



**Frank Logistics Limited v Golden Lion Real Estate Company & 6 others (Civil Appeal E303 of 2024) [2025] KECA 1471 (KLR) (12 September 2025) (Judgment)**

Neutral citation: [2025] KECA 1471 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E303 OF 2024  
DK MUSINGA, J MOHAMMED & GV ODUNGA, JJA  
SEPTEMBER 12, 2025**

**BETWEEN**

**FRANK LOGISTICS LIMITED ..... APPELLANT**

**AND**

**GOLDEN LION REAL ESTATE COMPANY ..... 1<sup>ST</sup> RESPONDENT**

**JAMES ONUNGA ..... 2<sup>ND</sup> RESPONDENT**

**ASHOK KUMAR SOOD ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF LANDS REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**CREDIT BANK LIMITED ..... 6<sup>TH</sup> RESPONDENT**

**PHILLIPS INTERNATIONAL LIMITED ..... 7<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court of Kenya at Nairobi (Mogeni, J.) delivered on 11th April 2024 in ELC Civil Case No. 792 of 2015)*

**JUDGMENT**

1. The 1<sup>st</sup> respondent, Golden Lion Real Estate Company, as the plaintiff in Nairobi ELC Civil Case No. 792 of 2015, by a re-amended plaint dated 11<sup>th</sup> November 2021, sought the following orders:
  - i. “A permanent injunction be issued restraining the Defendants either by themselves, their servants, workers, agents and/or employees from interfering, developing, trespassing, alienating, auctioning, selling, transferring or in any other manner dealing or disposing of the property known as L.R. No. 1/381 [I.R. No. 20011] otherwise known as the Blacky’z Lounge situated along Argwings Kodhek Road, next to Chaka Place opposite the Priory, Kilimani, Nairobi or any part thereof;



- ii. A declaration that the purported transfer of title L.R. No. 1/381 [I.R. No. 200711] to Frank Logistics Limited on 9/05/2018 is illegal, null and void.
  - iii. A declaration that the purported charge of title L.R. No. 1/381 [I.R. No. 200711] in favour of the 6th respondent is illegal, null and void.
  - iv. (iv) A mandatory injunction be and is hereby issued compelling the 4th respondent to effect the cancellation of the purported title L.R. No. 1/381 [I.R. No. 200711] that is in the name of the appellant.
  - v. In the alternative, a mandatory injunction be and is hereby issued compelling the appellant to transfer title L.R. No. 1/381 [I.R. No. 200711] known as the Blacky'z Lounge situated along Argwings Kodhek Road, next to Chaka Place opposite the Priors to the 1<sup>st</sup> respondent.
  - vi. In the event the appellant fails to transfer L.R. No. 1/381 [I.R. No. 200711] known as the Blacky'z Lounge situated along Argwings Kodhek Road next to Chaka Place opposite the Priors to the 1<sup>st</sup> respondent within sixty (60) days from of the Order of this Court, the Deputy Registrar of the High Court be mandated to execute all necessary documents to effect the transfer of the Property to the 1<sup>st</sup> respondent.
  - vii. General damages.
  - viii. (vii) Costs of the suit with interest on (ix) at court rates from the date of judgement till payment in full.
  - ix. Any other relief that this Honorable Court deems fit.”
2. At the trial, the suit against the 2<sup>nd</sup> respondent was withdrawn.
- The appellant entered appearance and filed a defence dated 20<sup>th</sup> January 2022 while the 3<sup>rd</sup> respondent neither entered appearance nor filed a defence. The 4<sup>th</sup> and 5<sup>th</sup> respondents entered appearance and filed a defence dated 9<sup>th</sup> December 2022, while the 6<sup>th</sup> and 7<sup>th</sup> respondents entered appearance and filed a defence dated 15<sup>th</sup> December 2021.
3. The 1<sup>st</sup> respondent's case was: that it was the owner of a property known as Land Reference Number 1/835, housing the 'Blackyz Lounge,' which it purchased from Propco Limited in 2014; that despite being the registered proprietor, it faced invasion and subsequent claims of ownership by the appellant, leading to legal disputes; that although there were court orders issued restraining the appellant from trespassing onto the said property, the appellant continued to engage in fraudulent activities, including forgery and misrepresentation, to transfer ownership and secure a charge with the 6<sup>th</sup> respondent; that collusion between the 2<sup>nd</sup> and 4<sup>th</sup> respondents further complicated matters, culminating in contempt of court proceedings for unauthorized property transfers and charges.
4. The 1<sup>st</sup> respondent listed the particulars of fraud on the part of the appellant as follows: forgery or causing to be forged the Certificate of Title Grant Number I.R. 67070 over the suit property in an attempt to dispose (dispossess?) the 1<sup>st</sup> respondent of the suit property; altering and/or misrepresenting the Land Reference Number 1/835 to be identified as L.R. No. 1/381 /I.R No. 200711 while referring to the Blacky'z Lounge situated along Argwings Kodhek Road, next to Chaka Place opposite the Priors, while knowing the existence of a court order barring any dealings on the property; wilfully causing the suit property to be registered in its name as Title Number L.R. No. 1/381 [I.R. No. 200711] while knowing the 1<sup>st</sup> respondent had absolute ownership of claim therein; altering or misrepresenting Land Reference No. 1/835 to be identified as L.R. No. 1/381 [I.R No. 200711]



