



**Kiruka & another (Suing as Personal Representatives of the Estate of Kiruka Waweru) v Kiarie & 2 others (Environment and Land Appeal E011 of 2022) [2023] KEELC 18580 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18580 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL E011 OF 2022**

**LN GACHERU, J**

**JULY 6, 2023**

**BETWEEN**

**BETHWEL WAWERU KIRUKA ..... 1<sup>ST</sup> APPELLANT**

**JEREMIAH THIGA KIRUKA ..... 2<sup>ND</sup> APPELLANT**

**SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF KIRUKA  
WAWERU**

**AND**

**KINYANJUI S KIARIE ..... 1<sup>ST</sup> RESPONDENT**

**LANDS REGISTRAR, THIKA ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgment and Decree in Kandara MCELC  
No 04 of 2020 issued by the Hon. E. Mutunga on 24th March, 2022)*

**JUDGMENT**

1. The Appellants being aggrieved by the judgment of the Court in Kandara SRM Civil No. 4 of 2020, of 24<sup>th</sup> March 2022, have preferred this Appeal. The Appeal rests on Nine Grounds as set out in the Memorandum of Appeal dated 24<sup>th</sup> June 2022, and filed on 12<sup>th</sup> July, 2022. The Appellants are seeking for Orders:
  - a. That this Appeal be and is hereby allowed
  - b. The judgment/ decree of the Chief Magistrate’s Court at Kandara MCELC No. 04 of 2020) by Hon. E Mutunga delivered on 24<sup>th</sup> March 2022, be set aside.



- c. That it be determined that the Appellants proved their case before the trial Court and the prayers in the Amended Complaint dated 22<sup>nd</sup> January 2021, be granted
- d. That the Appellants be granted costs of this Appeal
- e. That this Honourable Court be pleased to make any further orders and discretions that may deem fit and just in the circumstances of the case.

2. The facts of the case at the trial Court were; - that the Appellants sought Orders for cancellation of title over Loc. 1/ Chomo/ 388, which is registered in the name of the 1<sup>st</sup> Respondent. They also sought for an order of permanent injunction against the 1<sup>st</sup> Respondent. The Appellants claim was purchasers interest over the suit land, which they claimed was land bought and registered in the name Kiruka Waweru, before it was fraudulently and illegally transferred to the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent opposed the said suit and averred that the suit property belonged to his deceased father Samuel Kiarie Kinyanjui, before it was sub-divided. He averred that upon sub-division, the suit land was given to him by his father on 5<sup>th</sup> August, 1989, as a gift. He further averred that the land was erroneously registered in the name of Kiruka Waweru, but after a hearing before the Land Registrar, the register was corrected.

3. The trial Court rendered its judgment and dismissed the Appellants' case on the strength that the case was not proved on the required standard of balance of probability. Hence this appeal.

The Appeal was admitted and parties were given directions to canvass the appeal by way of written submissions.

The Appellants filed their written submissions through the Law Firm of Daniel, Henry & Co. Advocates, and submitted on the stated grounds of the appeal. The Appellants highlighted the role of this Court as an Appellate Court and invited the Court to look into the facts and the law as set out in the submissions. They also submitted that the Appellants had proved that the suit land was registered in their father's name and which he held a good title to. That the Land Registrar had corroborated their testimony that the title to the suit property was lost in 2012. They attacked the evidence of the 1<sup>st</sup> Respondent and submitted that the 1<sup>st</sup> Respondent did not lead any evidence as to the root of his title as required in *Munyu Maina vs Hiram Gathiba Maina*, Civil Appeal No. 239 of 2009, where a registered owner whose title is under scrutiny is required to lead evidence as to how title was acquired.

4. On grounds No. 7-9, they submitted that the only institution mandated to cancel title is the Court as was held in the case of *Super Nova Properties Limited & Another vs District Land Registrar Mombasa & 2 Others* (2018) eKLR. That therefore the 2<sup>nd</sup> Respondent had no power to cancel the title of Kiruka Waweru, and as result the action of cancellation was illegal and to that extent they had proved illegality. They added that the Land Registrar had testified that the transfer to their father's name was from a sale agreement with the registered proprietor for a consideration of Kshs. 60,000/=.

They further submitted that the 1<sup>st</sup> Respondent did not prove how he acquired his title and the reason he failed to cause transfer immediately. That his title was thus ripe for cancellation as was held in the case of *Martha Chelal & Another vs Elijah Kipkemoi Boiywo & 2 Others* {2019} eKLR, where the Court observed that a title acquired fraudulently can be cancelled.

