



Leruka v Kantilal Shah (Suing through his Duly Appointed Attorney Neelish Amratlal Shah) & 4 others (Environment and Land Appeal E001 & E005 of 2023 (Consolidated)) [2025] KEELC 3758 (KLR) (14 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3758 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E001 & E005 OF 2023 (CONSOLIDATED)
LN MBUGUA, J
MAY 14, 2025

BETWEEN

HAWA ALI LERUKA APPELLANT

AND

VINOD KUMAR KANTILAL SHAH (SUING THROUGH HIS DULY APPOINTED ATTORNEY NEELISH AMRATLAL SHAH) 1ST RESPONDENT
ABDI AZIZ 2ND RESPONDENT
THE ESTATE OF NAGIN CHOUHAN 3RD RESPONDENT
THE LAND REGISTRAR 4TH RESPONDENT
THE HON ATTORNEY GENERAL 5TH RESPONDENT

((Being appeals from the judgement of Hon B.Mararo (SPM) delivered in Nanyuki CMCC No. 67 of 2019 ON 11.7.2023))

JUDGMENT

1. This judgment relates to the two consolidated appeals. The first case is No. E001 of 2023, having been filed by one Hawa Ali Leruka (the 1st defendant in the case before the trial court). She will be identified as the 1st appellant in this appeal. The second appeal is No E005 Of 2023 brought forth by The Estate of the Late Nagin Chauhan (the 2nd defendant in the case before the trial court). They will be identified as the 2nd appellants in this appeal). The plaintiff in the trial court was Vinod Kumar Kantilal Shah who will be identified as the 1st respondent in both appeals. The rest of the defendants/respondents did not take part in the proceedings before the trial court.



2. The uncontroverted fact is that the suit property Nanyuki Municipality/Block 6/3X5 is registered in the name of the Plaintiff (respondent) who filed a suit CM ELC No. 67 of 2019 for the eviction of the 1st appellant. The 1st appellant on the other hand contends that the suit property was sold to the 2nd appellant who then sold the said land to her and her deceased husband.

The Case before the trial court.

3. The suit before the trial court was filed by Vinod Kumar Kantilal Shah, suing through his duly appointed attorney Neelish Amratilal Shah vide a plaint dated 8.8.2019 against Hawa Ali Leruka and Abdi Aziz as the 1st and 2nd defendants. The plaintiff was claiming to be the registered owner of the suit land Nanyuki Municipality Block 6/3X5, but averred that the said land had been trespassed upon by the defendants.
4. He therefore prayed for judgment against the defendants in the following terms;
 - a) An eviction order directing the defendant to vacate from Nanyuki Municipality Block 6/3X5 and surrender vacant possession to plaintiff.
 - b) General damages for trespass and mesne profit.
 - c) An order of permanent injunction restraining the defendants by themselves, through their agents, servants, workmen or employees from entering, trespassing, occupying, continuing to occupy, use or possess or in any other way interfering with the plaintiff's peaceable and interrupted user, possession and ownership of title number Nanyuki Municipality Block 6/3X5
 - c) Costs of the suit."
5. The 1st defendant Hawa Ali Leruka filed a defence and a counterclaim dated 6.5.2021 contending that the suit land was offered to one Fulehand Shah as an unsurveyed plot no 21 in Nanyuki Municipality. That Fulehand through a power of attorney given to Rameshchandra Gudka was to sell his interest in the suit property to Nagin Chauhan. There was however a delay in the transaction as the seller delayed in releasing the title, and that the Part Development Plans had not been approved. That Nagin also fell ill and he therefore sold his interest in the suit land to her (Hawa) and Robert Percival Slade, who were a husband and wife team.
6. The 1st defendant further stated that they took over the suit property as from 1998, but contend that the said land was fraudulently transferred to the plaintiff.
7. In the counterclaim, the 1st defendant sued the following defendants
 - Vinod Kumar Kantilal Shah sued through his duly appointed attorney Neelish Amratilal Shah as the 1st defendant
 - The Estate of Nagin Chauhan as the 2nd defendant
 - The Land Registrar as the 3rd defendant
 - The Hon Attorney General as the 4th defendant.
8. The 1st defendant prayed for judgment in the following terms;
 - a) A declaration that the title obtained in Title Number Nanyuki Municipality block 6/3X5 was falsely obtained, illegal and unlawful.