- with intention to secure a charge to a sum of Kshs. 90, 000,000 with the 6<sup>th</sup> respondent; knowingly misrepresenting its ownership and title to the suit property to the 6<sup>th</sup> respondent who charged it to secure a sum of Kshs. 90,000,000; and interfering with the 1<sup>st</sup> respondent's quiet enjoyment and possession of the suit property.
5. The particulars of fraud on the part of the 4<sup>th</sup> respondent were listed as follows: collusion with the agents of the appellant to alter L.R No. 1/835 situated along Argwings Kodhek Road, Kilimani next to Chaka Place opposite the Priory to L.R No. 1/381 [I. R No. 200711]; collusion with the appellant to register L.R No. 1/381 in favour of the 6<sup>th</sup> respondent on 9<sup>th</sup> May 2018; and collusion with the appellant and/or the 6<sup>th</sup> respondent to register a charge on land L.R. No. 1/381, the Blacky'z Lounge situated along Argwings Kodhek Road, next to Chaka Place opposite the Priory.
  6. The 1<sup>st</sup> respondent also pleaded that the invasion and possession of the suit property was illegal.
  7. In support of the 1<sup>st</sup> respondent's case, PW1, Tang Jia Rong, adopted his witness statement dated 17<sup>th</sup> August 2015 and relied on the 1<sup>st</sup> respondent's list and bundle of documents dated 4<sup>th</sup> July 2022 together with a supplementary bundle dated 28<sup>th</sup> October 2021 as his evidence in chief. He explained: that prior to the 1<sup>st</sup> respondent purchasing the property from Propco Ltd, his advocates confirmed the title's authenticity and he believed that the title was legitimate; that when he was evicted from the suit property in August 2014, he reported the incident to the police; that the appellant used a fraudulent title to obtain credit; that the court order was, however, not registered with the Registrar of Lands; and that upon learning of the intended auction from the media, he placed a caution on the suit property.
  8. The appellant's case was: that it was the registered proprietor of L.R. No.1/1381 original number 1/835 and was a stranger to the land Reference Number 1/835 (original 225/5) alluded to by the 1<sup>st</sup> respondent; that if the 1<sup>st</sup> respondent paid any money to Propco Limited, then the transaction was not in relation to the appellant's piece of land and it was only Propco Limited that was answerable or liable to the 1<sup>st</sup> respondent; that it was a stranger to the alleged invasion and fraud alleged by the 1<sup>st</sup> respondent; that the property on the 7<sup>th</sup> respondent's Notice of 20<sup>th</sup> September 2021 did not match with the exact physical location of the 1<sup>st</sup> respondent's property.
  9. DWI, Francis Nyaga Njeru, the appellant's director, adopted his witness statement and relied on the appellant's list and bundle of documents and contended: that the suit property was in the occupation of the appellant's tenant and that he was the one who undertook its development; that he was not aware of an injunction issued on 27<sup>th</sup> January 2017; that there were discrepancies in the dates and documents related to the transfer to the 1<sup>st</sup> respondent and the change of user application, particularly as regards the timing in relation to the 1<sup>st</sup> respondent's claims and the court injunction; that the property was charged to the 6<sup>th</sup> respondent as a security for a loan; and that the appellant had always been the owner of the suit property since 2014 and its title was acquired after due diligence was conducted.
  10. DW2, Edward Shylock Ndege Omwega, also adopted his witness statement as his evidence in chief and stated: that he sold the suit property to the appellant and signed the transfer on 21<sup>st</sup> January 2015 and further explained the discrepancies in the title grant number and transfer dates, indicating that the transfers to him and the appellant occurred in 2017 and not in 2015; that there were variations and inconsistencies in the documents and dates in the transfer process relied on by the 1<sup>st</sup> respondent; that there was an agreement with the 3<sup>rd</sup> respondent, Ashok Kumar Sood; that he was aware of the allegation that the 3<sup>rd</sup> respondent died on 15<sup>th</sup> September 2011; and that although the transfer to the appellant was on 2017, the appellant had already acquired the property prior to that date.



11. The 4<sup>th</sup> and 5<sup>th</sup> respondents denied the allegations of fraud and collusion made against the 4<sup>th</sup> respondent. The 6<sup>th</sup> and 7<sup>th</sup> respondents also denied the allegations made by the 1<sup>st</sup> respondent and averred that the 7<sup>th</sup> respondent was acting as the 6<sup>th</sup> respondent's agent. The 6<sup>th</sup> respondent denied knowledge of the property in question, asserting a distinct property reference and detailing a loan transaction with the appellant. The 6<sup>th</sup> and 7<sup>th</sup> respondents rejected allegations of fraud and collusion, emphasizing their due diligence before registering a legal charge over the property. They maintained that the 1<sup>st</sup> respondent's claims lacked merit and sought to be removed from the suit.
12. DW3, Wainaina Francis Ngaruiya, the 6<sup>th</sup> respondent's head of legal, similarly adopted his witness statement and relied on the list of documents filed by the 6<sup>th</sup> and 7<sup>th</sup> respondents as his evidence in chief. In his evidence, he contrasted the documents in respect of LR 1/835 with those of LR 1/381 and stated that LR 1/835 was not known to the 6<sup>th</sup> respondent. According to him, the 6<sup>th</sup> respondent's attention was not brought to the  
  
existence of the order in respect of the charged property. In his view, in the absence of a survey report confirming the position of the 1<sup>st</sup> respondent's parcel, reliance could only be placed on the evidence from the land registrar's office as the authority on ownership clarification. A conduct of due diligence by way of post-registration search and ongoing charge registration, he stated, revealed the appellant as the owner.
13. DW4, Charles Kipkurui Ng'etich, the deputy Chief Land Registrar stationed in Kehancha, Migori County, while adopting his witness statement admitted that the records he referred to in his statement were not before the court. He acknowledged that there were discrepancies between the 1<sup>st</sup> respondent's property registered under Government Lands Act (GLA) and the appellant's claim under Registration of Titles Act (RTA). In his evidence, the property was registered under the latter Act and he was not aware of any prior registration under the GLA. He therefore assumed that the appellant's position was right and confirmed that he was involved in the transfer of the said property to the appellant though he did not see the transfer  
  
