



**Kamau v Mbete & another (Environment and Land Appeal 051 of 2020)  
[2023] KEELC 20973 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20973 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL 051 OF 2020  
MD MWANGI, J  
OCTOBER 12, 2023**

**BETWEEN**

**AGNES WAHURA KAMAU ..... APPLICANT**

**AND**

**PURITY MBETE ..... 1<sup>ST</sup> RESPONDENT**

**NAIROBI CITY COUNTY ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the judgment of the Senior Resident Magistrate Court  
at Nairobi (C. Kithinji) in CMCC ELC No. 618 of 2018 dated 4th 2020)*

**JUDGMENT**

**Background**

1. The Appeal before me is an appeal from the judgment of the Nairobi Chief Magistrate's Court in CMCC ELC No. 618 of 2018 delivered on the 4<sup>th</sup> November, 2020. The Appellant was the Plaintiff in the said case. She appealed to this Court by way of a Memorandum of Appeal dated 30<sup>th</sup> November, 2020 which was later amended on 24<sup>th</sup> April, 2023. The Appellant in her Memorandum of Appeal cited 8 grounds of appeal. It was the Appellant's position that the learned magistrate erred in Law and fact in the following manner:
  - a. The Learned Magistrate erred in law and fact by holding that properties L.R. Nairobi Block107/1442 and Nairobi Block107/1443 situate in Umoja II Zone 8 emanated from plot numbers 151 and 152 instead of plot numbers 115 and 116 respectively despite overwhelming documentary evidence from the Appellant confirming the same.
  - b. The Learned Magistrate erred in Law and in fact by disallowing the Appellant's application for leave to file new documentary evidence that was not in her possession at an adequate



time before the hearing emanating from an independent investigation by the 2nd Respondent offices of the Director, Investigation & Information Analysis confirming inter- alia that:

- i. The 1st Respondent forged a beacon certificate for plot site number 284 renaming it plot number 151 and 152;
  - ii. The alleged lease certificate between James Maina Gathigo and the 2nd Respondent which the 1st respondent produced and relied upon were unauthentic and forgeries as the same were never within the records of the 2nd Respondent;
  - iii. Pursuant to a Part Development Plan resurvey dated 8th January, 2016 the Appellants plots 115 & 116 were forwarded to the Survey of Kenya for allocation of parcel numbers L.R. Nairobi Block 107/1442 and Nairobi Block107/ 1443 respectively;
  - iv. The report recommended the revocation of beacon certificate and lease agreements of plot numbers 284 (151 & 152) which the 1st Respondent herein relied upon on grounds that they were forgeries used to obtain Certificates of Lease to Title Numbers L.R. Nairobi Block107/1442 and Nairobi Block107/1443;
  - v. The report recommends that plot numbers 151 and 152 which the 1st Respondent relies upon as per the Part Development Plan dated 8th January, 2016 as aforementioned were issued and surveyed L.R. Nairobi Block107/1454 and Nairobi Block107/ 1455 respectively;
  - vi. The 1st Respondent herein be prosecuted for the offence of fraudulently obtaining land registration by false pretenses contrary to section 320 of the Penal Code.
- c. The Learned Magistrate erred in Law and fact by relying on unsubstantiated hearsay evidence that the Appellant did not complete payments for her allotted plot numbers 115 and 116 in time where after the 2nd Respondent allotted the said plots as 151 and 152 to the Estate of James Maina Gathigo. As a result of erroneous reliance on the aforementioned evidence the Learned Magistrate misdirected and confused issues as plot numbers 151 and 152 were allocated to the Estate of James Maina Gathigo by the 2nd Respondent in the year 2002 and plot numbers 115 and 116 were allocated to the Appellant in the year 2003;
  - d. The Learned Magistrate erred in Law and fact by holding that the 2nd Respondent telepathically reallocated the Appellant's plots to the Estate of James Maina Gathigo even before the supposed initial allocation to the Appellant were issued;
  - e. The Learned Magistrate erred in Law and in fact by holding that the 1st Respondent had proved their counter-claim on a balance of probabilities as required by Law;
  - f. The Learned Magistrate erred in Law and in fact by relying on the documentary evidence produced by the 1st Respondent which were riddled with material inconsistencies and of no probative value.
  - g. The Learned Magistrate erred in Law and in fact by relying on the hearsay evidence of Mburu Kinyanjui and Godfrey Cheruiyot who did not corroborate their testimony with the production of any documentary evidence despite the latter being an expert witness.
  - h. The Learned Magistrate erred in Law and fact by failing to consider the Appellant's testimony and submissions in entirety while arriving at the Judgement.



2. The Appellant's prayers were that her appeal be allowed and the judgment of the Magistrate's court and all consequential orders therein be set aside. She also prays for a declaration to issue to the effect that properties L.R. Nairobi/block107/1442 and Nairobi/block107/1443 belong to the Appellant. Further, she prays for an order directed to the Chief Land Registrar for revocation of Titles to the properties L.R. Nairobi Block107/1442 and L.R. Nairobi Block107/1443 in the name of James Maina Gathigo and issuance of new ones in the name of the Appellant. The Appellant finally prays for the costs of the appeal.

