



**Charo v Kenya Airways Limited (Civil Appeal 32 of 2020)
[2025] KECA 1700 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1700 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 32 OF 2020
P NYAMWEYA, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
OCTOBER 24, 2025**

BETWEEN

JAPHET NOTI CHARO APPELLANT

AND

KENYA AIRWAYS LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Malindi (J. O. Olola, J.) delivered on 14th March 2019 in E.L.C Case No. 10 of 2008)

JUDGMENT

1. The genesis of the instant appeal is the suit filed by the respondent, Kenya Airways Limited, against the appellant, Japhet Noti Charo, in Malindi ELC Civil Suit No. 10 of 2008 vide a plaint dated 5th March 2008 in which the respondent prayed for:
 - “(a) A declaration that the Plaintiff is the owner of all that parcel of land known as LR No. 5785 situate in Malindi District;
 - b. An order of eviction against Japhet Noti Charo Shutu from all that parcel of land known as LR No. 5785-situate in Malindi District and an order that Court Bailiffs do restore possession of LR No. 5785 to the Plaintiff, Kenya Airways Ltd;
 - b. A permanent injunction restraining the Defendant or his agents and servant from entering upon or trespassing on all that parcel of land known as LR No. 5785- situate in Malindi District or from construction or from interfering in any manner whatsoever with the Plaintiff’s legal right to quietly possess and use the said premises;
 - c. Costs of the suit, and



- d. Any other relief that the Court may deem fit to grant.”
2. The respondent’s case was that it was the registered owner of LR No. 5785 situate in Malindi District (the suit property); that, in or about July 2006, the appellant, without the respondent’s consent or authority, wrongfully entered the suit property and took possession thereof; that the appellant had since 2008 commenced construction of a house on the suit property; that, by reason of the matters aforesaid, the respondent had been deprived of the use and enjoyment of the suit property, and has thereby suffered loss and damage; the appellant’s acts amounted to trespass, which was continuing; and that, despite demand and notice to the appellant to vacate the suit property, he refused, failed or neglected to do so.
3. In his statement of defence and counterclaim dated 15th May 2008, the appellant denied the respondent’s claim and averred that the suit property was their ancestral land; and that it was lawfully allotted to him as an “unsurveyed residential plot ‘D’ Malindi Municipal in 1998”. In his counterclaim, the appellant averred that the respondent, in collusion with officers in the Ministry of Lands fraudulently caused it to be registered as the proprietor of the suit property well aware that it belonged to the appellant; that the Commissioner of Lands issued a new allotment letter to the appellant thereby nullifying the title previously issued to the respondent; and that, therefore, the respondent’s title was null and void and ought to be cancelled. The particulars of the alleged fraud attributed to the Attorney General and the Ministry of Lands were:
- “ a. Issuing title irregularly and illegally without complying with the law.
 - b. Depriving the defendant of his interest in the suit property as the beneficial owner, without giving him a hearing and particularly acting without the benefit of a ground report.
 - c. Issuing title to the plaintiff in the absence of valid records of lawful allotment.
 - d. Requiring the plaintiff to supply the alleged letter of allotment and relying on it to issue title.
 - e. Issuing title on an expired document whose origin was at best suspect and concerned property in Trans-Nzoia District
 - f. Assisting a negligent allottee to get title to land it should not get.”
4. By reason of the matters aforesaid, the appellant prayed that the respondent’s title be cancelled; that the title register be rectified by inserting his name as the registered owner of the suit property; and that the respondent’s suit be dismissed with costs and judgment entered in his favour as prayed in his counterclaim.
5. It is noteworthy that none of the particulars of fraud pleaded as aforesaid were attributed to the respondent.
6. In its judgment dated 14th March 2019, the ELC (J. O. Olola, J.) allowed the respondent’s claim with costs and dismissed the appellant’s counterclaim with costs to the respondent. According to the learned Judge:
- “ 27. ... the Defendant conceded that the suit property was allocated to him on 12th April 2001. He was therefore not the owner of the suit property when the same was allocated to the Plaintiff on 6th May 1991 as he purports in his pleadings.



In my view, once the property was allocated by the Commissioner of Lands and title was issued to the Plaintiff on 15th July 1994, the suit property was no longer available for allocation and could not be so allocated more than six years after the title therefor was issued.

28. At any rate because of the seriousness of the allegations of fraud, which is in itself a criminal act, the burden of proof is on the party who alleges it and the standard of proof thereof is more than a mere balance of probabilities. As it were, the Defendant did not show how the Plaintiff colluded with the unnamed officers from the Ministry of Lands to irregularly and illegally issue the Plaintiff with the title of the disputed property. While the process of allocation of the land to the Plaintiff was dogged by delays and some confusion at the initial stages, there was nothing to suggest that the Plaintiff and or any other official for that matter had engaged in acts of fraud prior to the issuance of the Grant.”

7. Aggrieved by the learned Judge’s decision, the appellant moved to this Court on appeal on the following 8 grounds:

- “1. That the learned trial judge erred on both points of law and fact by shutting his eyes on the evidence of fraud and all the defects in the Plaintiff’s title which ought to have been declared a nullity in all fairness.
2. That the learned trial judge erred on both points of law and fact [by] failing to appreciate the evidence adduced by the Appellant.
3. That the learned trial judge ought to have forwarded the file to Justice Angote who heard all the witnesses starting from the plaintiff’s case till the close of the defendant’s case for purposes of writing judgment.
4. That the learned trial judge grossly erred on both points facts and law by failing to appreciate the fact that the Respondent’s documents as submitted could not support the Respondent’s claim or at all.
5. That the learned judge ignored all the defects pointed out to the trial judge in the Respondent’s title as against the deed plan.
6. That the learned trial judge was bias in all fairness and in particular by failing to appreciate the Appellant’s title which has got no defects or at all.
7. That the learned trial judge’s decision and judgment was harsh, unfair, unreasonable as the same did not give any reasonable grounds why the Respondent’s title was considered genuine as against the Appellant’s’
8. That the learned trial judge in the superior court was not fair on the part of the appellant.”

8. In support of the appeal, learned counsel for the appellant, M s. Richard O. & Company, filed written submissions and a list of authorities dated 14th November 2024 citing 3 judicial decisions, which we have duly considered along with Mr. Otara’s oral highlights when the appeal came up for hearing on the Court’s virtual platform on 28th April 2025. Counsel urged us to allow the appeal.



9. In rebuttal, learned counsel for the respondent, M s. Ochieng, Onyango, Kibet & Ohaga, filed written submissions, list of authorities and a case digest dated 28th October 2022. Counsel cited 10 authorities which Mr. Ouma highlighted orally at the hearing of the appeal on the Court’s virtual platform on the date aforesaid. He urged us to dismiss the appeal.
10. This Court’s mandate on 1st appeal was espoused in *Ng’ati Farmers’ Co-Operative Society Ltd v Ledidi & 15 Others* [2009] KLR 331 as follows:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
11. However, we are conscious as cautioned by the predecessor to this Court in *Peters v Sunday Post Ltd* [1958] EA 424 that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”
12. In our considered view, two main issues commend themselves for our determination, namely: whether the appellant had proved fraud on the respondent’s part in obtaining its title to the suit property; and whether the learned Judge was at fault in upholding the respondent’s title to the suit property.
13. On the 1st issue, counsel for the appellant submitted that the letter of allotment of the suit property was addressed to the “Managing Director Kenya Airways” and not to “Kenya Airways Limited”; that letters of allotment are not capable of being transferred; and that, therefore, the Managing Director Kenya Airways could not have transferred the suit property to the respondent. Counsel cited the Supreme Court Decision in *Torino Enterprises Limited v Attorney General* [2023] KESC 79 (KLR) where the apex Court observed that a letter of allotment does not transfer title on the allottee.
14. On their part, counsel for the respondent submitted that the appellant did not adduce any evidence to prove the particulars of fraud set out in his plaint, or that the respondent was a party to such fraud; that the allegations were made against the officials of the Ministry of Lands who were not identified by name or sued by the appellant; and that, without any evidence in support of his assertions of fraud, the allegations remain frivolous and baseless, and that they were correctly rejected by the trial court.
15. Counsel cited this Court’s decision in the case of *Charles Karathe Kiarie & 2 Others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others* [2013] eKLR; and *R. G. Patel v Lalji Makanji* (1957) EA 134, highlighting the principle that allegations of fraud must be strictly proved; that the standard of proof is more than a mere balance of probability; and that fraud is treated as a matter of evidence.
16. In addition to the afore-cited cases of Kiarie and Patel, we take to mind the fact that, apart from the appellant’s sweeping statement that the respondent acquired its title fraudulently, no particulars of