5. The 1<sup>st</sup> Respondent filed his submissions through the Law Firm of Muguro & Co. Advocates, and reiterated the evidence adduced during trial and raised two issues for determination by the Court.

The 1<sup>st</sup> Respondent submitted that he tendered enough evidence to show that he is the bona fide and legal owner of the suit property, and that he has lived thereon since birth. That the Appellants failed



to avail any evidence to show that their father bought the suit property or even explain the delay in seeking to claim interest over land.

He further submitted that the Appellants had failed to particularize and establish any fraudulent transactions attached to him as required in the case of *Vijay Morjaria vs Nansingh Madusingh Darbar & Another* {2000} eKLR, where the Court observed that issues of fraud must be specifically pleaded and proved. In the end, he submitted that the Appellants failed to prove their case and the appeal cannot therefore be allowed.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents through the Office of the Attorney General filed their written submissions and gave a brief history of the case before raising two issues for determination. It was their submissions that the 1<sup>st</sup> Respondent's claim for ownership is hinged on entry No.4, and that his evidence on how he acquired the suit property was clear. That the Appellants had a duty to challenge the 1<sup>st</sup> Respondent's title by adducing evidence on the root of their father's title as required in the case of *Munyu Maina vs Hiram Gathiha*, supra.

6. They further submitted that Sections 107 & 109 of the *Evidence Act* placed a duty on the Appellants' to lead evidence, but they failed to lead any evidence on fraud. That the Appellants failed to strictly prove the issue of fraud as is required in the case of *Gladys Wanjiru Ngacha vs Theresa Chepsat & 4 Others* {2013} eKLR, which considered the pronouncement in *R G Patel vs Lalji Makanji* {1957} EA 314, where the Court observed that fraud must be proved on a balance of probabilities. It was their further submissions that they undertook due diligence in registering the 1<sup>st</sup> Respondent, and if there was any fraud, they were not party to it, as they undertook their duty in good faith and within the confines of the law.

The 1<sup>st</sup> Respondent's title over Loc. 1/ Chomo/ 388, is the substance of this appeal. He was issued with the title on the 31<sup>st</sup> May, 2013. The land was first registered in the name of Samuel Kiarie Kinyanjui, on 2<sup>nd</sup> June 1989, before the entry was cancelled and the land registered in the name of Kiruka Waweru on 4<sup>th</sup> April 1990, and now the 1<sup>st</sup> Respondent. While the Appellants maintained that the suit property was sold to their father Kiruka Waweru, the Respondents hold that the registration in the name of Kiruka Waweru, was erroneous and was duly rectified. The Appellants are now before this Court because their suit was dismissed by the trial Court.

7. The role of this Court on Appeal is well laid out in Section 78 of the *Civil Procedure Act* which is to re-evaluate, re-assess and re-analyze the evidence as contained in the Record of Appeal. This was rehearsed by the Court in the case of *Selle vs Associated Motor Boat Co.* {1968} EA 123, and is well captured by Section 78 of the *Civil Procedure Act*, which espouses the role of a first appellate Court as to: '..... re-evaluate, re-assess and re-analyze the extracts of the record and draw its own conclusions.' This provision was buttressed by the Court of Appeal in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR, where it was held that:

“We have also, as we are duty bound to do as a first appellate Court, re-consider the evidence adduced before the trial Court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.

8. Further, the Court in the cases of *Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, rightly held: -

“This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine



whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

9. The discretionary power of the trial Court just like this Court is donated by *the Constitution* as well as Statute as such, this Court cannot unnecessarily interfere with the said discretion. The circumstances under which this Court can interfere with such discretion was well laid out by the Supreme Court in the case of *Apungu Arthur Kibira vs Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR, whether the Court held:

“We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious.”

10. The Superior Court quoted the pronouncement by the New Zealand Supreme Court in the case of *Kacem v. Bashir* (2010) NZSC 112; (2011) 2 NZLR 1, (Kacem), where it was held [paragraph 32]:

“In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.”

11. Madan, JA (as he then was) captured the principle more succinctly in the case of *United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd* (1985) EA 898, where he held as follows:

“The Court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The Court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

12. This Court cannot over-emphasize its role on appeal over this matter. Additionally, it cannot simply fault or take away the discretion of the trial Court just because it has been moved on Appeal. The Appellants have a duty to lead evidence to prove that the trial Court’s discretion ought to be interfered with on account of the principles set out hereinabove.