### **Court's Directions**

3. The Court's directions were that the appeal be dispensed with by way of written submissions. All the parties complied and filed their respective submissions.

### **Submissions by the Appellant**

4. The Appellant identified 5 issues for determination and submitted on each of them as follows:
  - i. Whether the trial magistrate erred in disallowing the Appellant's application for leave to file new documentary evidence.
5. The Appellant's position is that the Law allows a party to obtain evidence even after a suit is filed or heard as provided for under Section 78 of the *Civil Procedure Act*. Further, under Order 11 of the Civil Procedure Rules, even after the pre-trial conference and after a matter has been set down for hearing, the Appellant is of the opinion that nothing prevents the court from exercising its discretion to allow parties to call further witnesses or file further documents to ensure that each party is afforded a fair hearing. The Appellant made reference to the decision of the Supreme Court in the case of Raila Odinga & Others -vs- IEBC and 3 Others [2013] eKLR where the court pronounced the principles applicable in considering whether to allow additional evidence filed outside the contemplation of the rules.
6. The Appellant argues that on 20<sup>th</sup> September, 2020, when the matter first came up for hearing before the trial court, her Advocates on record were served with the witness statement of the 2<sup>nd</sup> Respondent. They immediately sought an adjournment concurrently with leave of the court to file additional evidence in support of their case. The trial court denied them an adjournment as well as leave to file additional evidence.
7. It is the Appellant's submissions that denying them both the adjournment and the leave to file additional documents amounted to denying her the right to a fair hearing, as envisaged under Article 50 of *the Constitution* of Kenya, 2010, and further denied her access to justice under Article 49 of the same Constitution. She asserts that the additional evidence that her advocates sought to adduce was of extreme probative value and would have aided the court in making its final decision in the matter, regarding the ownership of the suit property. The Respondents would not have been prejudiced in any way as they would have been allowed more time under Rule 10 of Order 18 of the Civil Procedure Rules and Section 146 of the *Evidence Act*.
8. The Appellant discloses that the additional evidence was an investigative report conducted by the Director of Investigations and Information Analysis Department that explained that plot No. 284 (113 & 116) were later given parcel number 1442 and 1443 that belongs to the Appellant. The Appellant therefore submits that the evidence she wished to adduced raised serious issues that the trial Court ought to have considered before rendering its decision.



9. The Appellant urges this Court to review the evidence the trial court refused to admit and use it in making its decision regarding the ownership of the suit properties.
  - ii. Whether L.R. Nairobi Block107/1442 and L.R. Nairobi Block107/1443 emanated from plot No. 284 (115 & 116) – Umoja Zone 8.
10. The Appellant asserts that the suit properties emanated from Land Plot No. 284 (115 & 116) – Umoja Zone 8 as a result of title conversion exercise carried out by the Ministry of Lands and Physical Planning within Nairobi County. The 1st Respondent’s position however, was that the Plots originated from Plot Nos. 151 & 152 – Umoja Zone 8, which had belonged to her late husband, James Maina Gathigo.
11. The Appellant invites this Court to evaluate afresh the evidence tendered before the trial court in order to arrive at its own independent conclusion. She refers to the decision in the case of *Selle & Another – vs- Associated Motor Boat company Ltd and others* [968] EA 132 in support of her position.
12. The Appellant states that she purchased the suit properties vide an allotment letter dated 17<sup>th</sup> July, 2003 issued by the Nairobi City Council with regards to Plot number 284 Umoja II Zone 8. The Appellant at the trial relied on the allotment letter and beacon certificate of the suit premises as well as the Land rates payments as ‘prima facie’ evidence that she was the owner of the suit property.
13. The Appellant pointed out that the City County of Nairobi through the Director, Investigation & Information Analysis vide a letter dated 2<sup>nd</sup> April 2019 addressed to the Chief Officer Lands indicated that they had carried out investigations which established that Plot No. 284 (115 & 116) were indeed given parcel number 1442 & 1443 respectively. It was according to the Appellant, a finding of the investigation that the plot No. 284 (Originally two plots 115 and 116), 151 and 152 all existed in the Nairobi City County Part Development Plan of formalization of Umoja II – Zone 8. Further that Plot No. 284 (formerly 115 & 116) were resurveyed and renamed as 172 and 173 which were later allocated Parcels No. 1442 and 1443 respectively while Plots 151 and 152 were allocated parcels No. 1454 and 1455 respectively at the Survey of Kenya. This was in agreement with the Appellant’s position on ownership of the suit properties.
14. The Appellant submits that the trial court’s failure to admit the additional evidence, which was of great probative value to the determination of the issue before it, denied the Appellant access to justice and ultimately a fair hearing, which is a non-derogable right enshrined in *the Constitution*.
  - iii. Whether the trial magistrate erred in finding that the 1<sup>st</sup> Respondent proved her case on a balance of probabilities.
15. The Appellant under this issue submits that it is common law that the burden of proof lies on whoever moves the court first. In Civil cases, the standard of proof is on a balance of probabilities. She cites the case of *Palace Investment Ltd -vs- Geoffrey Kariuki Mwenda & Another* [2015] eKLR to argue the position.
16. The Appellant states that she produced before the trial Court a letter of allotment dated 17<sup>th</sup> July, 2003, a beacon certificate for property Plot 284 (115 & 116) Umoja II – Zone 8 and proof of payment of all requisite County fees to prove her prima facie ownership of the suit properties. She further affirms that in the year 2003, she proceeded to construct rental houses on the suit property from which she collects rental income. She states that none of her documents or actions were challenged by the Respondent.
17. The Appellant avers that the Respondent on her part produced Certificates of title for L.R. Nairobi Block/1442 and L.R. Nairobi Block/1443 issued on 12<sup>th</sup> March, 2018 in the name of James Maina Gathigo. It is the Appellant’s case that registration of Title is not absolute and is impeachable under



