

**IN THE COURT OF  
APPEAL AT MALINDI  
(CORAM: NYAMWEYA, LAIBUTA & NGENYE, JJ.A.)**

**CIVIL APPEAL NO. E001 OF 2022**

**BETWEEN**

**ASILI JUANO DIDO** (*Suing on her own behalf and on behalf of 17 Others*).....**APPELLANTS**

**AND**

**STIMA INVESTMENT CO-  
OPERATIVE  
SOCIETY LTD..... 1<sup>ST</sup>  
RESPONDENT  
NATIONAL LAND COMMISSION..... 2<sup>ND</sup>  
RESPONDENT COUNTY GOVERNMENT OF LAMU... 3<sup>RD</sup>  
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 17<sup>th</sup> March 2022*

*in*

***Petition No. 13 of 2016  
Consolidated with  
E.L.C No.109 of 2016 and  
E.L.C No. 110 of 2016)***

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**JUDGMENT OF THE  
COURT**

1. By a petition dated 27<sup>th</sup> July 2016 and filed in the Environment and Land Court (the ELC) at Malindi in **ELC Petition No. 13 of 2016**, the 1<sup>st</sup> respondent, Stima Investment Co-operative Society Limited, sought as against the appellants and

the 2<sup>nd</sup> and 3<sup>rd</sup> respondents (Asili Juano Dido, the National Land Commission and the County

Government of Lamu respectively) : *“(i) a declaration that the 1st respondent was the bona fide proprietor of the suit property to wit L.R No. 29207 with an indefeasible title against the appellants and the whole world; (ii) an order of injunction to restrain the appellants from claiming title to, transferring, alienating, disposing off, entering into, remaining on, interfering with, wasting and/or dealing in any manner whatsoever with the suit property; (iii) an order of prohibition to restrain the 2nd Respondent from investigating, inquiring on, hearing and determining the complaint lodged by the appellants and/or any other complaint relating to the suit property; (iv) an order of certiorari to bring to the Court and quash any decision or findings of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on the complaint lodged by the appellants over the suit property; and (v) that, in any event, the costs of the Petition be borne by the Respondents.*

2. From the scanty record as put to us, and in the absence of page 13 of the petition, we can only gather from the impugned judgment that the 1<sup>st</sup> respondent’s petition was founded on the grounds that it was the registered proprietor of the parcel of

land registered as LR

No. 29207 situate North of Lamu County (the suit property) and measuring 27.26 Hectares in the approximate, having purchased it from one Ahmed Mohamed Omar (Omar) whereupon a transfer was registered in its favour on 18<sup>th</sup> December 2015; that, by a letter dated 8<sup>th</sup> April 2016, the 2<sup>nd</sup> respondent informed the 1<sup>st</sup> respondent that the appellants had lodged a complaint alleging that some strange people had invaded their land, *to wit*, the suit property; that the 2<sup>nd</sup> respondent had no jurisdiction or powers in respect of private property, and that it could not purport to carry out any investigations of whatever nature in respect of the suit property; that, by a letter dated 12<sup>th</sup> April 2016, the 3<sup>rd</sup> respondent communicated to the 1<sup>st</sup> respondent its decision not to grant development approvals on the grounds that it (the 3<sup>rd</sup> respondent) had established that the suit property was the subject of a dispute between the 1<sup>st</sup> respondent and other claimants; and that "...that, by a letter dated 12<sup>th</sup> April 2016, the 3<sup>rd</sup> respondent communicated to the 1<sup>st</sup> respondent its decision not to grant development approvals on the grounds that it (the 3<sup>rd</sup> respondent) had established that the suit property was the subject of a dispute between the 1<sup>st</sup> respondent and other claimants, and that it (the 3<sup>rd</sup> respondent) had received complaints from a group of people

claiming ownership of the suit property; and that the 1<sup>st</sup> respondent established that it was the appellants that were illegally laying claim to the suit property.