document. He admitted that although the documents from the 1<sup>st</sup> respondent's bundle indicated sequential numbering, he did not come across them when he carried out his searches, hence had doubts regarding their association with the property. In his evidence, the fact that he never came across the documents relied upon by the 1<sup>st</sup> respondent suggested that they were not available as at 9<sup>th</sup> December 2022 but confirmed that the documents in favour of the appellant's ownership were available.
14. At the conclusion of the trial, the learned Judge identified the issues for determination as: whether the 1<sup>st</sup> respondent was the proprietor of the suit property; whether the registration of the appellant as the proprietor of the suit property was lawful; whether the 1<sup>st</sup> respondent was entitled to the prayers sought; and who should bear the costs of the suit.
15. In her judgement, the learned Judge found that the appellant's title was procured unprocedurally, as there was no conversion of title; that the 1<sup>st</sup> respondent established and proved that as at 9<sup>th</sup> May 2018 when the appellant was registered as proprietor of the suit property, the 1<sup>st</sup> respondent held a valid title to the suit property which was duly registered; that accordingly, the registration of the appellant as its proprietor was unlawfully and irregularly obtained; that in light of the glaring discrepancies, the title held by the appellant was in conflict with the legal regime under which the suit property was held and registered hence, pursuant to section 80 of the *Land Registration Act*, 2012, the title was ripe for cancellation; that notwithstanding absence of evidence of fraud, without the evidence on how the conversion of titles from one regime to another was done, the issuance of the appellant's title was unprocedural, illegal, null and void; and that the 1<sup>st</sup> respondent proved, on a balance of probabilities, that



it legally obtained the document of title to the suit property and therefore had proprietary rights in it, was the legal owner and should be allowed to take possession and enjoy it without any interference.

16. It was however found that whereas the 1<sup>st</sup> respondent sought and prayed for award of general damages, during the trial no evidence was adduced nor any basis laid to support the claim that the 1<sup>st</sup> respondent suffered any damages. Accordingly, judgment was entered for the 1<sup>st</sup> respondent as follows: -
- a. The 1st respondent is hereby declared to be the lawful registered owner of LR No. 1/835 (Original Number 1/225/5).
  - b. An order of permanent injunction is hereby issued restraining the Defendants either by themselves, their servants, workers, agents and/or employees from interfering, developing, trespassing, alienating, auctioning, selling, transferring or in any other manner dealing or disposing of the property known as L.R. No. 1/381 [I.R. No. 20011] otherwise known as the Blacky'z Lounge situated along Argwings Kodhek Road, next to Chaka Place opposite the Priory, Kilimani, Nairobi or any part thereof.
  - c. A declaration is hereby issued that the purported transfer of title L.R. No. 1/381 [I.R. No. 200711] to Frank Logistics Limited on 9/05/2018 is illegal, null and void.
  - d. A declaration is hereby issued that the purported charge of title L.R. No. 1/381 [I.R. No. 200711] in favour of the 6th respondent is illegal, null and void.
  - e. A mandatory injunction is hereby issued compelling the 4<sup>th</sup> respondent to effect the cancellation of the purported title L.R. No. 1/381 [I.R. No. 200711] that is in the name of the appellant.
  - f. The appellant, their agents and servants are directed to vacate and deliver vacant possession of land parcel L.R. NO. 1/835 (Original Number 1/225/5) to the 1st respondent forthwith failing which eviction to issue on application.
  - g. The 1<sup>st</sup> respondent shall have the costs of the suit.
17. Aggrieved, the appellant moved to this Court to challenge the decision on some 35 grounds of appeal. As will be apparent from the issues that we have to determine in this appeal, we find it unnecessary to reproduce the same in this judgement. The 6<sup>th</sup> and 7<sup>th</sup> Respondents have lodged a Notice of Cross appeal dated 7<sup>th</sup> May 2024. For the same reason that we have decided not to reproduce the main grounds of appeal, we see no necessity of reproducing the grounds of the cross-appeal.
18. We heard the appeal on the Court's virtual platform on 20<sup>th</sup> November 2024 during which learned counsel, Ms Anyango Opiyo, appeared for the appellant, learned Senior Counsel, Mr Nyaoga, appeared with Mr Gabriel Mwangi for the 1<sup>st</sup> respondent, learned counsel, Mr Omwoma, appeared for the 3<sup>rd</sup> respondent, while learned counsel, Mr Mugisha, appeared for the 6<sup>th</sup> and 7<sup>th</sup> respondents. Learned counsel relied on their submissions which they briefly highlighted.
19. On behalf of the appellant, it was submitted: that, on the authority of *Kinyanjui Kamau vs George Kamau Njoroge* [2015]eKLR, *Vijay Morjaria v Nansingh Madhussingh Darbar & Another* [2000] eKLR and *Charles Larathe Kiarie & 2 Others vs Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others* [2013] eKLR, both the allegations for fraud and misrepresentation were not proved at the trial, thus the learned Judge erred in law and in fact in failing to find and hold that the appellant had indefeasible title under section 26(1) (a) of the *Land Registration Act*; that, based on *Samuel Kamere v Lands Registrar* (2015) eKLR, the 1<sup>st</sup> respondent failed to demonstrate that its predecessor, Propco Limited, possessed a valid and legal title to the suit property, thus the learned Judge



- erred in law and in fact in finding the 1<sup>st</sup> respondent is the bona fide purchaser; that on the basis of the finding in *Torino Enterprises Limited v AG* (Petition No. E006 of 2022) [2023] KESC 79(KLR), there was an obligation on the 1<sup>st</sup> respondent to carry out due diligence by looking at the history of the suit property before purchasing it, yet the 1<sup>st</sup> respondent admitted not having ascertained whether the title was valid and legal; and that, contrary to section 107 of the *Evidence Act*, there was no proof that the 1<sup>st</sup> respondent paid Propco Limited a sum of \$2,300,000/- for the purchase of the suit property.
20. It was further submitted: that the learned Judge erred in law and in fact in failing to find and hold that the 1<sup>st</sup> respondent's purported transfer dated 13<sup>th</sup> November 2014 was neither an indenture nor a title; that vide the letter dated 4<sup>th</sup> October 2015 from the Ministry of Lands, Housing and Development, there were no records of conveyance purportedly registered as Volume N112 Folio 136/31 File 11933 at the Government Lands Registry as corroborated by the testimony of DW4; that the transfer dated 13<sup>th</sup> November 2014 did not bear the EDMS Stamp contrary to section 19(1)(a) and (b) of the *Stamp Duty Act*; that the 1<sup>st</sup> respondent did not impeach the appellant's title by summoning any person from the office of the 4<sup>th</sup> respondent to controvert DW4's testimony; that the Court has a duty to uphold the sanctity of the records kept at the lands office as was held in *Solomon Omwenga Omache & Another v Zackery O. Ayieko & 2 Others* [2016] eKLR; that the 1<sup>st</sup> respondent did not produce any sale agreement for the purchase of the suit property between itself and Propco Limited in order to demonstrate how it acquired the suit property, thus the learned Judge, in finding that the 1<sup>st</sup> respondent's title to be valid, contravened section 38(1) of the *Land Act*; and that the learned Judge erred in insisting that the appellant needed to prove conversion of the suit property from GLA to RTA, yet at the time of the purchase, the suit property was registered under RTA as confirmed by DW4.
21. In addition, it was contended: that although the charge in favour of the 7<sup>th</sup> respondent dated 12<sup>th</sup> February 2019 was legally registered to secure loan facilities, the learned Judge erred in finding and holding that the charge was illegal notwithstanding evidence of compliance with all the statutory conditions under section 56 of the *Land Registration Act*; that the 7<sup>th</sup> respondent undertook due diligence which established that the suit property was registered in the name of the appellant; that, on the authority of *Equip Agencies Ltd v I & M Bank Ltd* (2017) eKLR, the learned Judge did not lay any basis for finding that the charge was illegal; that that the learned Judge erred in holding that the 1<sup>st</sup> respondent does have a legitimate claim over Land Reference No. 1/1381[I.R No. 200711] when its claim is for LR No. 1/835[Org.225/5] which the appellant has no claim for; that based on the case of *Kenya Breweries Ltd & Another v Washington O. Okeyo* [2002] eKLR, the 1<sup>st</sup> respondent did not establish the special circumstances it suffered or suffers to warrant an order for mandatory injunction compelling the 4<sup>th</sup> respondent to cancel the appellant's title; that a permanent injunction cannot be issued against it when it had possession of the suit property and was the registered owner, hence the order would be in vain; that the learned Judge erred by issuing an order directing the appellant to vacate and deliver vacant possession of the suit property without considering that the title to the land was with the appellant; that the learned Judge wrongly exercised her discretion to award the costs of the suit to the 1<sup>st</sup> respondent undeservedly; that the learned Judge manifested bias when she failed to consider the appellant, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents in derogation of the appellant's rights under Articles 25(c) and 50 of *the Constitution*, contrary to the decision in *R v Chief Immigration Officer* (1976) 3 AER 843; that the learned Judge erred by failing to appreciate or reconsider very succinctly legal points, authorities and arrived a decision that was wholly against the weight of the evidence that had been adduced; and that, based on the case of *Mary Njoki v John Kinyanjui Muthuru* [1985] eKLR, the learned Judge erred by taking into consideration extraneous and irrelevant issues which led to misinterpreting both facts and the law which led to a decision that had no legal basis, and which amounted to a travesty of justice against the appellant.



22. On behalf of the 6<sup>th</sup> and 7<sup>th</sup> respondents, it was submitted that although the trial court directed the parties to file and serve their submissions on or before 11<sup>th</sup> March 2024, the 1<sup>st</sup> respondent filed its submissions on 6<sup>th</sup> March 2024 but did not serve them on the 2<sup>nd</sup> to 7<sup>th</sup> respondents; that the 6<sup>th</sup> and 7<sup>th</sup> respondents only became aware of the 1<sup>st</sup> respondent's submissions on 11<sup>th</sup> March 2024 upon checking the e-filing portal; that the 6<sup>th</sup> and 7<sup>th</sup> respondents managed to file their submissions on 13<sup>th</sup> March 2024; that by filing its submissions close to the deadline, the 1<sup>st</sup> respondent denied the appellant as well as the 6<sup>th</sup> and 7<sup>th</sup> respondents an opportunity to review and respond to its submissions; that by failing to consider the appellant's submissions or those of the 2<sup>nd</sup> to 7<sup>th</sup> respondents and relying on the 1<sup>st</sup> respondent's submissions, the trial court condemned the appellants without a hearing before delivering its judgement, thus denying them a fair trial; that the 1<sup>st</sup> respondent failed to prove that the acquisition of its alleged title was proper by demonstrating the process used in acquiring the title; that the 1<sup>st</sup> respondent failed to produce before the trial court any instrument for the acquisition of land in the nature of an indenture of conveyance as per the GLA, to which it claimed its title to the suit property; that instead, the 1<sup>st</sup> respondent only produced a transfer document purporting that it was the title document; that the 1<sup>st</sup> respondent's transfer document had no entries on it, nor was it accompanied by all the previous original transfers over the suit property outlining the history of the suit property; that contrary to the decision in *Dina Management Limited v County Government of Mombasa & 5 Others* [2023] eKLR and *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, the 1<sup>st</sup> respondent did not demonstrate that it had a good root of title over the suit property; that contrary to the stipulations in the Supreme Court Case of *Samuel Kamere v Lands Registrar* [2015] eKLR, by failing to demonstrate the steps it took before purchasing the suit land, the 1<sup>st</sup> respondent failed to demonstrate that it carried out due diligence; that despite the appellant proving its good title, the learned Judge erred in finding that the appellant did not have a legitimate title over the suit property; that the root title demonstrated by the appellant was consistent with the records at the lands registry as confirmed by the 4<sup>th</sup> and 5<sup>th</sup> respondents; that the 1<sup>st</sup> respondent failed to prove its allegation that the appellant acquired the suit property fraudulently as held in *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR .
23. The 6<sup>th</sup> and 7<sup>th</sup> respondents prayed that the appeal be allowed and the judgement of the trial court be set aside.
24. Although he did not file submissions, Mr Omwoma informed us, on behalf of the 3<sup>rd</sup> respondent, that he associated himself with the appellant's position.
25. In opposing the appeal, Mr Mwangi, learned counsel for the 1<sup>st</sup> respondent, noted the several discrepancies in the documents relied upon by the appellant and submitted: that the transfer to the appellant and several other transactions to the suit property were done after the court had granted the injunction on 27<sup>th</sup> January 2017.
26. Learned senior counsel, Mr Nyaoga, who led Mr Mwangi for the 1<sup>st</sup> respondent, described what the appellant was engaged in as "layering". Mr Nyaoga took the Court to the process of acquisition of land under the GLA and the process that was adopted during the transition period between the repealed Acts and the new Act. It was submitted that in the circumstances of this case, the remedy available to the appellant was to go against those from whom it acquired title since it could not claim that it was a bona fide purchaser without notice of want of title of the person from whom it acquired title.
27. We have considered the record as put to us, the grounds on which the appeal is anchored, the rival submissions and the applicable law. Our mandate on a first appeal as set out in rule 31(1) (a) of the Rules of this Court is to reappraise the evidence and to draw our own conclusions.



28. In the case of *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”

29. Having carefully considered the record placed before us, the impugned judgment, the written and oral submissions of learned counsel for the appellant and for the respondents, the cited authorities and the law, we settle the following as the main issues that commend themselves to us for determination, namely: (i) whether the appellant’s and the 1<sup>st</sup> respondent’s conflicting claims relate to one and the same property; (ii) if the answer is in the affirmative, what constitutes the suit property?; (iii) who as between the appellant and the 1<sup>st</sup> respondent has established the root of title and has indefeasible proprietary right over the suit property; (iv) whether the learned Judge was correct in allowing the 1<sup>st</sup> respondent’s claim and dismissing the appellant’s counterclaim; and, (v) finally, what orders ought we to make in determination of the appeal, including orders on costs?

30. The first three issues are inter-related, and we shall therefore determine them together. Our findings thereon shall inform the conclusions we arrive at regarding the last two issues. To determine the question as to who has the right of claim over the suit property, we begin by appreciating the principle enunciated by this Court in its decision in *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR where the Court observed that:

“Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of *the Constitution* or Statute. The condition precedent to taking away anyone’s property is that the authority must ensure compliance with *the Constitution* and Statutory provisions.”

31. This, among other judicial decisions, underscores the sanctity of title to immovable property subject, however, to the provision of Article 40(6) of *the Constitution*, section 23 of the Registration of Titles Act (now Repealed), and section 26 of the *Land Registration Act*, 2012. Article 40 of *the Constitution* reads:

1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
  - a. of any description; and
  - b. in any part of Kenya ....
  - c. (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

32. The sanctity of title to property under Article 40 of *the Constitution* was enunciated in the Supreme Court decision in *Rutongot Farm Ltd v Kenya Forest Service & 3 others* [2018] eKLR, where the Court held that:

“... once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of *the Constitution* is then expressed in the terms that no



person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution.”

33. In this regard, the decisive question that begs our inquiry is whether the appellant’s proprietary interest in the suit property is liable to impeachment pursuant to Article 40(6) of *the Constitution* in the face of the contention that the suit property was irregularly transitioned from the GLA to RTA.

34. The sequence of events leading to the respondent’s Certificate of title raise pertinent questions that call for answers in light of the test enunciated by this Court in Embakasi Properties Limited & another vs. Commissioner of Lands & another [2019] eKLR, where the Court had this to say on the basis of which title to land may be impeached:

“Although it has been held time without end that the certificate of title is: “... conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof,” it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the *Land Registration Act*, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme.” [Emphasis added]

35. Section 26(1) of the *Land Registration Act*, 2012 affirms the sanctity of title to immovable property and the indefeasibility thereof in the absence of fraud, misrepresentation or other unlawful conduct in its acquisition. The section reads:

1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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, un- procedurally or through a corrupt scheme. [Emphasis ours]

36. Turning to the question as to whether the appellant’s root of title stands, we refer to the recent case of Dina Management Limited v County Government of Mombasa & 5 others (supra) in which the Supreme Court held that establishing a good root of the title is the first step in establishing whether a party is a bona fide purchaser for value, and had this to say:

“94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment...

110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...



111. Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired.”

37. In the same vein, this Court in *Munyu Maina v Hiram Gathiha Maina* (supra) held:

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

38. We must, however, be quick to point out that a registered proprietor of land will not be called upon to prove the root of the title on spurious allegations since the law presumes that the person named as proprietor of the land in a certificate of title is, pursuant to section 26(1) of the *Land Registration Act*, the prima facie absolute and indefeasible owner thereof. Therefore, in order for the registered proprietor to be called upon to prove the root of title, some evidence must be placed before the court on the basis of which the court can be satisfied that there are reasonable grounds for believing that the title may not have been properly obtained.

39. The respondent’s evidence, as presented by its director, who testified as PW1, Tang Jia Rong, was that it was the registered proprietor of LR No. 1/835 (Original Number 225/5) which it purchased from Pepco Ltd on 13<sup>th</sup> November 2014. He produced the Conveyance registered as Volume N112 Folio 136/31 File 11933 at the Government Lands Registry, Nairobi. The 1<sup>st</sup> respondent exhibited certificate of official search for the said property issued on 15<sup>th</sup> September 2015 which confirmed that as at that date, the property measuring 0.1896 Ha was registered in its name.

40. In his statement, Francis Nyaga Njeri, the appellant’s director, stated that sometime in 2014, the appellant started the process of purchasing LR No. 1/1381 from Edward Shylock Omwega Ndege, which was paid for in instalments until 2015 when it was cleared. From the statement, it appears that the said land was not in the name of Omwega as he had not transferred it into his name and only did so after receipt of the whole purchase price from the appellant. According to Nyaga, before commencing construction, he applied for change of user and notified the public that the land was not available for sale. He stated that before entering into the sale agreement, he conducted due diligence and obtained relevant documents and made the necessary payments.

41. In his evidence before the court, he however stated that:

“The IR No. 67070 for the third document shows a different IR at the 3<sup>rd</sup> page of title is IR 64342. The title is incomplete as presented. The page that has a transfer to Frank Logistics it shows 2-3-2017. (sic) For the plaintiff’s bundle at page 25 the date is 13/11/2014 and transfer to Frank Logistics is more than 2 years. Page 33 of the same bundle is a certificate of postal search dated 15/09/2015 which is 2 years before transfer and also 2 years after the injunction the transfer was done. The transfer to Frank Logistics is 1 and ½ years after the claim that they are owners and entering into the property. The Defendant’s bundle, application for change of user document No. 4 was done in July 2016 and owner’s name is listed as Frank Logistics whereas the transfer was done in March 2017. The document for certificate of title is dated 9/05/2018 and Land Reference is indicated as 1/1381 and



original 1/835. The lease document is dated 4/05/2018. This is the lease that led to the issuance of title. In the lease the parcel Number is LR No. 1381 issued pursuant to a change of user to Frank Logistics. For the change of user, the Land Reference is stated as LR No. 1/835. On the notification of approval refers to Land Reference Number as 1/835. None of the documents referring to change of user relate/include a change to Land Reference Number. Land Reference number changed after the Court injunction of 2015 but we were never served. There was a process...The property was charged in February 2019 to the 7<sup>th</sup> Defendant as LR 1/835. I am not aware that the area where the suit property is situated is an adjudication area under GLA ...The Rent Clearance Certificate receipts both refer to GLA.”

42. Edward Shylock Omwega Ndege in his statement corroborated Nyaga’s statement that they got into an agreement for sale in 2014, but the transaction was concluded in 2015 through cash payments to his bank accounts. It was his position that the 1<sup>st</sup> respondent’s title could not be genuine and must have been fraudulently obtained.

43. In court he stated:

“The title Grant Number on document number 3 is IR 67070 and page 3 of the document the IR is number 64342. The number 67070 is cancelled. Page 4 shows that the transfer to me is dated 2-3-2017. Then the stamp of transfer to Frank Logistics also shows that it was on 2-3-2017. According to the Transfer Stamp it means I did not own the property in 2015 as alleged by DW1. The 1<sup>st</sup> document shows the transfer from Ashok to me is dated 24/01/2011, the dates on the 2<sup>nd</sup> documents has stamps showing the transfer to have happened in 2017. At page 3 the IR is shown as 67070/3 whereas the title page reads IR 67070/1. The document number 2 is dated 21/01/2015 the stamps show they are dated 02/03/2017.”

44. Charles Kipkurui Ngetich, DW4, the Deputy Chief Land Registrar’s statement, was to the effect that the Grant IR 67070 for a term of 99 years with effect from 1<sup>st</sup> August 1977 was issued to F. H. Osmond and registered on 20<sup>th</sup> September 1983; that the property was transferred to Ashok Kumar Sood and registered on 1<sup>st</sup> April 1994; that property LR No. 1/835 IR 67070/1 was transferred by Ashok Kumar Sood to Edward Shylock Omwega Ndege vide a transfer booked on 2<sup>nd</sup> March 2017 as IR 67070/3; that vide a transfer dated 21<sup>st</sup> January 2015, the property was transferred by Edward Shylock Omwega Ndege to Frank Logistics Limited and the transfer was registered on 2<sup>nd</sup> March 2017; that there was a change of user of the suit property and a lease for parcel LR 1/1381 IR 200711 dated 4<sup>th</sup> May 2018 was issued and subsequently a Certificate of Title IR 200711 dated 9<sup>th</sup> May 2018 registered in favour of Frank Logistics Limited; that the suit property was charged to Credit Bank PLC vide Presentation No. 1079 and registered on 13<sup>th</sup> February 2019; that there were no records in respect of documents of ownership in respect of LR No. 1/835 (original No. 2-5/5) produced by the 1<sup>st</sup> respondent.

45. Before the court, he testified that:

“Though I refer to records in my statement the same are not before the Court. I assure that the property was registered under RTA Act. I am not aware that the Plaintiff’s property was registered under GLA...Document No. 8 in 2<sup>nd</sup> Defendant’s bundle (Rates Clearance Certificate) both refer to GLA...2 properties cannot have same title unless it is double registration. LR 1/835 cannot refer to 2 distinct properties. At page 26 it shows LR 1/835 (original number 225(5) relates to the same property.”



46. We have taken the liberty to set out in extenso, the evidence as presented by the various witnesses. The public notice of the change of user referred to was in reference to LR No. 1/835 situated in Hurlingham, off Argwings Kodhek Road. The lease agreement entered into between the appellant and one Abaye Tesfu Negussie on 1<sup>st</sup> July 2016 was in reference to LR No. 1/835 registered on 20<sup>th</sup> September 1983 as IR 67070/1 measuring 0.1896 more particularly delineated on the Deed Plan No. 104399. It is clear that the particulars of the property tallies with the very property which was confirmed by the certificate of search to belong to the 1<sup>st</sup> respondent on 15<sup>th</sup> September 2015. No doubt, therefore, the land being claimed by both the appellant and the 1<sup>st</sup> respondent was one and the same. We agree with the finding by the learned Judge that:

“The 2<sup>nd</sup> Defendant contended that he started the process of purchasing LR No. 1/1381 sometime in 2014 from Edward Shylock Omwega Ndege and paid in installments until the whole of the purchase price was cleared in the year 2015...This property appears to be different from the one registered in the Plaintiff’s name but the Court record shows that LR No. 1/835 (Original No. 225/5) and LR No. 1/1381 are the same property. The Court has observed that the property said to have been transferred to the 2<sup>nd</sup> Defendant by one Edward Shylock Omwega Ndege is Grant IR 67070 for LR No. 1/835, land survey plan no. (deed plan) 104399 measuring 0.1896 Ha. Therefore, this shows that this property is similar to the one registered in the Plaintiff’s name.”

47. It was clear from the evidence that apart from bare statements in court by DW4, he did not present before the court the records held by the lands registry on which he based his testimony in order to support his evidence. Referred to the documents adduced, particularly the rates clearing certificate, he reluctantly conceded that the property referred to therein was registered under the GLA. No attempt was made by him to explain the circumstances under which the property was later registered under RTA.