the circumstances provided for under Sec. 2 (1) of the *Land Registration Act*. The Appellant insists that the Titles produced by the 2<sup>nd</sup> Respondent in the name of James Maina Gathigo were obtained illegally, unprocedurally and through a corrupt scheme.

18. The Appellant notes that in her amended Defence and Counter-Claim, the 1<sup>st</sup> Respondent indicated that she had filed Misc. Application No. 7 of 2018 seeking to have James Maina Gathigo presumed dead as he had been missing since the year 2009. The Appellant points out that in spite of James Maina Gathigo having been missing since 2009, intriguingly, the Certificates of Title were issued on 12<sup>th</sup> March, 2018 in his name. That, according to the Appellant is proof that the Titles were not procedurally issued to James Maina Gathigo in 2018.
19. The Appellant allege that the investigation report dated 2<sup>nd</sup> April, 2019 was categorical that the Respondent forged two beacon certificates and lease agreements in order to obtain the certificates of lease for Nairobi/block 107/1442 and Nairobi/block 107/1443 in the name of James Maina Gathigo.
  - iv. Whether the 1<sup>st</sup> Respondent had locus standi to issue the Appellant on behalf of the Estate of James Maina Gathigo.
20. The Appellant submits that the 1<sup>st</sup> Respondent lacked the Locus Standi to file a counter-claim seeking orders in favour of the Estate of James Maina Gathigo while she had been sued privately for attempting to take over the management of the rental units on the suit property. She made reference to the case of Joel Kamau Ithagu & Another -vs- Rebecca Waithera Kamau & 2 Others [2018] eKLR where the Court cited with approval the holding in the case of Trouistik Union International -vs- Mbeyu & Another [1993] eKLR to the effect that personal representatives are people who have obtained grant and not blood relations.
21. The Court was emphatic that if an administrator brought an action before obtaining a grant, the same would be “incompetent from inception”.
22. The Appellant submitted that the magistrate’s Court erred by failing to consider that the 1<sup>st</sup> Respondent filed the Counter-claim in her own capacity and not as a representative of the Estate of the Late James Maina Gathigo. By ordering that the suit property formed part of the Estate of James Maina Gathigo, the Hon. Magistrate went beyond her jurisdiction.
23. On costs, the Appellant prays for costs of the Appeal and of the suit.

### **Submissions by the 1<sup>st</sup> Respondent**

24. In her submissions, the 1<sup>st</sup> Respondent insists that the judgment delivered in her favour on 4<sup>th</sup> November, 2020 was regular in all aspects. The appeal is therefore unmerited frivolous, vexatious and an abuse of the process of Court only intended to deny her the fruits of her judgment.
25. The 1<sup>st</sup> Respondent identifies 3 issues for determination namely:
  - a. Whether the court was wrong to disregard the ‘new’ evidence
  - b. Whether the lower court misdirected itself on factual issues
  - c. Whether raising new issues to litigate over is prejudicial to the Respondents.
26. With regard to the first issue, the 1<sup>st</sup> Respondent submits that the matter before the Lower Court was certified for hearing on 20<sup>th</sup> January, 2020. It was fixed for hearing eight months after the date of certification i.e. on 22<sup>nd</sup> September, 2020. The letter that the Appellant sought to produce was dated 2<sup>nd</sup> April, 2019.



