

**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: GATEMBU, MUMBI NGUGI & KORIR,**

**JJ.A.) CIVIL APPEAL NO. 356 OF 2019**

**BETWEEN**

**PETER KAKUI MUTISO.....APPELLANT**

**AND**

**JOEL NZUKI NZIOKA**

*(Suing as the personal representative of*

**ESTHER NTHEYA NZIOKA (Deceased).....RESPONDENT**

*(Being an appeal against the judgment of the Environment and Land Court at  
Machakos (O.A. Angote, J.) dated 8<sup>th</sup> February 2019*

*in*

**HCCRC No. 47 of 2000)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. A perusal of the record of appeal shows that through the plaint dated 9<sup>th</sup> March 2000 and amended on 8<sup>th</sup> November 2017, the appellant, Peter Kakui Mutiso, sued Esther Nthenya Nzioka ("**Esther**") asserting that she had invaded his land parcel No. **Mitamboni/Kaiani/1312**. He sought a permanent injunction against her or her servants from entering or using the suit property. According to the appellant, Esther had trespassed into the suit property in the year 2000. Esther passed away during the pendency of the suit and was substituted by Joel Nzuki Nzioka who is the respondent in this appeal. In reply, the respondent through the Amended Defence and Cross Action dated 23<sup>rd</sup>

October 2017 opposed the appellant's case and also laid claim to the suit property.

2. In the judgment delivered on 8<sup>th</sup> February 2019, Angote, J. dismissed the suit on the grounds that it was filed contra-statute. The learned Judge proceeded to allow the cross action and cancel the appellant's title deed issued on 10<sup>th</sup> February 2015, holding that it was issued based on misrepresentation.
3. The appellant, being dissatisfied with the judgment of the trial court, has appealed to this Court on 10 grounds, which we reproduce verbatim as hereunder:

- i. The learned trial Judge misdirected himself and erred in holding that the directions of the Land Adjudication and Settlement Officer to the Chief Land Registrar to issue a title deed pursuant to the decision of the Land Adjudication Officer and the process was erroneous despite that the Respondent never raised the ground that the title deed was acquired illegally, unprocedurally or through a corrupt scheme.***
- ii. The learned trial Judge misdirected himself and erred in placing undue reliance on the misinterpretation of the decision of the High Court quashing the Minister's award by Director of Land Adjudication and Settlement and views of the Chief Land Registrar to cancel the Plaintiff's title deed despite the said Director of Land Adjudication and Settlement and the Chief Land Registrar being not parties to the suit and cross action.***
- iii. The learned trial Judge erred and misdirected himself in holding that the appeal to the Minister***

***in respect of the suit land has never been determined to date and***

**indeed as directed by the High Court in judicial review miscellaneous Application No. 304 of 2013 the dispute between the Plaintiff and the Defendant is still pending as at the time the Plaintiff filed this suit in the year 2000 despite that the judicial review directions were given on 19<sup>th</sup> June 2015 after the title deed had been issued on 10<sup>th</sup> February 2015 and could not act retrospectively and the same was unreliable as they were given after the title deed had been issued.**

- iv. The learned trial Judge misdirected himself and erred in holding that the registration of the Plaintiff as the proprietor of the subject land can be altered according to the provisions of section 27(1) of the Land Adjudication Act despite that restrictions had already been removed and the land adjudication officer has no power to alter the said registration.**
- v. The decision of the said Judge was against the weight of the evidence adduced.**
- vi. The learned trial Judge erred in failing to make a finding on the issue that the Defendant's counterclaim was time barred notwithstanding overwhelming evidence that the title deed to the suit land was issued on 10<sup>th</sup> February 2015 and having been registered as the proprietor of the suit land in 1995.**
- vii. The learned trial Judge erred in failing to appreciate and hold that there was no evidence by the Defendant to prove his allegations that the title deed for the plaintiff was issued fraudulently and through misrepresentation.**
- viii. The learned trial judge erred and misdirected himself in granting reliefs/prayers that were not**

***sought for in the cross action and failing to find that the Respondent is bound by his pleadings.***

***ix. The learned trial judge erred in finding that the Plaintiff ought to have obtained the consent of the***

**adjudication officer before filing the suit in the year 2000 when the issue was not raised by the Respondent.**

**x. The learned trial judge misdirected himself and erred in cancelling the title deed for parcel *Mitaboni/Kaiani/1312* despite his finding that both the Plaintiff and the Defendant are claiming a portion of land measuring approximately 3 acres and which forms part of land known as *Mitaboni/Kaiani/1312*.**