Section 107 of the *Evidence Act* makes provision for the legal burden of proof, it provides:

“Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

13. The evidential burden on the other hand is provided for under Sections 109 and 112 of the *Evidence Act*, which provides:

109. The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.



14. While the legal burden remains, the evidentiary burden may be shifted. The Appellants had the burden of adducing evidence before the trial Court to prove their case, and whether the burden shifted at any point, this Court will have to peruse the record. Further, Court will also draw from the Record of Appeal, as well as the rival written submissions whether the principles enunciated above have been proven.

Having analyzed the foregoing, and having perused the Record of Appeal, and having read through the respective written submissions by parties, and being guided by the authorities cited, the issues for determination herein are:

- i. Whether the Appellants proved their case on a balance of probability?
- ii. Whether the judgment of the trial Court should be set aside?
- iii. Who should bear the costs for this appeal?

### **Whether the Appellants Proved Their Case on a Balance of Probability?**

15. It was the Appellants case that the suit property belonged to their father Kiruka Waweru, who acquired the property through purchase in 1990. There was no copy of a sale agreement adduced before the trial Court to buttress this. However, as per the Green Card availed before the trial Court, it is evident in entry 3 that Kiruka Waweru, became the registered owner of the suit property on 4<sup>th</sup> April, 1990. No title deed was placed before the trial Court as *prima facie* evidence of ownership.

The foregoing registration was done under the Registered Land Act, Cap 300, and in the said Act, under Section 27, it conferred absolute ownership to a registered proprietor. Section 32 (2) on the other hand provided that a title deed was *prima facie* evidence of the contents of the title deed. The Section provides:

“(2) A title deed or certificate of lease shall be only *prima facie* evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register.”

16. The Court in the case of *Noah Onyango Amwayo v Sylvanus O Otumba & another* [2013] eKLR, elaborated the provisions of Sections 27 and 32 of the *Registered Land Act*, and had this to say:

“The language of subsection 2 of the above Section is clear that a title deed or a certificate of lease are only *prima facie* evidence of the matters shown therein but the land and lease are subject to all entries in the register. The subsection therefore cedes primacy to the register in respect of the title. Section 27 of the same Act puts the matter beyond controversy.

.....”

It is therefore plain, from the above provisions, that what in reality constitutes a title to land under the Registered Land Act is the register. A title deed is only a *prima facie* evidence of the matters shown therein but the land or lease are subject to all entries in the register.”

17. Under the *Land Registration Act*, 2012, registration of a proprietor confers on him/ her absolute ownership of the property. The *Act* also contemplates that the Certificate of title issued after registration is *prima facie* evidence of ownership. Section 26 (1) (b) of the *Land Registration Act*, provides:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all Courts as *prima facie* evidence that the person named



as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

18. The Appellants failed to produce a copy of title deed on the premise that the same was lost. This Court has perused a copy of the Kenya Gazette, which conforms to the allegations of lost title Deed. This was corroborated by the Respondents. The Appellants’ availed a copy of Green Card and Certificate of Search which corroborated their allegation that the suit land was registered in the name of their father Kiruka Waweru. The Court in *Noah Onyango Amwayo vs Sylvanus O Otumba & another*, *supra* had this to say where an Appellant produced a green card extract to prove ownership:

“In the case before us, the appellant testified at the trial before the High Court that he had misplaced his title deed in respect of the disputed land. He however produced the green card and a certificate of official search in respect of the same parcel of land. The two documents, in our view, constituted what we may refer to as extracts of title and were better evidence of his title than a title deed would have been, because they contained all the entries on the register in respect of the disputed title and carried current information relating to the parcel of land.”

19. Presently, there is no doubt the contents of the Green Card corroborated the Appellants’ testimony and even though there was no evidence of transfer, there is evidence Kiruka Waweru, became a registered owner. To this end, the Appellants had on a balance of probability established that their father was the owner of the suit property.

However, the 1<sup>st</sup> Respondent explained how he came to acquire the suit property. It was his case that the suit property was erroneously registered in the name of Kiruka Waweru, but the same was corrected before the Land Registrar. It is unfortunate that Mr. Kiruka Waweru, was not present to shade some light on the events that lead to cancellation of title. Nevertheless, DW3 told the trial Court that she was the wife of the said Kiruka Waweru, and she was aware of the 1<sup>st</sup> Respondent’s allegation. It was her testimony that the suit property was erroneously written in her husband’s name, and her husband wilfully consented to having his title deed cancelled. She gave details of the occurrence that led to discovery of the title up until cancellation. This Court did not have the benefit of confirming the demeanour of the witness, and looking at the proceedings there was no reason to doubt her evidence as she gave account of how title was cancelled.

20. Further, the Court is alive to the pronouncement in the case of *Munyu Maina vs. Hiram Gathiba Maina*, Civil Appeal No. 239 of 2009, as quoted by the parties’ to this suit. The Court of Appeal held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”



21. Again, in the case of *Hubert L. Martin & 2 Others...vs... Margaret J. Kamar & 5 Others* [2016] eKLR, the Court held:

“Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’ (emphasize added)

22. Both the Appellants and the 1<sup>st</sup> Respondent had a duty to furnish evidence as to how they became title holders. The legal burden remained constant throughout the proceedings, and what could only shift was the evidentiary burden. The shift was well explained by the Court in the case of *Mbutia Macharia v Annab Mutua Ndwiga & another* [2017] eKLR, where the Court held:

(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

23. This position was reiterated by the Supreme Court in the Presidential Election Petition No. 1 of 2017, between *Raila Amolo Odinga & Another vs. IEBC & 2 Others* (2017) eKLR, where the Court held:

(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through out a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

24. As already established above, the Appellants were able to establish that their father was the registered proprietor of the suit land and even though they could not lead evidence as to how he became registered owners. There was evidence that he acquired registration before the 1<sup>st</sup> Respondent. The duty of leading evidence as to the ownership of the suit land shifted to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent had a duty to lead evidence as to how he acquired land. There was a common evidence that the suit land arose from sub-division of land Loc. 1/ Chomo/ 261, which was registered in the name of Samuel Kiarie Kinyanjui, the 1<sup>st</sup> Respondent’s father. The 1<sup>st</sup> Respondent claimed to have acquired the land as a gift. He produced a copy of Letter of Consent, which details the land was transferred to him as a gift. There was no evidence to rebut this.

25. To corroborate his testimony of how land was transferred to him, 1<sup>st</sup> Respondent called DW3, the wife of Kiruka Waweru, and whose testimony the Court has found above corroborated the 1<sup>st</sup> Respondent’s theory. DW1 the Land Registrar told the trial Court that there was a transfer done between the 1<sup>st</sup>



Respondent and Kiruka Waweru, and even though he did not explain the circumstances that led to the transfer, the witness statement dated 31<sup>st</sup> August, 2021 that was adopted as evidence indicated that they relied on the documents availed for purposes of registration.

It is important to point out that as per the copy of Limited Grant attached to the Appellants' documents, and produced in Court, the said Kiruka Waweru died on 21<sup>st</sup> January, 2015. The transfer was done 31<sup>st</sup> May, 2013, during his life time. Deducing from the 1<sup>st</sup> Respondent's witness statement adopted as evidence before the trial Court, the 1<sup>st</sup> Respondent has been in occupation of the suit land and there was no evidence that the said Kiruka Waweru, ever challenged his use and occupation of the land. The Appellants did not seek to rebut the testimony of DW3, whom this Court finds that her testimony had such great probative value to corroborate the 1<sup>st</sup> Respondent's case.

26. The Appellants have submitted that the Land Registrar, does not have power to cancel title. This cannot be gainsaid as it has been pronounced by several Courts. As a matter of fact, of Court of Appeal in Mombasa Appeal No. 98 of 2016;- *Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties)* [2018] eKLR, agreed with the trial Court that

“The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”.

27. The power is donated by Section 80 of the *Land Registration Act* which provides:
- (1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. (emphasis added)
  - (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.
28. The Land Registrar has power under Section 79 of the *Land Registration Act*, to rectify title. The Section provides:

Rectification by Registrar. 79.

- (1) The Registrar may rectify the register or any instrument presented for registration in the following cases—
  - (a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;
  - (b) in any case and at any time with the consent of all affected parties; or
  - (c) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.
- (2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.



- (3) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.

29. Essentially, the Land Registrar may only correct errors or omissions, but not such that affects the interest of the proprietor. Even though, Section 79(1)(b) allow the Land Registrar to “in any case and at any time with the consent of all affected parties” It has been argued that the title deed issued to Kiruka Waweru, was erroneous and it is apparent that the Land Registrar can correct errors, unless it affects interest as it was in this case. The Green card adduced as evidence does not indicate cancellation of entry. There is no evidence that the 2<sup>nd</sup> Respondent cancelled, the title. What is only apparent is that entries No. 1 and 2 were cancelled before title could be issued to Kiruka Waweru which is such a curious transaction but even though it is not the subject of this appeal or was it an issue on trial. There is no entry that show the title issued to Kiruka Waweru was cancelled.