- b) That this Honourable court do order hereby revoke and cancel the titles obtained subject to the by the plaintiff as pertains to the ownership of the subject property.
 - c) An order vesting wholly and unconditionally the suit property known as Title Number Nanyuki Municipality Block 6/3X5 to the 1st defendant by original claim and plaintiff by counterclaim.
 - d) An order directing the Land Registrar to register the interest of the 1st defendant as the owner of property known as Title Number Nanyuki Municipality Block 6/3X5.
 - e) Costs of the suit”.
9. The 2nd defendant in the counterclaim, The Estate Of Nagin Chauhan filed a statement of defence dated 25.8.2022 in response to the counterclaim of the 1st defendant. However, the same was expunged from the records on 30.8.2022 for having been filed out of time. This party was directed to file a formal application seeking leave to file a defence out of time, but there was no compliance with the aforementioned direction.
 10. No pleadings were filed on behalf of the rest of the parties in both the main suit and the counterclaim.
 11. The trial was initially heard in absence of the defendants culminating in the exparte judgment dated 6.10.2020. The said judgment was however set aside, allowing the defendants to file their pleadings. But only the plaintiff and the 1st defendant in the main suit proffered evidence at the trial.
 12. The case for the plaintiff in the main suit was advanced by Neelish Amratlal Shah (PW1). He adopted his witness statement dated 8.8.2019 as his evidence. He also produced the documents in his list dated 8.8.2019 as P-exhibits 1-7. His case is that he holds a Power of Attorney from his maternal uncle Vinod Shah, That he has a title issued in year 2018 and that Vinod is already in occupation of the said land. He contends that the suit property initially belonged to Vinod’s father who is Kantilal Fillah.
 13. Pw1 further stated that Nagin Chauhan was a care taker of the suit property and he had approached the family of the plaintiff desiring to buy the said land, but he never paid for it, so the suit land was never sold. Thus the 2nd defendant (Nagin) had nothing to transfer to the 1st defendant (Hawa).
 14. As at 8.8.2019 when pw1 recorded his witness statement, the plaintiff was claiming rent at Ksh 70 000 per month for a period of 8 years.
 15. On cross-examination by counsel for the 1st defendant, Pw1 reiterated that the property could have earned Kshs. 70,000 per month, adding that the suit property was inherited by Mr. Vinod
 16. The case of the 1st defendant was advanced by Hawa Leruka Slade (DW1). She adopted her witness statement dated 17.5.2021 as her evidence. She also produced documents in her bundle dated 17.5.2021 as exhibits 1-32. She contends that they (herself and her husband, Robert Slade) bought the suit property in 1998 from Nagin Chauhan who was in the process of buying the same from Rameshchandra who had a Power of Attorney from the owner as per their agreement dated 20.5.1998.
 17. She contends that they moved into the property with the full knowledge of the owner of that land and their occupation was not questioned for the last 25 years.
 18. She contends that the transaction faced unfathomable delays in the release of the title as well as delay in approval of the part development plans. She further stated that in the pendency of the transaction,



Nagin fell ill, that is when he decided to transfer his interest in the suit land to the 1st defendant and her husband.

19. She states that upon taking possession of the suit land, Dw1 and her husband embarked on developing the said land which became their matrimonial home where they also had tenants. They are also the ones who undertook survey work and they were issued with a beacon certificate.
20. She avers that the lease certificate of the plaintiff was fraudulently issued.
21. On cross examination, by counsel for the plaintiff, Dw1 stated that Nagin was in the process of buying the suit land and he paid money, but she did not have their agreement and Nagin did not have a title. She further stated that Nagin had a Power of Attorney from Artimlal Shah, but the same was not registered.
22. She contends that the suit property was not transferred to them. They sued Nagin because he is the one who sold the land to them.
23. On cross examination by counsel for the 2nd defendant in the counterclaim, Dw1 stated that she is a bonafide purchaser of the suit land, having bought it from Nagin, adding that she paid Ksh 1.5 million as purchase price.
24. In re-examination, Dw1 stated that she was not privy to the agreement between Fulehand and Nagin.
25. With that evidence, judgment was delivered on 11.7.2023, where the court gave the following orders;
 - a. That an order of permanent injunction is hereby issued restraining the defendant's by themselves, through their agents, servants, workmen or employees from entering, trespassing, occupying, continuing to occupy, use or possess or in any other way interfering with the plaintiff's peaceable and uninterrupted user, possession and ownership of Title Number Nanyuki Municipality Block 6/3X5.
 - b. That the 1st defendant is entitled to a refund of Kshs. 1,500,000/= together with interests at commercial rates from the year 1998 till payment in full from the 2nd defendant in the counterclaim being the estate of Nagin Chauhan.
 - c. That the plaintiff shall have the costs of the main suit together with interest at court rates.
 - d. That the 1st defendant shall have the cost of the counterclaim together with interest at court rates.
 - e. That the cost in (c) and (d) above to be borne by the 2nd defendant".