4. As held in **Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR)**, our mandate as per rule **31(1)(a)** of the **Court of Appeal Rules** is to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the trial Judge are to stand or not and give reasons either way. In order to live up to this mandate, we will rehash each party's case before conducting our independent analysis and reaching our conclusion.
5. For the appellant, his case was captured in the amended plaint dated 8<sup>th</sup> November 2017, as well as the reply to the amended defence and counterclaim dated 8<sup>th</sup> November 2017. Through the pleadings, the appellant laid claim to 3 acres which he averred was part of ***Mitamboni/Kaiani/1312*** which he purchased from a third party in 1977. During adjudication, the adjudication officer, pursuant to Objection No. 267 of 1987, ordered the 3 acres to be combined into his title, ***Mitamboni/Kaiani/1312***. It was not until 2000 that the respondent trespassed into his land, thereby

threatening his continued peaceful enjoyment and usage of  
the

property. He was therefore seeking orders affirming his ownership of the property and injuncting the respondent from interfering with it.

6. The appellant testified as **PW1** and told the trial court that he was the registered owner of land parcel No. **Mitaboni/Kaiani/1312**, which was initially occupied by his parents from 1945, having been bought from a third party, and was passed to him upon their demise. His evidence was that he was using and working on the land. In 1987, the late Esther began claiming the upper side of the suit property. During adjudication, the appellant filed Objection No. 267 of 1987, which was allowed, and the 3-acre portion awarded to him. Dissatisfied, Esther appealed to the Minister, and the Minister allowed her appeal, thereby granting her the suit parcel. It was the appellant's testimony that he moved to the High Court through Judicial Review Application No. 304 of 2013 where the Minister's decision was quashed. He was subsequently issued with a title deed for **Mitaboni/Kaiani/1312** on 10<sup>th</sup> February 2015. His case was that his registration was a first one and thus indefeasible.
7. On the other hand, the respondent denied the appellant's claim and asserted ownership over the 3 acres. It was his averment that during the adjudication process, Objection No. 267 of 1987 was filed, and it went against him. Being dissatisfied with the outcome of the objection, he appealed to the Minister, and the appeal was

pending hearing and determination. It was his case that the property had belonged to his deceased parents since 1977.

8. The respondent testified as **DW1** in support of his case. His testimony was that the suit property was bought by his father, Phillip Nzioka, from Musyimi Ndolo for Kshs. 13,500 as evidenced by a sale agreement dated 6<sup>th</sup> January 1977. According to him, payments were made in instalments of Kshs. 3,000 on 9<sup>th</sup> January 1977, Kshs. 10,000 on 28<sup>th</sup> July 1977 and Kshs. 1,300 on 16<sup>th</sup> September 1977. The final instalment being inclusive of a token for the witnesses. It was **DW1**'s evidence that the family had been in occupation and possession of the suit property for 40 years. The witness averred that in 1985, the area was declared an adjudication section and following survey, parcel No. 1300 was awarded to his late mother, while parcel No. 1312 was awarded to the appellant. His mother objected to the decision and the matter was referred to the District Land Adjudication Board in Kaiyani, under Objection No. 267 of 1987 in respect of parcel No. 1300. The Board awarded the suit property to the appellant and upon appeal to the Minister in Appeal Case 181 of 1988, the Board's ruling was reversed, with an order that parcel No. 1312 be subsumed under the parcel No. 1300 belonging to his mother. Aggrieved, the appellant sought review of the Minister's decision, and on 25<sup>th</sup> July 2014, the Minister's decision was quashed by Odunga, J. (as he then was) on the ground that the Minister had violated the respondent's right to fair hearing.

9. **Boniface Munyaka (DW2)** told the trial court that **DW1** is his brother and that their late father purchased the disputed parcel of land from Mr. Musyimi. He testified that the Kangundo Law Courts had ruled that the suit land belonged to Mr. Musyimi. DW2 further explained that Mr. Musyimi sold part of the land to the appellant and another portion to their father, and that their family has been using the land continuously.
10. **Peter Nguli (DW3)** testified that the late Musyimi Ndolo was his brother. His evidence was that his brother sold a portion of the suit land to the appellant, and in 1977, he also sold a portion of the land to the respondent's father. According to **DW3**, the respondent was residing on the disputed portion of land, which is 50 meters from the portion sold to the appellant.
11. When this matter came up for hearing, learned counsel, Mr. Mutinda appeared for the appellant, while learned counsel, Mr. Nzaku was present for the respondent. Counsel for the parties relied on their written submissions accompanied by brief oral highlights.
12. In the submissions dated 15<sup>th</sup> March 2024, Mr. Mutinda argued that the trial court erred by granting reliefs and prayers that the respondent did not seek in the cross-action. Specifically, counsel submitted that the cross action only prayed for the cancellation of a title deed issued on 10<sup>th</sup> February 2016, which was not in existence, but the court instead ordered the cancellation of the appellant's title deed issued on 10<sup>th</sup> February 2015. