with the title deed.
29. After the close of the evidence, parties were directed to file written submissions which they did, dated 7.6.2021 and 5.7.2021 respectively. The trial court in a judgment dated 28.7.2021 held that the 2nd respondent was the duly registered owner of the land; the appellant was a trespasser to the land and therefore he should vacate the land. A permanent injunction was also issued against the appellant restraining him or his servants, agents or employees' forms interfering with the land after vacating it. Costs were also imposed on the appellant for both his dismissed claim and for the 2nd respondent's counterclaim which is now the subject of this appeal.
 30. With leave of court, parties herein opted to canvass the appeal by way of written submission dated 13.12.2022. the appellant under grounds 1-4 of the appeal submitted that the appellant was 41 years old at the time of registration while the 2nd respondent Karogo Nkoroi was 16 years old hence she could not have gone through the process of adjudication and acquired a registration number.
 31. Similarly, the appellant submitted that the assertion that the allegations that the 2nd respondents grandfather recorded the ownership on behalf was not factually correct. On grounds No. 5-10 the appellant relied on John Masinde Kanchenga vs DLASO Transzoia & others 2021 eKLR that the first in possession or occupation ought to have been given preference and that the mere fact that the prefix "M" was omitted should not have made the appellant lose his land which he had occupied, possessed used and owned since 1968.
 32. It is trite law that parties are bound by their pleadings and issues flow from the pleadings. In the case of Galaxy Paints Co. Ltd vs Falcon Guard Ltd (2000) 2 E.A 385 the court held that it was a principle of law that parties were generally confined to their pleadings. See also David Sironga Ole Tkai vs Francis Arap Mugo & 2 others (2014) eKLR.
 33. In the case of John Kamunya & another vs John Nginyi Muchiri & 3 others (2015) eKLR, the court held that a judgment would only be pronounced on the issues arising from the pleadings and or issues framed by the parties for the court determination but confined to their pleadings. See IEBC vs Stephen Mutinda Mule (2014) eKLR.
 34. Similarly, in Clips Ltd vs Brands Imports (Africa) Ltd formerly Named Brand Imports Ltd (2015) eKLR the court took the view that new issues could not be raised by way of submissions. Again, in the case of Republic vs Chairman Public Procurement Review Board & another exparte Zapkass Consulting & Training Ltd & another (2014) eKLR, the court held that submissions were not pleadings and new issues raised by way of submissions were best ignored. Further, in Benson W. Kaos & 72 others vs AG & 85 others (2022) eKLR cited with approval Erastus Wade Opande vs KRA & another Kisumu HCCCA NO. 46 of 2007 and Nancy Wambui Gatheru vs Peter W. Wanjere Ngugi NRB HCC No. 36 of 1993 where it was held that submissions were not evidence by which a case could be decided. See also Daniel Arap T. Moi vs Mwangi Stephen Murithi (2014) eKLR.
 35. In this appeal the primary pleadings by the parties remained the plaint dated 11.6.1986, a reply to defence and defence to counterclaim dated 8.7.2010, the defence dated 1.7.2008 for 1st respondent and the defence and counterclaim dated 1.7.2008 by the 2nd respondent. The 2nd defendant never participated in the lower court suit nor was he sued in this appeal, given the order issued on 19.10.2017 for the discontinuance of the case against him.



36. The appellant's claim was captured at paragraphs 5,6,7,8 & 9 of the plaint that; the suit property was unlawfully acquired and transferred between the 1st and 2nd respondents on 12.7.1978 which transactions he discovered on 1980 and reported to the police. He sought for the nullification of the sale, transfer and reversal of ownership to himself.
37. In the reply to defence and defence to the counterclaim dated 8.7.2010, the appellant at paragraph 3 thereof pleaded that the property was erroneously registered inserting the 2nd respondent's name instead of his name and that it could only have been fraudulent and an illegal registration since the 2nd respondent then was a minor. Further, he averred that he had been in long occupation of the land since 1968.
38. On their part the 1st and 3rd respondent's defence and counterclaim dated 1.7.2008 termed the appellant as an impostor and a stranger to the land; the claim misplaced, the 2nd respondent stated her registration, was first in time and unimpeachable or indefeasible. Further she averred that the entry by the appellant to the land was permissible in 1996 and that he had refused to vacate the land in 1997. She therefore sought for vacant possession or eviction and a permanent injunction.
39. In a reply to defence to the counterclaim dated 20.7.2010 the 2nd respondent denied any alleged error in her registration but, admitted that at the time the land was registered under her name she was a minor hence a legally registered owner and asserted that the appellant was being dishonest or making a false claim.
40. Arising from the pleadings, parties herein drew separate list of issues dated 7.10.2014 and a further list of issues dated 6.11.2014 and 28.11.2014 respectively.
41. The respondents have submitted on grounds 1 & 5 of the appeal that there was no evidence tendered by the appellant on occupation with effect from 1960's during the period of gathering, demarcation, adjudication and registration, and further that such issues being raised were not even pleaded in the plaint. Further the 1st and 2nd respondents submitted that P. Exh No MFI No. (1) and D. Exh No. (2), the copy of records was clear that the registration in favour of the 2nd respondent occurred on 24.9.1997 as a first registration. The 1st & 3rd respondent's D. Exh (2) was never cancelled and given that the appellant tendered no evidence by way of a copy of a green card or register for his alleged registration in 1968, the trial court was right in its findings more so when PMF1 1&2 were never tendered in evidence.
42. As to the entry of the appellant into the premises it was submitted that DW 2 was clear on the date of entry which was corroborated by the evidence of DW 3 & DW 5. Reliance was placed on John Mungai Mulango & another vs Jeremiah Kiarie Mukoma (2015) eKLR.
43. On the proposition that parties were bound by their pleadings and so is the court to determine a dispute based on pleadings and the evidence adduced in support of such pleadings, the 1st and 2nd respondents submitted that it was trite law that a court cannot decide on issues not pleaded and that the appellant was raising new issues in ground No. 1 of the memorandum of appeal contrary to the holding in KCB Ltd vs Mwanza Mbaluka and another (1996) eKLR citing with approval Captain Harry Gandy vs Caspair Air Charters (1956) EACA 139.
44. As to grounds No. 5, the 1st and 2nd respondents submitted that the appellant never raised any evidence of any individual record of existing rights to the suit land by way of an adjudication record since the evidence by PW 3 fell short of proving the (RER) compared to DW 2 & DW 4's evidence. Therefore, it was submitted that without such evidence, the assertion of partiality and bias on the part of the trial court lacked basis in law.



45. Coming to ground No. 2 of the appeal, the 1st & 2nd respondents submitted that DW 1, DW 2, DW 3 & DW 5 were consistent on how the 2nd respondent became the registered owner and produced D. Exh No's. (4) and (5) which evidence was not controverted by the appellant.
46. Further, as to the name of the 2nd respondent as compared to the appellant's name, the 1st & 2nd respondents submitted that no evidence was produced to counter D. Exh No. (5) and D. Exh (6) (a) and (b) as read together with the evidence from the Registrar of Persons produced as D. Exh No. 7 (a) & (b).
47. Coming to ground No. 3 of the appeal, the respondents submitted that the appellant failed to discharge the burden of proof as provided under Section 107 and 109 of the *Evidence Act* on the issue of fraud or illegality by either producing the criminal case file or a forensic report showing that the title deed was ever found wanting.
48. On ground No. 4 of the appeal, it was submitted that DW 1, 2, 3,4 & 5's evidence was not challenged over the entry and that the existence of HCC No.73 of 1986 could not be evidence of occupation since the appellant had not sued the 1st and 2nd respondents until they came to know about the case in 2007.
49. On ground No. 6, it was submitted that the court's judgment was sound, based on the evidence tendered while in ground No. 7, the court was urged to find DW 4, the land registrar's evidence was clear by clarifying that a minor could in law be registered as an owner of land and confirmed the date of first registration by way of the copy of register as D. Exh No. 2.
50. On ground No. (8), the 1st & 2nd respondents submitted that the issue of prefix "M" common among the Ameru was never pleaded and evidence tendered before the trial court and that it was only raised during the cross examination of DW 4.
51. On ground No. 9, it was submitted that a registration of land was a matter of law and hence equity follows the law in which case in this instance the circumstances did not favour the disregard of the law since the registered owner was clearly known. Reliance was placed on Salome Warware vs George Muna & another (2015) eKLR on the proposition that the maxim could only apply where the law was not clear. The court was urged to find that in the suit filed on 18.6.1986, any exclusive occupation had not been pleaded and that during the hearing such evidence was not tendered.
52. On whether the appellant's submissions were ignored, it was submitted that the judgement was clear that the trial court took into consideration all evidence and submissions at page 17 of the judgment and that the issue of (RER) had not been advanced through evidence. Reliance was placed on Stephen Ndolo Wambua vs Beatrice Mbula Mutulu & 2 others (2019) eKLR citing with approval Daniel T. Arap Moi & another vs Stephen Muriithi & another (2014) eKLR that submissions were not evidence in law as well as Joseph Muriithi Njiru vs Mathenge Njeru (2016) eKLR that parties are bound by their pleadings.
53. Having gone through the pleadings, evidence tendered, written submissions before the trial court, in this court and the law, the issues for the court's determination are:
 1. Whether the appellant pleaded and proved the acquisition, gathering, demarcation, registration, occupation and possession of the suit land in 1960 or thereabout.
 2. If the appellant pleaded and proved his identity and its relationship to the ownership and registration of the suit land to the exclusion of the 2nd respondent.



3. If the appellant pleaded and proved that there was fraud, illegality and misrepresentation by the 2nd respondent in her acquisition and registration as the owner of the suit land in 1978.
 4. If the appellant pleaded and proved that the 2nd respondent fraudulent and illegally acquired names similar to his name with the sole aim of fraudulently, illegally and unprocedurally acquiring his title deed.
 5. If the appellant pleaded and proved his occupation, possession and ownership of the suit land with effect from 1960 to the filing of the suit.
 6. If the appellant was a bonafide owner of the suit property.
 7. If the 2nd respondent had any legal rights over the suit property which should be enforced by this court.
54. The basis of the appellant's case was the plaint dated 11.6.1986, a reply to defence and defence to the counterclaim dated 8.7.2010. In the two pleadings, the appellant case was that the suit land was registered erroneously in the 2nd respondent's names by omitting his correct name M'Nkoroi and that the names appearing as Karogo Nkoroi could not have been possible since at that time of the land adjudication the 2nd respondent was a minor, as such she could not be registered as an owner and if it ever happened, the same was fraudulent, illegal and against the law.
55. Further, the appellant pleaded in the reply to defence and defence to counterclaim that he had been the rightful occupant since 1968 and beyond.
56. On the other hand, the 2nd respondent filed a defence and counterclaim dated 1.7.2009 claiming that she was a first registered owner of the land holding an indefeasible title, the appellant being an imposter and a stranger to it. The 2nd respondent counterclaimed for the land saying that the entry into the land by the appellant was as a licensee in 1996 but when told to vacate in 1997, he turned around and chased the 2nd respondent out of the land. She sought for eviction, vacant possession and a permanent injunction since the alleged entry in 1968 was false.
57. In support of his claim the appellant came with P. Exh No. 1 a copy of record for L.R Abothuguchi/Makandune/47. It showed that the register was opened on 24.9.1977 and a title deed issued on 12.7.1978. The names used were those of Karogo Nkoroi the 2nd defendant and not the appellant. The record showed that the person who collected the title deed signed for it. In her evidence the 2nd defendant admitted that she was the one who collected and signed for the title deed.
58. It is trite law under Order 2 Rule 4 of the Civil Procedure Rules, that fraud must be specifically pleaded and proved on a balance of proof higher than in ordinary suits as held in *Arthi Highway Developers Limited vs West End Butchery Limited & 6 others* (2015) eKLR and *Virjay Morjaria vs Nasingh Madhusingh Darbar & another* (2000) eKLR.
59. In this suit, the appellant never pleaded the specific particulars of the illegalities and or fraud on the part of the 2nd respondent in the manner her names were acquired, registered and subsequently used to register her as the owner of the land in 1978 as provided under Order 2 Rules 1 (4) and 10 of the Civil Procedure Rules.
60. The appellant merely pleaded that he was recorded the owner of the land at the inception of the land adjudication in the area. He further attempted to prove this by calling a former demarcation officer for that area and one Justus Muthamia as PW 2 a chairman of the committee a Mr. Reuben Mwirigi as



- PW 3 who merely came up with MFI P 2. The onus was on the appellant to prove those facts by way of production of the demarcation book and the record of existing rights as at 1968 under his names.
61. The exhibits produced by the 2nd respondent talk of the register being opened in 1977 for this particular property. To impeach such a public record under the retired Registered Land Act, the appellant had to bring the certificate of finality and the adjudication register which had been sent to the Chief Land Registrar and the Director of Land Adjudication for the titling in Nairobi, allegedly including his names and the address. In absence of such a record, my finding is that the appellant never proved that either at the gathering stage, the land adjudication process and prior to the tilting, he was the bonafide recorded owner of the suitland.
 62. The 2nd issue is whether the appellant pleaded and proved that the 2nd respondent used a resemblance of names as deception and registered her names with the Registrar of Persons as Karogo Nkoroi and lastly posed as the appellant so as to acquire the title and registration.
 63. It is trite law that prior to the final register being sent for the titling, parties are called upon to peruse the register, ascertain their acreage, details and address under the Land Adjudication Act. The appellant failed to tender any evidence that he ever attended such a meeting after the publication of the final register and confirmed the correct names against his parcel of land.
 64. The appellant also failed to produce the demarcation book or evidence of a duly certified record as at the adjudication stage to ascertain before the trial court that he truly was the one adjudicated the suit land before the titling so as to impeach the records produced by the land registrar as D. Exh No. (2). There may be a remarkable similarity of the names by the parties. Whoever avers that the other had taken up his/her names had the obligation to prove that. The particulars of fraud and the name deception by the 2nd respondent was not pleaded in the body of the plaint and defence to the counterclaim.
 65. The mandate to issue any documents of registration or identification falls with the National Registration Bureau under the Citizenship and Registration Act previously the Registration of Persons Act (Cap 107) Laws of Kenya.
 66. In the case of Ruth A. Ogembo vs Jagdip Bhagwadas Morparia & another (2018) eKLR, the issue before the court the identity documents used in the transaction which had been disowned by the issuing authorities including a letter from the Registrar of Persons.
 67. In this suit the appellant urged the court to find him the true Karogo Nkoroi and the one registered as the owner of the suit land. Lenaola J (as he then was) when he first heard this suit made an order on 19.9.2007 for the appellant to be given records from the Registrar of Persons following the issuance of his ID Card No. 2520514 on 11.9.2001, before the hearing could resume. The appellant seems to have ignored the said order up to this appeal.
 68. On the other hand, the 2nd respondent gave out all the relevant documents and evidence from the National Registration Bureau. Looking at the record of appeal herein it is apparent that it deliberately left out some of the proceedings in this file since inception. The appellant also disowned his own affidavit sworn on 24.7.1985 and produced as D. Exh 3. The appellant admitted that his ID card was issued in 1960 but lacked record of documents to show he was also known as Nkoroi. PMF 1 (a) and 2 were never produced as exhibits. In law such documents cannot form part of evidence. See Kenneth Nyaga vs Hasting Kiguta and 2 others (2015) eKLR. There was nothing produced to show that the land was recorded in his name in 1966 so that if that may be so, the 2nd respondent's name was superimposed as hers in the register on 24.9.1977.