3. According to the 1<sup>st</sup> respondent, there was eminent danger of the appellants interfering with, degrading, wasting and destroying the suit property. It further contended that the complaint lodged by the appellants and the subsequent inquiries and investigations by the 2<sup>nd</sup> respondent, and the decision by the 3<sup>rd</sup> respondent over the suit property, violated the 1<sup>st</sup> respondent's right to quiet uninterrupted possession and enjoyment of the suit property, as well as its right to fair administrative action as enshrined in Article 47 of the Constitution.

4. The 1<sup>st</sup> respondent's petition was supported by the affidavit of Nelson Irungu (its Chief Executive Officer) sworn on 27<sup>th</sup> July 2016 essentially deposing to the afore-mentioned grounds on which the petition was anchored.

5. In response to the 1st respondent's petition, the appellants filed a replying affidavit of Asili Juano Dido (Dido) sworn on 21st February 2017 for her own behalf and on behalf of the other 17 appellants. In her replying affidavit, Dido deponed that the appellants and many others own, work and reside on portions of the suit property; that the suit property comprises trust land held by the 3rd respondent for the appellants' benefit; that the survey and acquisition by the 1st respondent of the suit property was undertaken by corrupt means; that the 1st respondent was not in possession of the suit property; and that the court had directed that **ELC Case No. 109 of 2016 - Ahmed Mohamed Omar v Mwanamkuu Bahani Bwahaj & 17 Others** and **ELC Case No. 110 of 2016 - Taumu Somobwana Bakari & 65 Others v Ahmed Momhamed Omar & 5 Others** be heard together with their petition.

6. On their part, the 2<sup>nd</sup> respondent filed a replying affidavit of Brian Ikol, its Deputy Director Legal Affairs and Enforcement, sworn on 5<sup>th</sup> August 2015 in which he deponed that the 2<sup>nd</sup> respondent had the jurisdiction to address the appellants' complaint; that, acting on the complaint, they wrote to the 1<sup>st</sup>

respondent notifying them of the

complaint, and requiring that they confirm whether they were undertaking any project on the suit property, the acreage of the suit property and the relevant documentation in support; that, instead of filing the petition, the proper thing would have been for the 1<sup>st</sup> respondent to appear before the 2<sup>nd</sup> respondent and make their submissions on the issue of jurisdiction; that no prejudice would be suffered by the 1st respondent to appear before the 2nd respondent; that the issue as to whether the suit property was private or public land could not be determined by the ELC at that point in time; that the 1st respondent should not be allowed to shop for a favourable forum; and that the appellants had a legitimate expectation to have their complaint determined by the 2nd respondent.

7. In addition to the foregoing, the 3rd respondent filed its replying affidavit of Florence Ndung'u (its Chief Officer in the Department of Lands, Infrastructure, Natural Resources and Water) sworn on 5th September 2015 in which she averred that, sometime in September 2015, the 3rd respondent received an application from Eco-Plan Kenya, acting on behalf of the 1st

respondent, requesting for

development permission and change of use of the suit property from the then current use for shops and offices to residential cum commercial use; that the application was submitted together with a proposal and plan to have the suit property subdivided into 459 plots

; that she wrote seeking comments from the County Surveyor, the County Lands Officer and the County Physical Planner, and that neither of them objected to the 1st respondent's proposal save that certain conditions stipulated in their comments be met; that, pursuant to the recommendations, the Director Lands, Physical Planning and Urban Development visited the site for inspection; that he was confronted by an angry mob, who alleged that the suit property was their ancestral land; that the suit property was initially allocated to one Ahmed Mohamed Omar and subsequently sold to the 1st respondent; that, in light of the formenting dispute, the 3rd respondent's Director aforesaid considered it fit to defer the approvals to allow time for the 1st respondent to have the dispute resolved; that the 3rd respondent acted within their powers and did not violate the 1st respondent's rights as alleged or at all; and that the 3rd respondent was wrongly joined in the petition, which was an abuse of the court

process.

8. **Malindi ELC No. 109 of 2016** having been struck out on 18th January 2019, the 1st respondent's petition was consolidated and heard together with **Malindi ELC Case No. 110 of 2016 - Taumu Somobwana Bakari & 65 Others v Ahmed Momhamed Omar & 5 Others**, in which the plaintiffs therein prayed for: (a) a declaration that all that parcel of land situated at Hindi Magogoni, Lamu, Lamu County purportedly known as L.R No. 29207 and registered as Grant No. 60203 did not belong either to the 1st or 2nd Defendants (Omar and the 1st respondent herein), but that the Plaintiffs' ancestral rights and interest are genuine; (b) an order to issue compelling the 3rd and 4th Defendants (the 2nd respondent herein and the Chief Land Registrar) to cancel registration of the title known as Grant No. CR 60203 L.R. No. 29207; (c) a permanent injunction restraining the 1st and 2nd Defendants (Omar and the 1st respondent herein) either by themselves, their servants, agents and employees from evicting the Plaintiffs, or from fencing, trespassing into, interfering with or constructing any structure or fence that may prevent any of the Plaintiffs from accessing any part of the suit land

as occupied and possessed by them; (d) costs of the suit; and (e) any other appropriate relief.

9. In its judgment dated 17th March 2022, the ELC (**J. O. Olola, J.**) allowed the 1st respondents petition as prayed in **ELC Petition No. 13 of 2016** with orders that the 1st respondent's costs be borne jointly and severally by the appellants and the 3rd respondent. Consequently, the plaintiffs' suit in **ELC Case No. 110 of 2016** stood determined in terms of the decision in the petition with which it was consolidated. According to the learned Judge, the two consolidated suits stood determined in the following terms:

*“(i) A declaration is hereby made that the Petitioner [the 1st respondent herein] is the bona fide proprietor of the suit property to wit L.R No. 29207 situated in Hindi, Lamu with an indefeasible title against the 1st Respondent [the appellants herein] and the whole world;*

*(ii) A permanent order of injunction is hereby issued restraining the 1st Respondents [the appellants herein] from claiming title to, transferring, alienating, disposing off, entering into, remaining on,*

*interfering, wasting and/or dealing in any manner whatsoever with the suit property L.R No. 29207;*

*(iii) An order of certiorari is hereby issued bringing to this Court and quashing the decisions of the 3rd Respondent as contained in their letter dated 12th April, 2016 on the complaint lodged by the 1st Respondents [the appellants] over the suit property L.R No. 29207;”*

10. For the avoidance of doubt, reference to “1<sup>st</sup> respondents” in the impugned judgment means and includes the appellants in the instant appeal and the plaintiffs in **ELC Case No. 110 of 2016**, whose claims stood dismissed.

11. Aggrieved by the learned Judge’s decision, the appellants moved to this Court on appeal on 8 grounds faulting the learned Judge for: failing to properly evaluate the evidence on record; failing to find that the respondents had failed to respond to the counterclaim made against them in **Malindi ELC Case No. 109 of 2016**; failing to find that the respondents had failed to respond to the claims made against them in **Malindi ELC Case No.**

**110 of 2016;** failing to

appreciate that the appellants had established on a balance of probabilities that they and their ancestors were and continued to be in occupation of the suit property, and that they were in actual possession thereof; misapprehending the appellants' defences and counterclaims against the respondents; failing to find that the respondents' title was acquired in a mysterious and corrupt manner; and for dismissing the appellants' claim.

12. In support of the appeal, learned counsel for the appellants, M/s. Muli & Ole Kina, filed written submissions and list of authorities dated 30<sup>th</sup> October 2024 citing 7 judicial authorities to which we will shortly return.

13. In rebuttal, learned counsel for the 1<sup>st</sup> respondent, M/s. Waruhiu, Kowade & Ng'ang'a, filed written submissions and list of authorities dated 22<sup>nd</sup> April 2024 citing 5 judicial authorities, which we will shortly consider.