The Appeals Nos 1 and 5 of 2023.

26. Aggrieved by the aforesaid decision, both the 1st defendant in the main suit (Hawa) as well as the 2nd defendant in the counterclaim (Estate of Nagin) filed separate appeals challenging the judgment of the trial court.
27. Hawa, the appellant in E001 OF 2023 (1st appellant) filed her memorandum of appeal dated 28.7.2023 raising seven (7) grounds of appeal enumerated as follows;
 1. That the Learned trial Magistrate erred in law by failing to give concise statement of the case, a concise statement of evidence adduced by parties, the



points of determination, the decision thereon and reasons of his judgment pronounced on 11th July 2023.

2. That the Learned Magistrate erred in law and fact in failing to consider the submissions tendered by the appellant herein vis-à-vis those of the 1st Respondent hence arriving at the wrong decision.
3. That the Learned trial Magistrate greatly misdirected himself in treating the submissions of the appellant very superficially thereby erroneously arriving at a wrong conclusion on the issue of ownership.
4. That the Learned Magistrate erred in law and fact in failing to consider the evidence tendered by the appellant herein vis-à-vis those of the respondents on the issue of fraud and illegality as pleaded in the counterclaim.
5. That the Learned trial Magistrate erred in law and fact by wholly disregarding the evidence and oral testimony submitted before the court.
6. That the Learned trial Magistrate erred in law and in fact in his ruling by failing to appreciate the gravity of the issue raised by the appellant and the submissions filed by the appellant.
7. That the decision of the Learned trial Magistrate is against settled principles of the law”.

28. The 1st appellant therefore prays for judgment in the following terms;

“

- “1. That the appeal be allowed.
2. That this Honourable court be pleased to set aside the judgment of the subordinate court and order dismissal of the 1st respondent’s suit.
3. A declaration that the title obtained in title number Nanyuki Municipality Block 6/3X5 was falsely obtained through illegal and unlawful means.
4. That this honourable court be pleased to set aside the judgment of the subordinate court and order granting the 1st Respondent ownership of Title number Nanyuki Municipality Block 6/3X5.
5. An order directing the land registrar to revoke and cancel title in the 1st respondent’s name in title number Nanyuki Municipality Block 6/3X5 and register the title in favour of the appellant.

Alternatively, to prayer 5 above, this honourable court be pleased to review the order and grant the appellant ownership of title number Nanyuki Municipality Block 6/3X5.

6. That the respondent do pay the costs of this appeal.
7. That such further relief as may appear just to the honourable court”.



29. The 2nd appellants who are The estate of Nagin lodged their appeal in case No. 5 of 2023 vide the memorandum of appeal dated 8.8.2023 raising 5 grounds of appeal enumerated as follows;

- “ 1. That the Learned Magistrate erred in fact and in law by directing that the 1st defendant/1st respondent is entitled to a refund of Kshs. 1,500,000 paid to the late Mr. Nagin Chauhan together with interest from the year 1998 till payment in full when the said cause of action and the order thereof was statutorily time barred.
2. That the Learned Magistrate erred in fact and in law by directing that the 1st defendant/1st respondent was entitled to a refund of Kshs. 1,500,000 paid to the late Mr. Nagin Chauhan together with interest from the year 1998 till payment in full when the said prayer had not been specifically pleaded or prayed for by the 1st defendant in its counterclaim dated 6th May 2021.
3. That the Learned Magistrate overstepped his jurisdiction when he made conclusions of fact based on issues that had not been pleaded.
4. that the Learned Magistrate denied the appellant its constitutional right to a fair hearing by arriving at a decision on an issue of fact that had not been pleaded by the 1st defendant/1st respondent.
5. That the Learned Magistrate erred in law and in fact by awarding an amount of interest that exceeds the principal amount contrary to the In Duplum Rule”.

30. The 2nd appellants therefore pray for judgment in the following terms;

- “a) The appeal be allowed.
- b) The judgment orders (b) and (c) of the judgment delivered on 11th July 2023 be set aside.
- c) The appellant be granted costs of the appeal”.