fraud were pleaded against it in the plaint or proved in evidence at the trial. This Court in *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR had this to say:

“Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases ... in cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

17. It is trite law that he who alleges must prove. Section 107(i) of the *kenya act 1963 46 Evidence Act* provides that:

Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

18. The appellant having failed to prove fraud on the appellant’s part, we find no fault in the learned Judge’s finding that the allegations of fraud levelled at the respondent in obtaining its title to the suit property were baseless, which settles the 1st issue.

19. Turning to the 2nd issue as to whether the learned Judge erred in upholding the respondent’s title to the suit property, we take note of the contention by counsel for the appellant that the title was wrongfully issued in view of the fact that the letter of allotment was address to its Managing Director. We find no words to describe such interpretation of the law relating to corporations whose officers and directors constitute the hands and mind with which body corporates conduct their business. All we need to say is that quick refreshment of mind on the age-old tenets of company law on the role of chief officers who administer the business of bodies corporate, including exchanging correspondence through their office, would come in handy if one were to avoid the notion that a letter of allotment addressed to the office of a Managing Director of the respondent meant that title to the suit property ought to have been granted to him or her personally. Counsel’s submission can only be treated as a pinch of humour that lightens the solemnity with which the Court conducts its judicial business.

20. Having said that, we take to mind that the respondent obtained title to the suit property as its first proprietor having received its letter of allotment dated 6th May 1991. Its title document was issued three years later on 15th July 1994. On the other hand, the basis of the appellant’s claim over the suit property is a letter of allotment purportedly issued on 12th April 2001 and a title document purportedly registered on 19th April 2011, a whole decade after the appellant acquired its title to the property, which was not available for allotment to any other person.

21. This Court in *Embakasi Properties Limited & another v Commissioner of Lands & Another* [2019] eKLR held as follows:

“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 *kenya act 2012 3 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”.

22. In the same vein, this Court in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR stated that:

“... when a registered proprietor’s root of the title is under challenge, it is not sufficient to dangle the instruments of title has 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 would not be noted in the register.”

23. A cursory look at the record as put to us does not reveal any evidence of fraud or misrepresentation on the respondent’s part in acquisition of its title to the suit property. Its root of title remains unshaken and indefeasible. Accordingly, we find no fault in the learned Judge’s decision to uphold it.

24. In view of the foregoing, we reach the inescapable conclusion that the appeal fails and is hereby dismissed. Consequently, the judgment and decree of the ELC at Malindi (J. O. Olola, J.) in Malindi ELC Civil Suit No. 10 of 2008 dated 14th March 2019 is hereby upheld.

25. The appellant shall bear the costs of the appeal.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF OCTOBER 2025.

P. NYAMWEYA

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

..... **JUDGE OF APPEAL**

G. W. NGENYE-MACHARIA

..... **JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

Deputy Registrar