14. The 2<sup>nd</sup> respondent did not file any submissions in the appeal. On their part, counsel for the 3<sup>rd</sup> respondent, M/s. Swaleh Kulthum Harith, filed written submissions and a list of authorities citing two judicial decisions.

**15.** This Court's mandate on 1<sup>st</sup> 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.”***

16. 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.”***

17. In our view, the issues that commend themselves for our determination are: (i) whether the 1<sup>st</sup> respondent’s title to the suit property was acquired irregularly or fraudulently, and whether the learned Judge was at fault in upholding it; (ii) whether the appellants’ claim of ancestral rights over the suit property or their continued occupation thereof defeated the 1<sup>st</sup> respondent’s title thereto; (iii) whether the respondents effectively defended the appellants’ claims in **Malindi ELC Case Nos. 109 and 110 of 2016**; (iv) whether, in his judgment, the learned Judge misapprehended the appellants’ defences and counterclaims against the respondents; and (v) whether the learned Judge was at fault in dismissing the appellants’ claims.

18. On the 1<sup>st</sup> issue as to whether the 1<sup>st</sup> respondent’s title to the suit property was acquired irregularly or fraudulently, and

whether it was improperly upheld, the learned Judge had this to say:

*“47. While the 1st Respondents [the appellants and the claimants in **ELC Case No. 110 of 2016**] accused the Petitioner [the 1st respondent herein] and its predecessor in title of obtaining registration of the suit property fraudulently and through corruption and collusion with Government Officers, there was no such evidence of fraud or corruption as it did emerge that the land had been so registered as early as 1998 even though the title was issued much later.*

*48. Where one holds a title such as the one in possession of the Petitioner [the 1st respondent], Section 26 of the Land Registration Act, Act No. 3 of 2012 provides as follows:*

*‘26 (1). The certificate of title issued by the Registrar upon registration or to a purchaser of land upon 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, unprocedurally or through a corrupt scheme;*

*(2) A certified copy of any registered instrument signed by the Registrar and sealed with the seal of the Registrar, shall be received in evidence in the same manner as the original.’*

*49. Thus having acquired such a title it is presumed to be valid and it was therefore incumbent upon the parties disputing the same to demonstrate that it was acquired illegally or without complying with due process. The 1st Respondents have not done that and there was therefore no basis upon which this Court could hold that the suit property does not belong to the Petitioner.”*

19. Faulting the learned Judge’s decision, counsel for the appellants submitted as follows:

*“12. .... The trial judge did not consider the land’s nature, category and prior ownership, resulting in a void title transferred to the Petitioner. The land was trust land held by Lamu County Council for the benefit of the Appellants and similarly situated persons. The title’s acquisition process was unlawful for several reasons, including lack of public participation, improper survey and failure to advertise the land’s availability for alienation.”*

**20.** On the authority of **Funzi Island Development Limited & 2**

**Others v County Council of Kwale & 2 Others** [2014] KECA 882

(KLR); and **Munyu Maina v Hiram Gathiha Maina** [2013] eKLR,

counsel rightly submitted that a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular.

**21.** Citing **Dina Management (K) Limited v County Government**

**of Mombasa & 5 Others** [2023] KESC 30 (KLR); and **Munyu Maina**

**v Hiram Gathiha Maina** (supra), counsel contended that the

1<sup>st</sup>

respondent was not a *bona fide* purchaser for value and that, where

there is a challenge to the validity of a title, it is not enough to brandish the title, but that one must go to the root of that title.

22. On their part, counsel for the 1<sup>st</sup> respondent submitted that the appellants led no evidence to prove illegality, fraud or corrupt scheme on the part of the 3rd respondent, which they claimed had actuated illegal acts of alienation of the suit property; that the Grant in respect of the suit property was issued in 1998 and, since then, it remained unchallenged until they filed **ELC Case No. 110 of 2016**; and that the appellants had never held any title to the suit property capable of impeaching the 1<sup>st</sup> respondent's title.