48. The learned Judge found, as a fact that:

“On the basis of the evidence adduced by the plaintiff and the documentary evidence the plaintiff tendered I am satisfied that the Plaintiff was on 21/04/2015 registered as the owner and proprietor of L.R. No. 1/835(Orig. No. 1/225/5). The conveyance to the plaintiff on the face of it was properly executed, stamped and registered and by virtue of the registration as owner the plaintiff became the absolute and indefeasible owner of the suit property.”

49. This was a finding of fact and as was appreciated by this Court (Apaloo, JA, as he then was) in *Kiruga v Kiruga & Another Nai Civil Appeal No E303 of 2024 Page 36 of 48 [1988] KLR 348*:

“The word “proof”, as a legal concept, is not pre-ordained and has no objective existence, discoverable either by logic or analysis. It is merely the conclusion that the tribunal draws on any given set of facts or evidence. If the evidence is available and accepted, unless the law directs that a certain fact should be “proved” in a certain way, it cannot be the proper province of an appellate court merely to read that evidence and hold “it is not proved”. That really is another way of saying it is not persuaded by evidence. But the tribunal that needs to be persuaded, is the tribunal of fact to which the evidence is given not one which merely reads it in print. The only suggestion of the trial Judge having misdirected himself was on the onus of proof; but the trial Judge, quite rightly, makes no reference to the onus of proof, for, as often pointed out, no question of the burden of proof as a determining factor of the case arises on a concluded proof, except in so far as the court is ultimately unable to come to a



definite conclusion on the evidence, or some part of it, and the question will arise as to which party has to suffer thereby. The trial Judge came to a definite conclusion on the evidence and no question of onus did or could arise. An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the Judge can be said to be plainly wrong. It is a strong thing for an appellate court to differ, from the finding, on question of facts, of the Judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed the jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon evidence should stand. But this is jurisdiction, which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

50. Therefore, as held by Hancox, JA. (as he then was), in *Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183:

“The appellate Court only interferes with the trial Court’s findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did.”

51. The 1<sup>st</sup> respondent contended that it purchased LR No. 1/835 under GLA in 2014 and the transfer of title from Propco Limited to it was registered at the Government Lands Registry at Nairobi as Volume N112 Folio 136/31 File Number 11933. From the said transfer, the form of transfer was adopted from Form F of the RTA which was used in connection with land registered under the GLA (Now Repealed). From the documentary evidence adduced by the 1<sup>st</sup> respondent, the 1<sup>st</sup> respondent was registered as the owner of the suit property pursuant to a conveyance dated 13/11/2014 registered as Volume N112 Folio 136/31 File 11933. It was expressly stated that the property being conveyed to the 1<sup>st</sup> respondent by the said Propco Limited was:

“ALL THAT piece of land situate in the City of Nairobi in the Nairobi Area of the Republic of Kenya comprising by measurement Nought decimal one eight nine six (0.1896) of a hectare or thereabouts known as Land Reference Number 1/835 (Original Number 1/225/5) which said piece of land with the dimensions abuttals and boundaries thereof is more particularly delineated on Land Survey Plan Number 104399 deposited in the Survey Records Office at Nairobi aforesaid and thereon bordered red.”

52. The abstract of folio 136/31 of Volume N112 held by the Government Land Registry, Nairobi, which was produced in evidence by the 1<sup>st</sup> respondent reveals one transaction affecting the suit property. It shows that Presentation No. 2158, Volume N112 Folio 136/31 File 11933 was registered on 21/04/2015 at 13.45hrs. In addition, the 1<sup>st</sup> respondent produced a certificate of postal search as at 15<sup>th</sup> September 2015 furnished by the Registrar of Government lands that confirmed that the 1<sup>st</sup> respondent, Golden Lion Real Estate Company Limited, was the registered proprietor of a fee simple interest in respect of LR No. 1/835 (Orig. No. 1/225/5) and was registered on the register Vol. N112 Folio 136 File 11933, which registration tallied with the registration of the 1<sup>st</sup> respondent’s conveyance dated 13<sup>th</sup> November 2014 and the registration of the 1<sup>st</sup> respondent’s conveyance.
53. Clearly, there was evidence on the record on which the learned Judge could and did find that the 1<sup>st</sup> respondent was on 21<sup>st</sup> April 2015 registered as the owner and proprietor of L.R. No. 1/835(Orig. No. 1/225/5). We have no basis for interfering with that finding.



54. The question then is: at what point did the 1<sup>st</sup> respondent lose its registration? As we have stated, DW4 who ought to have placed before the court the records of the transactions in respect of the suit property failed to do so. The evidence presented on behalf of the appellant was itself suspect and far from satisfactory. Whereas, DW2, Edward Shylock Ndege Omwega, from whom the appellant claimed title stated that he acquired the property in 2015, no transfer was done in his name until 2<sup>nd</sup> March 2017, the very same day that a transfer was being done from DW2 to the appellant. There were unexplained discrepancies in the documentation relied upon by the appellant in support of its claim to the suit property. These discrepancies were noted by the learned Judge when she held that:

“The 2<sup>nd</sup> Defendant adduced the original title (before change of user), Grant IR 67070 for LR No. 1/835, land survey plan no. (deed plan) 104399 as evidence before the Court. The said title is not so clear but it was registered to one F.H. Osmond of P.O Box 48970. It also appears to be incomplete as (b) the provisions of the GLA and (c) the special conditions of the grant only begin from number 14. The stamp appearing below the Commissioner of Lands’ signature cancelled out registration I.R No. 67070/1 and added 64342.”

55. Apart from the foregoing, the first page of that title document indicates that the IR No. is 67070 and not 64342 and as correctly noted by the learned Judge, there was no demonstrable connection between the third page of document no. 3 in the appellant’s list of documents and the purported first and second pages of that same document since they related to different properties. That document recorded the transfer of a property described as I.R No. 64342 to Ashok Kumar Sood then to Edward Ndege and finally to the appellant.