69. Strangely the appellant in cross examination vehemently disowned MFi D 2 (a) & (b) the affidavit sworn by him before the lawyer but ultimately failed to object to its production as D. Exh No. (3).
70. Given the production of D. Exh No. 6 (a) & (b) and D. Exh No. 7 (a) & (b), it was quite clear that the identity of the 2nd respondent was settled to finality that she was born in 1962. Therefore, the linkage of the name with that of the appellant in so far as PMF 1 (2) and due to its non-production before the trial court by either a land register or a land adjudication officer, the issue of who among the appellant and the 2nd respondent was the owner can only be settled in favour of the 2nd respondent. This is so because the 2nd respondent had proved her identity, through authenticated records by the relevant government agencies and secondly, through the land ownership documents which were confirmed, approved and verified by the land registrar.
71. No evidence was tendered by the 2nd respondent falsified her name and illegally passed herself as if she was the appellant so as to procure an identity card and register herself as the owner of the land.
72. Section 110 of the repealed Registered Land Act mandatorily required a person executing an instrument to appear before the land registrar for purposes of establishing or verification of his identity.
73. In this appeal, the land registrar confirmed that a minor could be recorded as a land owner. Similarly, the land registrar confirmed that the records at their registry and the person who collected the title deed was the 2nd respondent. There was no evidence or questions put to the land registrar by the appellant that he had alleged lodged a complaint and an application for the rectification of record as the true owner and or sought for the cancellation or recall of the title deed from the 2nd respondent until the true identity of the registered person was established.
74. The appellant failed to tender any evidence that the alleged fraud or illegality on the registration and the issuance of the title deed and the change of his true name in the register was occasioned through collusion with the land registrar. Similarly, as to the issue of the prefix M other than the cross examination, no evidence was tendered that the appellant had between 1986 and 2020 and prior to the land registrar testifying, approached the land registrar claiming that there was a confusion or falsification of records in favour of the 2nd respondent.
75. As to the alleged investigation by the CID and the criminal case, the 2nd respondent was the registered owner and not her mother, the alleged judgment was not availed before the trial court. No forensic examination report was produced indicating any alleged falsification of land registry records, title deed or irregularities as per Section 103 of the Land Registration Act. The same case applied to the procurement of an identity card using the wrong names. No report was tendered from the National Registration Bureau that there was a double registration of identity cards and or falsification of names or using of a false pretense to register the names of the 3rd respondent as if she was the appellant. In any event the appellant never challenged the authenticity of D. Exh No. 6 (a) & (b) 7 (a) and (b).
76. In the case of Stanley Kosgei & another vs Charles Kambi (2022) eKLR, the court held that it was common knowledge that person of 18 years and above were best identified using their ID Cards and that it was not uncommon to find two persons with similar names and to unravel that, a confirmation from the Registrar of Persons was necessary to establish if the two were one and the same person as held in South Nyanza Sugar Co. vs George Omolo Ngeso (2021) eKLR.
77. In this suit the appellant to prove the misrepresentation had to do more than suppositions, speculations and casting of aspersions on the true identity of the 3rd respondent. Evidence had to be tendered that the 3rd respondent lied to both the Registrar of Persons as well as the land registrar. In Kennedy Odoo Okello vs District Land Registrar Migori & 2 others (2014) eKLR, the court



- was dealing with an alleged alteration and or superimposition of a death certificate allegedly given to the Registrar of Births and Deaths so as to procure a land registration. The court discussed the role of the area chief as to registration of deaths and births and the key forms required for purposes of introduction.
78. The court made a finding that a certificate annexed to the petition was a forgery intended to deceive and mislead the court, hence the court could also not believe the evidence of the petitioner as concerned the date of death given the petitioner had been proved as a person set out to mislead and deceive the court through forgery of documents presented to court.
 79. In the case of Estate Sonrisa Ltd and another vs Samuel Kamau Macharia & 2 others (2020) eKLR, there was evidence of a distinctive history tracing the original ownership of the land presented by a land registrar pointing out at a procedural process save for the signatures on the file and some missing vital supporting documents to the transfer. The party claiming the title land in 1996 was also not featuring in the records. More curious the said claimant's ID card appearing therein turned out to be a forgery after the report from the Registrar of Persons which the other parties had not controverted.
 80. The court concluded that the transaction was fraudulent. The court held that under Section 42 (1) of the Retired Registered Land Act, the register was the first reference point for a party wishing to purchase a registrable interest in land and that a land registrar was the custodian of the register in a registration district. The court further cited with approval Arthi Highway Developers (supra) on proof of fraud.
 81. In the case of Alice Chemutai Too vs Nickson Kipkurui Korir & others (2015) eKLR, the court held that a title deed's protection was removed and could be impeached on account of fraud, misrepresentation or where it was procured illegally, unprocedurally or through a corrupt scheme. The appellant had pleaded fraud and irregularities as to how the title was procured but without particulars. The court held that the onus was on him nevertheless to prove the illegalities, irregularities, misrepresentation and the fraud by cogent and tangible evidence as held in Virjay Morjaria (supra).
 82. In the case of IEBC vs Stephen Mule Mutinda (2014) eKLR; the court held that it could not base its decision on unpleaded issues. Similarly, in Kinyanjui Kamau vs George Kamau Njoroge (2015) eKLR the court disallowed grounds of appeal raising fresh issues which had not been canvassed before the trial court.
 83. Looking at the record of appeal, even though some of the issues were not pleaded by parties, parties themselves filed separate issues for determination moving outside their respective pleadings. By putting across the said issues and leading evidence as well as submitting on them, my finding is that the same were subject to the court's determination.
 84. The court held that the onus was also on the petitioner to rebut the presumption by law under Section 96 of the Evidence Act on the legality of the charge executed therein and attested by N.B Ombija advocate. The court said that a mere allegation without prove was not enough to rebut a statutory presumption.
 85. In this suit, there was a rebuttable presumption of regularity and legality on the state officers as they discharged their duties in registering the identity card in the name of the 2nd respondent. The same applied to the registration of her name as the title holder of the land in 1977. The evidence called by appellant to rebut that presumption has fallen short of challenging the property held by the 2nd respondent.



86. Parties are bound by their pleadings and must also bring cogent and tangible evidence to sustain their pleadings and the issues framed flowing from the pleadings.
87. Evidence of occupation since 1968 and beyond by the appellant could only be proved by the ascertainment of the register of existing interests on the land by way of a demarcation book, the record of existing rights (RER) and lastly, the adjudication registers prior to the issuance of the title deed in favour of the 2nd respondent in 1978.
88. Without such documentary evidence, the appellant could not sustain his claim and impeach a title deed under Sections 24, 25 & 26 of the Land Registration Act, so that this court can exercise its discretion to cancel it under Section 80 thereof on account of fraud, illegality, misrepresentation or issuance through corrupt scheme.
89. Equity follows the law and he who comes to equity must come with clean hands. The law as it was and currently obtaining as to the demarcation, registration and the issuance of title had to be followed, by not only the appellant but also the respondents.
90. PW 2 & 3's evidence was irrelevant as to the adjudication record in 1970 and the names used in the said records as compared to DW 4, the land registrar. The evidence of DW 5 was corroborated by DW 1, DW 2 & DW 4. Without any legal basis, of the alleged rights and a claim to occupy the suit land against the ascertained and recognized proprietary rights of the 2nd respondent, the appellant remained a self-claimed trespasser on the suit land by dint of Section 3 (3) of the Trespass Act.
91. Consequently, and given the foregoing, I find that the trial court was in order to reach the finding that the appellant had failed to prove his claim to the required standards unlike the 1st respondent and the 2nd respondent's defence and counterclaim. The decision is sustained. This appeal stands dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 1ST DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Kaumbi for respondent

Nyamu Nyaga for respondents

HON. C.K. NZILI

ELC JUDGE