**23.** Counsel cited the Ugandan case of **Katende v Haridar & Company Limited** [2008] EA 173, submitting that, based on the principles set out therein, it was incumbent upon the appellants to prove that the 1<sup>st</sup> respondent acted in breach thereof in consequence of which it was not a *bona fide* purchaser of the suit property for value.

24. The 3<sup>rd</sup> respondent made no submissions either way on this particular issue despite being best placed to confirm whether the suit property was, prior to the Grant to Omar in 2013, held in trust for the appellants and the claimants in **ELC Case No. 110 of 2016** as alleged or at all.

25. A cursory look at the record as put to us shows that the appellants' claim in **ELC Case No. 110 of 2016** was founded on what they referred to as "ancestral home, being community land" as pleaded in paragraph 10 of their undated plaint filed on 12th May 2016. In paragraph 17 thereof, the appellants averred that:

*"17. The Plaintiffs [appellants and the claimants in that suit] claim that the alienation of the suit land by the THIRD DEFENDANT [the 2nd respondent herein] and allocating the same to the FIRST and or the SECOND defendant [Omar and the 1st respondent herein] was illegal and ought to be reversed."*

26. It is instructive that nowhere in their plaint in **ELC Case No. 110 of 2016** did the appellants and other claimants plead unlawful acquisition by the 1st respondent of the suit property or the particulars of the alleged illegality. Neither did they plead the alleged *"lack of public participation, improper survey and failure*

*to advertise*

*the suit land's availability for alienation".* Apart from the claim that the suit property comprised their "ancestral home", the allegations of illegality are raised for the first time in their learned counsel's written submissions, which do not constitute pleadings or evidence. Neither were they in issue for determination by the trial court and, consequently, cannot be raised for our determination in the instant appeal (see: this Court's decision in

**Daniel Toroitich Arap Moi v**

**Mwangi Stephen Muriithi & Another** [2014]eKLR; and **Robert**

**Ngande Kathathi v Francis Kivuva Kitonde** [2020] eKLR).

Accordingly, the ground of appeal founded on the alleged illegality in acquisition of the 1st respondent's title to the suit property does not hold.

27. The same applies to learned counsel's submission that the suit property constituted trust land. Nowhere in their plaint did the appellant's plead or adduce evidence of such a trust, which the 3rd respondent was well placed to testify to. In the absence of any evidence from the appellants and other claimants as well as from the 3rd respondent, that the suit property was trust land

held in trust

for them, the only reasonable conclusion is that the property was government land available for allotment to Omar. The Grant on pages

107 and 108 of the record of appeal clearly shows that the suit property was the subject of a Grant by the President of the Republic of Kenya registered under the Registration of Titles Act in the name of Omar on 24th June 2013 and subsequently transferred to the 1st respondent on 18th December 2015 pursuant to an uncontested agreement for sale dated 10th July 2015.

28. To submit as counsel did this late in the day that the suit property was trust or community land held by the 3rd respondent for the benefit of the appellants and the other claimants in **ELC Case No. 110 of 2016** is, with all due respect, evidence from the bar. To our mind, the Grant to Omar by the President of the Republic of Kenya was not in respect of trust, community or ancestral land within the meaning of Article 63(2) (d)(ii) and (iii) of the Constitution, but public land (as defined in Article 62 of the Constitution) capable of alienation to individuals as private property. We need not say more in view of the fact that this issue

has been raised for the first time before us.

29. Having said that, it would be remiss of us not to clear the air by pronouncing ourselves on what constitutes community land as defined in the Constitution. Article 63 defines community land thus:

**63. (2) Community land consists of—**

... ..

**(d) land that is—**

... ..; ...

**(ii) ancestral lands and lands traditionally occupied by hunter- gatherer communities; or**

**(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).**

30. To our mind, the suit property was not trust or community land.

The only other question that calls for an answer is whether the 1st respondent was a bona fide purchaser of the suit property, which the appellants and other claimants contend he was not.

31. Black's Law Dictionary (8th Edition) defines a "bona fide purchaser" as:

**"One who buys something for value without notice of another's claim to the property and without actual or**

***constructive notice of any defects in or infirmities, claims or equities against the***

***seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."***

32. This Court in ***Samuel Kamere v Land Registrar*** [2015] eKLR

held that:

***"... in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property ...."***

33. When the 1st respondent entered into a sale agreement with Omar on 10th July 2015 and had the transfer registered on 18th December 2015, none of the suits in issue had been filed against the two or either of them to raise any concern as to the ownership of the suit property. We find nothing to suggest that the 1st respondent did not acquire a valid and legal title from the vendor. Prior to purchase, the 1st respondent undertook a search to establish that the suit property was registered in the vendor's name and thereafter paid a sum of Kshs107,250,000. Accordingly, the appellants' and other claimants' unsubstantiated contention

that the 1st respondent was

not a *bona fide* purchaser of the suit property for value does not hold. That settles the 1st issue before us.

34. Turning to the 2nd issue as to whether the appellants' claim of ancestral rights over the suit property or their continued occupation thereof defeated the 1<sup>st</sup> respondent's title thereto, we hasten to observe that, having found that the 1st respondent's title is indefeasible in view of the fact that the 1st respondent was a *bona fide* purchaser for value, the only reasonable conclusion to be reached in the absence of any evidence of illegality, or that the suit property was trust land, is that the appellants' claim of ancestral rights over the suit property, or their continued occupation thereof, does not hold. Neither does it defeat the 1<sup>st</sup> respondent's title thereto. In any event, their occupation for however long a period could not amount to anything in the nature of adverse possession since no such rights avail against public land. In principle, adverse possession cannot be used to acquire title to public, trust or government-owned land. This means that, even if someone occupies public land for a long period and meets the other requirements for adverse possession,

they cannot claim ownership thereof by adverse possession (see:

**Patrick Kirimi M'nganabu v Njeru Muchai** [2021] eKLR). We need

not say more since no such claim was laid by the appellants otherwise than by way of inference from their alleged long period of occupation.

35. On the 3rd issue as to whether the respondents effectively defended the appellants' claims in **Malindi ELC Case Nos. 109 and 110 of 2016**, suffice it to observe that, gathering from paragraph 11 of the impugned judgment, **ELC Case No. 109 of 2016 - Ahmed Mohamed Omar v Mwanamkuu Bahani Mbwahaj & 17 Others** was struck out on 18<sup>th</sup> January 2019. Moreover, none of the respondents in the instant appeal was party to that suit and therefore, there was no claim against them to defend.

36. As for **Malindi ELC No. 110 of 2016** to which the respondents were named as defendants, we find nothing on record to suggest that any of them filed their defence to the

appellants and claimants' claim. If they did, such pleadings are not on record. Be that as it may, an

extract of the proceedings of 15th February 2017 is instructive and settles the matter. As the learned Judge directed upon consolidation of the 1st respondent's petition and **Malindi ELC Case No. 110 of 2016:**

*“Court: There are a number of Parties involved in the consolidated suits. A number of documents have not been exchanged either. The Parties have however agreed to maintain Status Quo and proceed to hearing. Accordingly, I direct that the Parties do exchange documents afresh. The Petitioner should serve all parties with the Petition and every party should serve whatever documents filed in any of the files upon the other parties within 30 days of today's date.”*

**37.** To our mind, the record is clear that the parties were in agreement to proceed with the two consolidated causes (the petition and **ELC Case No. 110 of 2016**) on the basis of the pleadings as filed and the evidential documents as exchanged in obedience to the directions aforesaid. To turn around this late in the day and allege that the respondents did not file defences to the suit in **ELC Case No.**