While the appellant produced a transfer document dated 24<sup>th</sup> January 2011 between Sood and Edward Shylock Omwega Ndege for title number I.R No. 67070/1, the transfer that was registered on 2<sup>nd</sup> March 2017 was pursuant to the Registrar’s stamp which indicated that the IR No. was 67070/3. Whereas it was disclosed that Ashok Kumar Sood passed on 15<sup>th</sup> September 2011 after purportedly selling the suit property to Edward Shylock Omwega Ndege, no explanation was advanced as to why registration of the transfer was done 6 years later, on 2<sup>nd</sup> March 2017 after the purported transfer and on the same day that Edward Shylock Omwega Ndege transferred his interest in the suit property to the appellant, and why the same property was purportedly valued at Kshs. 70 million and Kshs. 130 million on the same day.

56. It was also clear that the court had issued orders on 27<sup>th</sup> January 2017 prohibiting any dealings on the land pending the hearing and determination of the suit in the presence of counsel, yet other transactions took place thereafter contrary to *lis pendens* doctrine. As this Court appreciated in *Rose*

*Wakanyi Karanja & 3 Others v Geoffrey Chege Kirundi & another* [2016] eKLR:

“The doctrine of *lis pendens* rests upon the foundation that it would plainly be impossible that any action or suit could be brought to a successful conclusion if alienations *pendent lite* were permitted to prevail. In *Bellamy -vs- Sabine 1 De G & J 566* it was held:

“The doctrine of *lis pendens* intends to prevent not only the defendant from transferring the suit property when litigation is pending but it is equally binding on those who derive their title through the defendant, whether they had or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party ...”

57. Whereas the appellant was registered as the proprietor of the suit property on 2<sup>nd</sup> March 2017, curiously, on 7<sup>th</sup> March 2016, before it became a registered proprietor thereof, it applied for change



of user. A registered and practicing planner stamped and signed the application on 13<sup>th</sup> July 2016, indicating the owner of LR No. 1/835 as the appellant, paving the way for the approval of the change of user on 15<sup>th</sup> July 2016 and the signing of the approval by the City Planning Department of the Nairobi City County on 16<sup>th</sup> August 2016. All these transactions took place before the appellant's transfer was registered and before the appellant was issued with a lease to LR No. 1381 on 7<sup>th</sup> May 2018 and the subsequent issuance of a certificate of title of Title No. I.R 200711, LR No. 1/1381 (Original Number 1/835) on 9<sup>th</sup> May 2018.

58. These were, but some of the discrepancies that bedevilled the appellant's acquisition of the suit property. Importantly, there was no evidence to show that the registration regime was changed from GLA to RTA since no conversion of the legal regime of the suit property to RTA from GLA was established by the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants before the trial court.

59. Having considered the evidence on record, we agree with the learned Judge that:

“In light of the glaring discrepancies, this Court finds and holds that the title held by the 2<sup>nd</sup> Defendant is in conflict with the legal regime under which the suit property was held and registered. The 2<sup>nd</sup> Defendant's title is ripe for cancellation.”

60. Although the learned Judge found that fraud was not proved, section 26(1)(b) of the *Land Registration Act* also applies where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. While we have no evidence that the appellant's acquisition of the title was through a corrupt scheme, it is clear to us that the manner in which the 1<sup>st</sup> respondent's title was lost was unprocedural and illegal.

61. We find no merit in this appeal.

62. As regards the Notice of Cross-Appeal by the 6<sup>th</sup> and 7<sup>th</sup> respondents, they were substantially the grounds relied upon by the appellant in support of the appeal. The only new ground raised therein, which in any case, was in support of the appeal, was that the appellant's submissions were not considered by the trial court. According to the learned Judge, although the directions on filing of written submissions were given on 12<sup>th</sup> February 2024, by the time of writing the judgment, only the 1<sup>st</sup> respondent had filed submissions dated 6<sup>th</sup> March 2024. On 12<sup>th</sup> February 2024 the learned Judge directed that:

“The Plaintiff is granted leave of 14 days from the date hereof to prepare and serve their submissions. The Defendants are granted corresponding leave upon service. Judgement shall be delivered on 11/04/2024.”

63. The 6<sup>th</sup> and 7<sup>th</sup> respondents complained that the 1<sup>st</sup> respondent filed the submissions too late in the day and never served them and that they only learnt from the e-filing portal that they had been filed. The 6<sup>th</sup> and 7<sup>th</sup> respondents then filed their submissions on 13<sup>th</sup> March 2024. We appreciate the role played by submissions in drawing the court's attention to the salient factual and legal issues in a dispute. That role ought not to be underestimated. We do not know when the learned Judge wrote the judgement. In this era of e-filing, we would urge Judges, for the sake of ensuring that justice is done to all parties, particularly where it is evident that a party who ought to have filed his submissions earlier, did so out of time, to countercheck if the other parties did file their submissions before embarking on the preparation of a judgement. It matters not, in those circumstances, if the other parties also filed their submissions out of time since, in those circumstances, the blame lies with the party who ought to have filed and served his submissions first. As this Court held in *Trust Bank Limited v Amalo*



Company Limited [2002] 2 KLR 627; [2003] 1 EA 350, the principle which guides the Court in the administration of justice when adjudicating on any dispute is that where possible, disputes should be heard on their own merit, and errors should not necessarily deter a litigant from the pursuits of his right, and further that the court is obliged to look at the documents on record even though filed out of time unless for a reason other than mere lateness, it considers it undesirable to do so.

64. Having said that, it is the law that submissions are not evidence in a case. Courts do often deliver judgements even where submissions are not filed. A judgement does not cease to be one simply because submissions were not filed or considered. That was the position adopted by this Court in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR where it was held that:

“Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one.

Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

65. In light of our finding hereinabove, we find no merit in the appeal and the cross-appeal, which we dismiss with costs to

**DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF SEPTEMBER ,2025**

**D.K .MUSINGA**

.....

**PRESIDENT**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**G. V .ODUNGA**

.....

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