27. The 1<sup>st</sup> Respondent points out that the Appellant had the said letter for 1 year 5 months but only waited until the day fixed for hearing to be allowed to produce the said document. In fact, on the date of the hearing, the Appellant sought a further 14 days to enable her produce the document. This was contrary to the clear provisions of Order 11 of the Civil Procedure Rules which were crafted to curb the mischief of trial by ambush. The 1<sup>st</sup> Respondent made reference to the decision by Odunga, J (as he then was) in the case of National Bank of Kenya Ltd -vs- John Aswani Litundo & Another (Commercial Division (HCCC 171 of 2006) as cited in the case of Interactive Gaming & Lotteries Ltd -vs- Flint Eirt Ltd & 2 others [2013] eKLR. She submits that the lower Court was therefore justified to disallow the document dated 2<sup>nd</sup> April, 2019 from being produced and relied upon by the Appellant in the case.
28. The 1<sup>st</sup> Respondent further submits that the document allegedly emanated from the offices of the 2<sup>nd</sup> Respondent (Nairobi City County) which was represented by Counsel in the case and had tendered all the documents they wished to rely on during the hearing. It is the 1<sup>st</sup> Respondent's case that only the 2<sup>nd</sup> Respondent could produce the said document. The 2<sup>nd</sup> Respondent opposed the production of the document as it was a stranger to it.
29. The 1<sup>st</sup> Respondent asserts that the Appellant offered a flimsy excuse that she had received the document late; but tendered no evidence to support that claim. The trial court therefore exercised its discretion in the interest of justice.
30. On the second issue, the 1<sup>st</sup> Respondent submitted that the 2<sup>nd</sup> Respondent through an expert witness, D.W.3 confirmed to the Court from its records that Plot number 151 and 152 were converted into L.R. Nos. Nairobi Block 107/1442 and Nairobi Block 107/1443 which were registered in the names of James Maina Gathigo – deceased.
31. As to whether there existed any binding agreement between the Appellant and the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent submitted that the Appellant only produced an allotment letter relating to one Plot number 284. The Appellant did not produce any allotment letters for the other plots (Plot numbers 115 and 116) which she claimed belonged to her.
32. On the allotment letter produce, the 1<sup>st</sup> Respondent pointed out to the conditions therein to the effect that acceptance and payment was to be within 30 days from the date of the allotment letter failing which the allocation will be deemed to have lapsed. The payment receipts produced by the Appellant were for the year 2010, whereas the allotment letter was dated 17<sup>th</sup> July, 2003. The import is that the payments were made after more than 7 years from the date of the allotment. The Appellant admitted the fact in Cross-Examination.
33. The 1<sup>st</sup> Respondent made reference to the decision in Mbau Saw Mills Ltd -vs- Attorney General & 2 others [2014] eKLR which cited with approval the holding in Paul Victone Otieno -vs- George Asuke & 2 others [2022] eKLR that an allotment letter does not confer any property rights to a person unless there is acceptance and payment of stand premium and ground rent within the prescribed period otherwise the offer lapses. The 1<sup>st</sup> Respondent's submission is that the offer in respect of Plot No. 284 lapsed after the Appellant failed to comply with the terms of the allotment letter. The conclusion therefore is that the Appellant came to equity with unclean hands.
34. The 1<sup>st</sup> Respondent argued that the Appellant had not discharged the burden of proof which under Section 107 of the *Evidence Act* was on her. She did not prove ownership of Plot Nos 284, 115 and 116. In contrast, the 1<sup>st</sup> Respondent affirmed that she had provided allotment letters in the name of her late husband over Plot No. 151 and 152 and the certificate of lease in respect of L.R. No. NAIROBI/BLOCK 107/1442 and 107/1443. Her evidence was further corroborated by the records produced



by the 2<sup>nd</sup> Respondent and the testimony of the expert DW3. Further, the 1<sup>st</sup> Respondent produced receipt evidence of payment of rates and utility bills; on the contrary, the Appellant did not produce any such evidence. The trial court, the 1<sup>st</sup> Respondent submitted, was therefore justified to find in her favour and against the Appellant.

35. Finally, the 1<sup>st</sup> Respondent addressed the issue whether raising new issues to litigate over in the appellate court is prejudicial to the Respondent. She made reference to the Court of Appeal decision in Republic -vs- Tribunal of Inquiry to investigate the conduct of Tom Mbaluto and others *exparte* Tom Mbluto [2018] eKLR cited in the case of Frera Engineering Company Ltd -vs- Morris Mureithi Mutembei [2020] eKLR as referenced in the case of Ada Chunda Sode -vs- Madina Oshe Jira & Another [2021] eKLR. The Court of Appeal in the above referenced case held that our appellate system except in exceptional cases restricts the appellate court to the consideration of issues that were canvassed before and decided by the trial court, otherwise the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of the first instance.
36. The 1<sup>st</sup> Respondent opines that the Appellant in this appeal seeks to litigate on 2 new issues. The first issue according to the 1<sup>st</sup> Respondent is whether the trial magistrate erred in finding that the 1<sup>st</sup> Respondent proved her case on a balance of probabilities. In this respect, the 1<sup>st</sup> Respondent submits that the Appellant seeks to litigate on the contents of the document dated 2<sup>nd</sup> April, 2019 whereas the trial court had already ruled that the document was not new and had in fact been in the possession of the Appellant for 1 year and 5 months before the trial.
37. Whereas the Appellant had not appealed against the ruling of the trial Chief Magistrate rejecting the document dated 2<sup>nd</sup> April, 2019, she had approached this Court with yet another new document dated 11<sup>th</sup> March, 2022, whose contents were identical to the earlier letter. The 1<sup>st</sup> Respondent terms it as mischievous for the Appellant to try and sneak in new evidence at this stage. She terms it as incredibly prejudicial to her for the Appellant to attempt to litigate afresh over a matter she failed to raise and challenge before the trial court.
38. The second new issue according to the 1<sup>st</sup> Respondent is the issue of Locus Standi brought out by the Appellant. The 1<sup>st</sup> Respondent asserts that throughout or during the proceedings before the trial court, the Appellant did not raise the issue of Locus Standi. In any event, the 1<sup>st</sup> Respondent affirms that she provided Letters of Administration issued to her on 27<sup>th</sup> June, 2019.