The issue of the Land Registrar’s power to cancel title was not an issue at the trial and there is a proper channel to challenge circumstances when the Land Registrar acted beyond his powers. Even so, the principles on introduction of new points were well settled in the case of *Securicor (Kenya) Ltd v EA Drapers Ltd & another* [1987] eKLR, where the Court observed that it is a discretionary power that

“ must be exercise sparingly, the evidence must all be on record, the new point must not raise disputes of fact and it must not be at variance with the facts or case decided by the Court below.”

30. The submissions by the Appellants that the 2<sup>nd</sup> Respondent acted beyond their scope cannot be sustained. This is a disputed fact that may require the calling of evidence, but as already established above, there is no evidence that the title deed of Kiruka Waweru, was cancelled. Furthermore, the 1<sup>st</sup> Respondent noted in his statement that they were advised to rectify the error by causing transfer of the suit land from Kiruka Waweru to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent’s allegations of transfer were corroborated by the Land Registrar that Kiruka Waweru transferred land to the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent did establish how he acquired title and this Court is convinced that his title was validly acquired unless the contrary is established. The Appellants raised an issue of fraud and they were duty bound to lead evidence, to that effect, it was not enough to particularize fraud but to strictly prove it. The Court of Appeal in Mombasa Civil Appeal No. 312 of 2012 *Emfil Limited vs. Registrar of Titles Mombasa & 2 others* [2014] eKLR held;

“ Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”. (emphasis added)

31. Similarly, the Court of Appeal decision in *John Kamunya & another v John Nginyi Muchiri & 3 others* [2015] eKLR, Court held:

“ we find that the law is clear as put by Mr. Karanja that matters of “fraud” must be strictly and specifically pleaded before these can be interrogated by a Court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the Court to determine.”

32. It is evident that the Appellants’ did not adduce any evidence before the trial Court to demonstrate that their father never consented to the transfer of land in the name of the 1<sup>st</sup> Respondent. Their claim was



that their father's title was cancelled and irregularly registered in the name of the 1<sup>st</sup> Respondent. The circumstances that lead to the 1<sup>st</sup> Respondent's acquisition of title were satisfactorily explained and this Court cannot hold otherwise. The trial Court did hold that the Appellants had failed to give evidence as to how the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents fraudulently transfer the land; a position this Court agrees with. Further, this Court concur with the findings of the Trial Court. Having analyzed the evidence adduced before the trial Court on the process of acquisition of land this Court does not find and see any fraud. The burden rested with the Appellants to lead evidence and they failed to do so.

It is the findings of this Court that the Appellants failed to prove their case on a balance of probability before the trial Court and thus trial Court was correct to hold so in its judgment.

**(ii) Whether the Judgment of the Trial Court should be Set Aside?**

33. The Court has already expressed itself in this judgment that it cannot simply interfere with the discretion of the trial Court without proper reason and evidence. The Appellants were duty bound to satisfy this Court that they have met the principles set out in the case of *United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd supra*. The Appellants failed to prove so and therefore this Court has no option and it cannot exercise its appellate powers in favour of the Appellants.

The Appellants did not satisfy this Court on any of the grounds set out in their Memorandum of Appeal, and in the end, they did not satisfactorily fault the judgment of the trial Court. This Court finds no reasons to interfere with and/ or set aside the Judgement of the trial Court. Consequently, the Court finds this appeal not merited and it must fail.

**(iii) Who Should Bear the Costs for This Appeal?**

34. Awarding of costs is a discretionary right donated to a Court by Section 27 of the *Civil Procedure Act*, but it is also a settled principle that costs shall follow the events. The Respondents are the successful parties and this Court finds no reason but to award them costs.

Having carefully analysed the instant Appeal and the available evidence, the Court finds that the Appellants failed in their attempt to fault to trial Court's findings in its Judgement of 24<sup>th</sup> March 2022.

Consequently, the instant Appeal is dismissed entirely and the trial Court's Judgement is upheld, with costs to the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 6<sup>TH</sup> DAY OF JULY, 2023.**

**L. GACHERU**

**JUDGE**

Delivered Virtually in the presence of; -

Appellants - Absent

2nd Respondent Absent

3rd Respondent

Joel Njonjo - Court Assistant