Submissions of the 1st Appellant.

31. The appeals were heard by way of written submissions of which the submissions of the 1st appellant are dated 20.11.2024. She reiterated the evidence tendered before the trial court while asserting her claim that she is a bonafide purchaser for value of the suit property, having acquired a valid legal interest thereof from Nagin. To this end, the case of Eunice Grace Njambi Kamall & Another v. The Hon Attorney General & 5 Others Civil Suit no.976 of 2012 was relied upon.
32. Further, it was submitted that the appeal no 5 of 2023 should be dismissed as the appellant therein had no defence to offer. To buttress this point, the case of Interchemie EA Limited v Nakuru Veterinary Center Limited (Milimani) HCCC No. 165B of 2000 and Kenya Hotels Limited v. Oriental Commercial Bank Limited (2018) Eklr were cited.

Submissions of the 2nd Appellant.

33. The submissions of the 2nd appellant are dated 13.11.2024 where it is argued that the issues for determination in a suit are those raised in pleadings as was stated in the case of Galaxy Paints Co. Ltd v Falcon Guards Ltd (2000) eklr and Odd Jobs v. Mubia (1970) EA 476. And That in the case at hand,



the reliefs sought by the 1st appellant in her counterclaim did not include a refund of Ksh. 1 500 000 or a claim on interest on the said amount, hence those were not issues for determination before the trial court. To this end, it was argued that the appellant was denied a right to a fair hearing when the trial court arrived at a decision on an issue which had not been pleaded.

34. It was also argued that the trial court erred in awarding an amount of interests which exceeded the principle amount in contravention of the in duplum rule. In support of this argument, the case of *Mwambeja Ranching Company Limited v Kenya National Capital Corporation Limited* (2019) Eklr was cited.
35. It was further argued that the alleged payment of Ksh. 1 500 000 to Mr. Nagin was made way back in 1998, and the claim was therefore time barred. To this end, the case of *Gathoni v. Kenya Co-operative Creameries Ltd* (1982) Eklr as well as *Rawal v Rawal* (1990) Eklr were relied upon.

The Submissions of the 1st Respondent.

36. This respondent (former plaintiff) filed submissions dated 9.12.2024 where he has reiterated the evidence tendered before the trial court. The cases of *Kuria Kiarie & 2 Others v Sammy Magera* (2018) eklr and *Kinyanjui Kamau v George Kamau* (2015) eklr were cited to buttress the point that the 1st appellant did not prove fraud before the trial court. It was further argued that the trial court properly invoked the “*Nemo dat quod non habet*” principle to buttress the point that Nagin had no good title to pass on to the 1st appellant.
37. It was also argued that the claim of the 1st appellant lay against the 2nd appellant as the latter is the one who sold the suit property yet he had no title.

Analysis and Determination.

38. The duty of the 1st appellate court was explained in the case of *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] Ea 123, where it was observed thus:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence on the case generally.”

39. I have considered all the arguments proffered in the two appeals. In respect of the claim of the 1st appellant (Hawa), I find that the question falling for determination is; What is the nature of rights and interests in the suit property that Hawa acquired from Nagin? Put it in another way, did Nagin possess any rights and interests in the suit property capable of being transmitted to another party?
40. A perusal of the documents availed by the 1st respondent before the trial court reveals that the suit property is registered in the name of the plaintiff (Vinod), of which the initial allottee was Fulehand Shah. The 1st respondent’s evidence was that Nagin had wanted to buy the suit property but he never paid for it.