### **Submissions by the 2<sup>nd</sup> Respondent**

39. The 2<sup>nd</sup> Respondent in its submissions lists 6 grounds why the appeal should be dismissed, namely:
  - a. The appeal is simply a regurgitation of the arguments made in the trial court.
  - b. There is no demonstration of how the trial court erred in Law and or fact
  - c. The appeal makes arguments based on documents whose use was disallowed by the trial court
  - d. The appeal makes reference to a letter whose use was disallowed in an application to introduce new evidence before this court
  - e. The appeal is essentially an application for review of the trial court's refusal to admit new documentary evidence
  - f. The Appellant has not attempted to explain why she did not seek a review or appeal the Lower Court's directions of 22<sup>nd</sup> September, 2020.



40. The 2<sup>nd</sup> Respondent submits that adducing of new or additional evidence on appeal is not a matter of right. It makes reference to Order 42 Rules 27 and 28 of the Civil Procedure Rules which allows the Appellate Court discretion to allow production of additional evidence on appeal. The 2<sup>nd</sup> Respondent states that the Appellant is inviting this Court to review the decision of the trial Court to refuse the admission of new /additional evidence. The 2<sup>nd</sup> Respondent argues that the Appellant has not demonstrated that the trial court failed to exercise its discretion judiciously.

### **Analysis of the pleadings before the trial court**

41. This being a first appeal, this court is conscious of its responsibility as pronounced in the old case of *Selle & Another -vs- Associated Motor Boat Company Ltd & others [1968] IEA* to,
- “reconsider the evidence evaluate it, and draw its own conclusions”. The court though must always bear in its mind that, ‘it has neither seen, nor heard the witnesses and should make due allowance in that respect’.
42. I will begin that onerous task by looking at the pleadings filed by the parties before the trial court;

### **Plaint by the Appellant.**

43. The suit was initiated by the Appellant herein by way of a Complaint dated 5<sup>th</sup> February, 2018 filed in Court on the same date. It was against the 1<sup>st</sup> Respondent who was named as the 1<sup>st</sup> Defendant and a 2<sup>nd</sup> Defendant by the name of Hillary Chumo. The Appellant alleged interference by the Defendants with her possession of Plot Nos. 284 and 285 – Umoja II Zone 8. She claimed to be the absolute proprietor of the plots therefore entitled to quiet possession of the same. The Appellant at paragraph 12 of the Complaint was categorical that she owned the Land in contention and “has each and every original document to prove ownership and payment of rates which records can also be found in the Nairobi City Council records.”
44. The Appellant claimed against the Defendants for an order of permanent injunction to restrain them from interfering with her property and all developments and tenants on the premises, as well as general damages for loss of business and causing her and her tenants anxiety.
45. The Appellant’s Complaint was accompanied by a list of witnesses listing herself and one, David Ndogo as witnesses. It was also accompanied by a list of documents listing 4 documents being an allotment letter, CID report, City Council rates payment receipts and agreement with a Property Management Company – Mamuka Valuers Ltd.

### **1<sup>st</sup> Defendant’s Defence & Counter-Claim**

46. The 1<sup>st</sup> Respondent’s response to the Appellant’s Complaint was by way of a Statement of Defence and Counter-Claim filed on the 23<sup>rd</sup> March 2018.
47. The 1<sup>st</sup> Respondent averred that the subject property’s proper description was Nairobi/block 107/1442 and 1443 which were duly registered in the name of James Maina Gathigo. She further averred that the subject property was her matrimonial property and she had a right to deal with it. She further admitted that she had in fact instituted HCCC 309 of 2009 to restrain the Appellant from interfering with her matrimonial property. She denied that the suit property(s) was owned by the Appellant.
48. In the Counter-Claim, the 1<sup>st</sup> Respondent accused the Appellant of unlawfully interfering with the suit property which was her matrimonial property while masquerading as the wife of James Maina Gathigo.



The 1<sup>st</sup> Respondent prayed for a declaration that the suit properties L.R. Nairobi/block 107/1442 and 1443 and Market Stalls B70 comprises Matrimonial Property between herself and the James Maina Gathigo, and a permanent injunction restraining the Plaintiff from interfering with the said properties.

49. From the record of appeal at Page 126, the Appellant made an application dated 28<sup>th</sup> May, 2019 seeking leave of the Court to amend the Plaintiff dated 5<sup>th</sup> February, 2018 and further that the amended Plaintiff annexed thereto be deemed to have been duly filed. The amended plaintiff substituted the 2<sup>nd</sup> Defendant sued earlier, Hillary Chumo with the 2<sup>nd</sup> Respondent herein, Nairobi City County.
50. From the record, the application was allowed by consent and the 1<sup>st</sup> Defendant (now the 1<sup>st</sup> Respondent) allowed to amend her Statement of Defence and Counter-Claim.

### **The Amended Plaintiff**

51. In the Amended Plaintiff, at Paragraph 10, the Appellant describes Plot number 284, Umoja II Zone 8 as having originally been named Plots 115 and 116 and later given parcel number 1442 and 1443 by the 3<sup>rd</sup> Defendant.
52. She reiterated that the Plot was neither owned by the 1<sup>st</sup> Respondent nor her husband. She alluded to an inquiry by the 3<sup>rd</sup> Defendant which had recommended that the Chief Officer, Ministry of Lands, the Director of Survey and GIS Nairobi County to initiate the process of revoking two beacon certificates and lease agreements of Plot Number 284 (151 & 152) which had allegedly been forged by the 1<sup>st</sup> Defendant (1<sup>st</sup> Respondent herein) to obtain a certificate of lease Title number NAIROBI/BLOCK 107/1442 and 1443 in the name of James Maina Gathigo.
53. The Appellant further alleged that the inquiry by the 3<sup>rd</sup> Defendant had also unveiled that Plot numbers 151 and 152 were supposed to be parcel number 1454 and 1455 as per the Survey of Kenya Maps and were to be allocated to the rightful owners including one James Maina Gathigo or his kin if genuine documents to prove the same were provided.
54. At paragraph 13 of the Amended Plaintiff, the Appellant asserted that the inquiry had disclosed that the contentious plot, the subject matter of the case was plot No. 284 and 285 – Umoja II Zone 8 which were originally named plots 115 and 116 and later given parcels numbers 1442 and 1443. She accused the 3<sup>rd</sup> Defendant of committing fraudulent acts of forgery by renaming plot number 284 to plots numbers 151 and 152.
55. The Appellant further claimed that the inquiry report and findings had confirmed her as the rightful owner of the suit property. She alleged that the 1<sup>st</sup> Respondent's claim was tainted with malice and the documents supporting her claim were obtained illegally contrary to Criminal Laws of this Country.
56. Consequently, the Appellant in addition to the prayers in her original plaintiff, prayed for:
  - a. An order directed to the Chief Officer Ministry of Lands, Director Survey and GIS Nairobi City County to revoke two beacon certificates and lease agreements of plot No. 284 (151 and 152) forged to obtain certificate of lease Title Nos. Nairobi/block/107/1442 and 1443, and
  - b. An order directed towards the Chief Officer Ministry of Lands to issue a certificate of Title to Plot numbers 284 (115 and 116) to the Plaintiff.

### **1<sup>st</sup> Defendant's Amended Defence and Counter-Claim**

57. In the Amended Defence and Counter- Claim, the 1<sup>st</sup> Respondent pleaded that James Maina Gathigo had been presumed dead by dint of a Court Order issued on 7<sup>th</sup> February, 2019 in High Court Misc.



Application No. 7 of 2018 and she had been made the Legal Administrator of his Estate. She was therefore defending the suit for the benefit of the Estate. She asserted that the due process had been followed prior to the issuance of the Certificates of Title in the name of James Maina Gathigo.

58. In the Counter-Claim, in addition to the prayers for a permanent injunction, the 1<sup>st</sup> Respondent prayed for a declaration that all the properties known as Nairobi/block 107/1442 and 1443 and Dandora Terminus Market Stall B70 belongs to the Estate of James Maina Gathigo.
59. Apparently, the Appellant did not file a Statement of Defence to the 1<sup>st</sup> Respondent's Amended Counter-Claim. None had been filed against the original Counter-Claim as well.
60. I must also point out that the Appellant's prayers in her appeal are totally different from her prayers before the trial court. In her Memorandum of appeal, the Appellant prays that her appeal be allowed and the judgment of the trial court be set aside but goes further to pray for:
  - i. A declaration that the properties L.R. Nairobi/block107/1454 and 1455 belongs to the Appellant.
  - ii. An order directed to the Chief Land Registrar for revocation of titles to the said properties in the name of James Maina Gathigo and issuance of new titles to herself.

### **Issues for Determination**

61. Having perused the submissions by the parties in this appeal, and the record of appeal, I am of the opinion that the issues for determination in this appeal are:
  - i. Whether the Appellant had made a case for leave to adduce additional evidence.
  - ii. Whether the Appellant had proved the claims of fraud/forgery against the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.
  - iii. Whether the Appellant had proved her claim of ownership of the suit properties.
  - iv. Whether the Appellant was entitled to the orders sought against the 1<sup>st</sup> Respondent.
  - v. Whether the 1<sup>st</sup> Respondent had the Locus Standi to initiate the Counter-claim on behalf of the Estate of James Maina Gathigo.
  - vi. What was the effect of the Appellant's failure to file a statement of Defence against the 1<sup>st</sup> Respondent's Counter-claim?
  - vii. Whether the 1<sup>st</sup> Respondent had proved her case of ownership of the suit properties on behalf of the Estate of James Maina Gathigo.
  - viii. Whether the 1<sup>st</sup> Respondent was entitled to the orders sought in her counter-claim.

### **Analysis and Determination**

#### **i.**

Whether the Appellant had made a case for leave to adduce additional evidence

62. It is important to highlight the chronology of events here. From the proceedings, the matter before the trial court was fixed for hearing on the 22<sup>nd</sup> September, 2020. However, prior to the said date, parties had confirmed full compliance with Order 11 of the Civil Procedure Rules. The record shows that the matter was certified ready for hearing after the Parties confirmation of full compliance with the Rules.