**110 of 2016** would be in disregard of the directions and the procedure agreed upon by the parties. In any event, nothing stood in the appellants' or any other party's way to apply for default judgment or other orders. Moreover, the effect of

consolidation was to

constitute the 1<sup>st</sup> respondent's petition effectively a defence to the appellants' and other claimants' suit in **ELC Case No. 110 of 2016**. Likewise, the appellants' reply to the 1<sup>st</sup> respondent's petition constituted their defence to his petition. Accordingly, nothing turns on this issue as parties were bound by their pleadings as filed.

**38.** Pleadings are the bedrock upon which all the proceedings derive from. This settled position was re-affirmed by this Court in **Independent Electoral and Boundaries Commission &**

**Another**

**v Stephen Mutinda Mule & 3 others** [2014] eKLR which cited

with approval the decision of the Supreme Court of Nigeria in

**Adetoun**

**Oladeji (NIG) v Nigeria Breweries PLC** SC 91/2002 where Adereji,

JSC expressed himself thus on the importance and place of pleadings:

***“... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with***

***the averments of the pleadings goes to no issue and must be disregarded.....***

***...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any***

***surprises by which no opportunity is given to the other party to meet the new situation.”***

**39.** In the same vein, the Supreme Court of Kenya in **Raila Amolo**

**Odinga & Another v IEBC & 2 others** [2017] eKLR found and held

as follows with regard to the essence of pleadings:

***“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings ....”***

40. Turning to the closely linked 4<sup>th</sup> and 5<sup>th</sup> issues as to whether the learned Judge misapprehended the appellants’ defences and counterclaims against the respondents; and whether the learned Judge was at fault in dismissing the appellants’ claims. We think

not. A cursory look at the impugned judgment discloses a  
meticulous

analysis of the evidence adduced at the trial of the two consolidated suits. We need not overemphasise the fact that the learned Judge was not obligated to provide a detailed transcript of every element of the evidence considered in reaching his decision (see: ***Effort Mutanda v S*** [2015] ZAFSHC 13).

41. However, we take to mind the submissions by counsel for the appellants that the Judge was at fault in “incorrectly categorising them as reliant on the County Government of Lamu”, whose import was not substantiated in the submissions for our scrutiny and pronouncement, save to observe that the 3<sup>rd</sup> respondent could have lent clarity to the issues raised by stating whether they were indeed trustees for the appellants in respect of the suit property as alleged. However, nothing turns on this submission since the suit property was public and not trust or community land.

42. Apart from the foregoing sweeping statements, including the alleged failure on the respondents’ part to defend the appellants’

counterclaim, it should be borne in mind that the only counterclaim

raised by the appellants was in **ELC No. 109 of 2016**, which was struck out. The appellants are not contending that their counterclaim survived the striking out, or what stood in their way of pursuing any claim(s) (if any) in alternative proceedings against Omar. However, it is not lost on us that the suit in issue was filed in 2016 after Omar had ceased to be the registered proprietor of the suit property in 2015 and, therefore, the defendants in that suit had no cause of action by way of a counterclaim against him. Neither did he have the *locus standi* to maintain the 2016 suit against them, which explains the trial court's decision to strike it out. And that settles the 4<sup>th</sup> and 5<sup>th</sup> issues before us.

43. Having carefully considered the record of appeal, the grounds on which it is anchored, the impugned judgment, the respective submissions, the cited authorities and the law, we find that the appeal fails and is hereby dismissed in its entirety. Consequently, the judgment and decree of the ELC (**J. O. Olola, J.**) delivered on 17<sup>th</sup> March 2022 is hereby upheld.

44. The appellants shall bear the 1<sup>st</sup> and 3<sup>rd</sup> respondents' costs of the appeal.

Orders accordingly.

**Dated and delivered at Mombasa this 24<sup>th</sup> 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**