41. None of the protagonists had any documents to indicate that Nagin ever bought the suit land. To this end, there was no sale agreement, no evidence of payment, and there was no transfer of the suit property to Nagin. In cross examination, Dw1 (Hawa, the 1st appellant) had stated that “Nagin was in the process of buying the property from Shah..... I do not have it (agreement between plaintiff and Nagin). We did agreement with Nagin. He did not have title...”
42. It is clear beyond peradventure that the transactions between the plaintiff and Nagin did not mature or materialize to give rise to ascertainable rights and interests in the suit property in favour of Nagin. It follows that Nagin had no rights and interests in the suit land capable of being transmitted to Hawa. Thus the trial court properly applied the maxim “Nemo dat quod non habet” which means that no one can give that which one does not have, See- Mutai v Serem & 3 others (Environment and Land Appeal E002 of 2023) [2024] KEELC 4149 (KLR) (16 May 2024) (Judgment).
43. Having acquired nothing from Nagin, the 1st appellant has no basis of questioning how the plaintiff became the registered owner of the suit land. Thus the appeal No E001 of 2023 must fail.
44. On the 2nd appeal No. 5 of 2023, I have keenly perused the pleadings of Hawa. She did not make a claim relating to the sum of Ksh. 1 500 000, the interest or any refund at all, yet this sum was awarded to her in the final judgment. The question falling for determination is whether the award made at order no. (b) in the judgment of the trial court should be sustained or set aside.
45. In the case of Ann Wairimu Wanjokhi -v- James wambiru Mukabi [2021] eKLR cited in Mabwa v Angelei & 3 others (Environment & Land Case 118 & 87 of 2015 (Consolidated)) [2023] KEELC 18230 (KLR) (21 June 2023) (Ruling) Neutral citation: [2023] KEELC 18230 (KLR, the Court of Appeal held as follows;
- “Although it is desirable that where necessary the pleadings should be amended to bring in all the issues, Odd Jobs vs Mubia (supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court”.
46. In the case at hand, the issue of payment of Ksh 1 500 000 was not raised by 1st appellant in her evidence in chief. It was only in cross-examination by the 2nd appellant that 1st appellant stated as follows; “your client sold me the property. I paid Kshs. 1,500,000”. No claim for refund was made by 1st appellant and there is even no mention of interest at all.
47. The issue of refund and interest was not pleaded, mentioned in evidence or in submissions by Nagin. This is because, Nagin’s defence which had been filed on 29.8.2022 was expunged from the records on 30.8.2022.
48. In David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] KECA 155 (KLR), the Court of Appeal stated as follows;
- “The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or



defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.

The proposition was expressed as follows by the former Court of Appeal for Eastern Africa in *Gandy v Caspar Air Charters Ltd* [1956] 23 EACA, 139:

“ [T]he object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given”

49. The court went on to state that;

“ The exception to the rule arises where the parties, in the course of the hearing, raise an issue that was not pleaded and leave the same to the court to decide. Emphasize added hence in *Odd Jobs v Mubia* [1970] EA 476, Law, JA; speaking for the predecessor of this Court stated that:

“ [A] court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision.” (See also *Vyas Industries Ltd v Diocess OF MERU* [1982] KLR 114)”

50. There is nothing in the proceedings before the trial court to indicate that the issue of the payments made by Hawa including interests thereof were left for the courts determination. In contrast such a claim ought to have been made as special damages which must not only be pleaded, but must also be proved, See *Farah Awad Gullet v CMC Motors Group Limited* [2018] eKLR.

51. I come to the conclusion that the trial court erred and was out of character in making the order no (b) in the judgment, awarding Ksh 1 500 000 with interest to the 1st appellant herein as against the 2nd appellant.

52. On the issue of limitation raised by the 2nd appellant in relation to the refund of Ksh 1 500 000, the court notes that this is a new issue which was not made a subject of contest before the trial court, seeing that the defence of the 2nd appellant was struck off.

53. In the case of *Kiplagat Korir v. Dennis Kipngeno Mutai* (2006) eKLR cited in *Abraham Yattani Guyo v Qunche Woge* [2020] eKLR, the court stated that;

“ Substantial justice frowns upon a party who invokes provisions of the law unduly and at a later stage of a proceeding to take undue advantage against an opponent. In any event, this court would be placed in an awkward situation were it to uphold the argument of the appellant where it has been called upon to decide on an issue which is raised for the first time on appeal. If this court were to make a determination on the issue of jurisdiction on this appeal as urged by the appellant, this court would not be sitting on appeal, but be acting as a court of first instance. This is because the issue of jurisdiction was not raised before the trial resident magistrate’s court. I say no more on that score.”

54. . Similarly, I decline to determine the question of time barr as it was not raised before the trial court.



Final Orders.

55. . In the final analysis, I proceed to give judgment in respect of the two appeals in the following terms;

- 1) The Appeal No ELC E001 of 2023 is hereby dismissed with costs to the 1st respondent.
- 2) The Appeal No. E005 of 2023 is hereby allowed to the extent that the award made at prayer no (b) in the judgment of the trial court is hereby set aside. However, I direct that each party shall bear their own costs of the suit (Appeal No. E005 of 2023).

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 14TH DAY OF MAY 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