On 17th December, 2019, the matter was stood over to 9th January, 2020. Once again, the Parties confirmed compliance. On 29th January, 2020, Counsel for the 2<sup>nd</sup> Defendant sought 30 days leave to comply which was granted. The matter was slated for mention on 27th February, 2020. On the said date, the Appellant in spite of her earlier confirmation of compliance sought 30 days to comply, which leave was granted. The matter was then fixed for hearing by consent of the Parties on 22<sup>nd</sup> September, 2020.

63. On the said hearing date, Counsel for the Appellant informed court that she had critical documents that she needed to file. She requested for 14 more days to compile the documents and file them. The explanation was that the county took time to issue the documents. The said prayer was vehemently opposed by both counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The Court declined to grant the adjournment and noted that the matter was certified ready for hearing on the 22<sup>nd</sup> February, 2020. Further that the Appellant/Plaintiff knew the totality of her case at time of filing back in 2018 and should therefore have filed all the documents she needed to by then. The court also noted that the Defendants were ready to proceed. The court noted that the Civil Procedure Rules do not contemplate an adjournment at that stage. The hearing then proceeded.
64. Compliance with the pretrial requirements in civil proceedings is governed by the provisions of Order 11 of the Civil Procedure Rules which makes provisions on Case Management and Pre-trial Conferences. The Order is intended to assist the Courts and the parties to expeditiously have the disputes resolved. Parties are expected to file and exchange a list of witness statements of their intended witnesses as well as a list of all the documents intended to be relied on at the hearing, before the suit is certified as ready for trial.
65. Odunga J (as he then was) had the following to say in the case of National Bank of Kenya Limited vs John Aswani Litondo & Another Nairobi HCCC No. 171 of 2006, which views I fully agree with:
- “The rationale behind these provisions is to discourage trial by ambush and to ensure that the provisions of Sections IA & 1B of the *Civil Procedure Act* are meaningfully implemented...to create a level playing ground for all the parties coming before the Courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing... To conceal documents until after the Plaintiff's case is closed was mischief that the new rules were meant to cure. Trial by ambush is no longer acceptable in civil litigation and any party doing so, will be doing so at the risk of being locked out of relying on its documents...”
66. In the instant case, as analyzed above, Counsel for the Appellant severally confirmed compliance with Order 11 of the Civil Procedure Rules. The Court rightly noted that the Parties including the Appellant had enough time and opportunity to file their documents prior to the hearing date.
67. Whereas I do appreciate that it is a Constitutional requirement to administer justice without undue regard to procedural technicalities, any party who fails to comply with the clear and unequivocal rules of procedure set out in the Civil Procedure Rules, is duty-bound to provide a plausible account for non-compliance. In the case of Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR, Kiage JA pointed out that:

“I am not in the least persuaded that Article 159 of *the Constitution* and the Oxygen Principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost effective manner...were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice...it is in the even-handed and dispassionate application of rules that Courts give assurance that there



is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity."

66. The Appellant herein did not justifiably explain why she did not comply within the 30 days she had sought. She had a whole 7 months prior to the hearing date. The only reason stated was that there was delay in procuring the documents from Nairobi City County, The Appellant's Counsel did not even state the nature of documents he intended to adduce. The trial Court was therefore right to insist on the case proceeding to hearing.
67. There must be an end to litigation. The Appellant had her day in court. The Appellant's attempt to reopen the case at this stage is a travesty of justice. The Appellant, I must point out is attempting to reframe her case at the stage of appeal. She has even in her Memorandum of Appeal prayed for different orders from what she had prayed for before the trial court.
68. This Court made a ruling on 16<sup>th</sup> March, 2023 in respect of an application by the Appellant seeking leave to adduce a letter dated 11<sup>th</sup> March, 2022 as further evidence at the stage of appeal. The court referred to the decision in the case Mohamed Abdi Mohamed vs Ahmed Abdullahi Mohamed and 3 others [2018] eKLR, where the Supreme Court of Kenya laid down the guidelines on admission of additional evidence before Appellate Courts in Kenya. These guidelines were stated as follows:

"Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by Counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- a. The additional evidence must be directly relevant to the matter before the Court and be in the interest of Justice;
- b. It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- c. It is shown that it could not have been obtained with reasonable diligence for use at the trial, was within the knowledge of, or could not have been produced at the time of the suit or Petition by the Party seeking to adduce the additional evidence;
- d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has direct bearing on the main issue in the suit;
- e. The evidence must be credible in the sense that it is capable of belief;
- f. The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- g. Whether a Party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- h. Whether the additional evidence discloses a strong prima facie case of willful deception of the Court;



- i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence;
- j. The Court must find the further evidence needful;
- k. A Party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the omissions or patch up the weak points in his/her case.
- l. The Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

80 We must stress here that this Court even with the application of the above stated principles will only allow additional evidence on a case by case basis and even then, sparingly, with abundant caution.”

- 66. The Letter that the Appellant sought to introduce at the appellate stage is definitely different from what she had attempted to present before the trial court on 22<sup>nd</sup> September, 2020. I noted in my earlier analysis that the Appellant had amended her Complaint before the trial court. In the Amended Complaint, she extensively referred to the alleged investigations by the 2<sup>nd</sup> Defendant (whom she erroneously referred to as the 3<sup>rd</sup> Defendant). I find it inconceivable then for the same Appellant to claim that she came across the document/report late.
- 67. I find that the Appellant is engaged in an attempt of covering evidential gaps and making a fresh case on appeal after losing before the trial court. That was my reason too for disallowing the introduction of the new letter on appeal.
- 68. I therefore uphold trial court's finding in denying the Appellant leave to introduce new evidence at the hearing stage.

**ii. Whether the Appellant had proved the claims of fraud/forgery against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent**

- 66. As noted in my analysis of the pleadings before the trial court, the Appellant accused the Respondent of obtaining the documents supporting her claim illegally contrary to the criminal Laws of this Country.
- 67. It is trite law that any allegations of fraud must be pleaded and strictly proved. I am guided by the Court of Appeal decision in the case of Kuria Kiarie & 2 Others-vs-Sammy Magera [2018] eKLR where it was held:

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

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



66. I find the serious allegations by the Appellant against the Respondents unsubstantiated. The evidence adduced falls short of the standard of proof expected by the Law.

### iii. Whether the Appellant proved her claim of ownership of the suit properties.

66. I must point out that the Appellant's case was hinged on the letter of allotment for plot referred to as Plot 284. The Appellant alleged that it was this Plot that mutated into the 2 suit properties Nairobi/ block 107/1442 and 1443. The Appellant had in her pleadings affirmed that she had 'each and every original document to prove ownership and payment of rates which records can also be found in the Nairobi City Council records'. She however did not provide this compelling evidence to support the claim. She was bound under Section 107 of the Evidence Act to prove the allegation.

67. Moreover, a letter of allotment as has been held in a plethora of authorities is merely a Letter of Offer. If the terms therein are not satisfied within the timelines stipulated, the offer like any other offer lapses. An unfulfilled allotment letter cannot be the basis of founding a claim of ownership of Land.

68. This position was restated by the Supreme Court in Petition 5 (E006) of 2022; Torino Enterprises Limited v Attorney General [2023] eKLR where the Learned Judges stated that;

“an Allotment Letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein..... Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a Stand Premium and Ground Rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfilment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an Allotment Letter.”

66. The Court's finding is that the Appellant did not prove her claim of ownership of the suit properties.

67. Consequently, this Court agrees with the finding by the trial court that the Appellant was not entitled to the orders sought. The Court was justified to dismiss her case as it did with costs to the Defendant.

### iv. Locus Standi of the 1<sup>st</sup> Respondent

66. The Appellant had initially sued the 1<sup>st</sup> Respondent in her personal capacity. In response, the 1<sup>st</sup> Respondent filed a statement of Defence and Counter-claim averring that the suit properties were matrimonial properties owned by herself and the late James Maina Gathigo. She was therefore claiming a legal right over them. She sought to restrain the Appellant from interfering with them.

67. It was only after she had obtained Letters of Administration that she amended her Counter-claim and sought the prayers on behalf of the Estate of James Maina Gathigo. She by then was the legal representative of the Estate of James Maina Gathigo and had a right to sue on behalf of the Estate. Section 2 of the Civil Procedure Act defines a legal representative as follows;

“means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.

66. The 1<sup>st</sup> Respondent had the Locus Standi to prosecute the counter-claim on behalf of the estate of James Maina Gathigo.



**v. Failure to defend the Counter-claim**

66. Failure by the Appellant to defend the 2<sup>nd</sup> Respondent's Counter-Claim simply meant that the 1<sup>st</sup> Respondent's averments in the Counter-claim were uncontroverted.

**vi. Did the 1<sup>st</sup> Defendant prove her case.**

66. The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 – on the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

67. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

66. Section 26 (1) of the [Land Registration Act](#) states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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.

66. The certificates of title produced by the 1<sup>st</sup> Respondent were prima facie evidence that the deceased was the absolute and indefeasible owner of the suit properties. The Appellant did not adduce sufficient evidence to impeach the titles on grounds of fraud or misrepresentation. Neither did she prove that the titles had been acquired illegally, unprocedurally or through a corrupt scheme.

**(vii) Whether the 1<sup>st</sup> Respondent is entitled to the orders sought.**

66. My finding is that the 1<sup>st</sup> Respondent proved her counter-claim against the Appellant on a balance of probabilities. She was therefore entitled to the orders sought.

67. Having considered the totality of the case I agree with the findings of the trial court. I therefore uphold the judgment of the trial court. The Appeal herein fails and is dismissed with costs to the Respondents.

It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF OCTOBER, 2023.**

**M. D. MWANGI**

**JUDGE**



In the virtual presence of:

Mr. Omari for the 1<sup>st</sup> Respondent.

Mr. Isinta for the 2<sup>nd</sup> Respondent

Ms Kalaine for the Appellant

Yvette: Court Assistant

**M. D. MWANGI**

**JUDGE**

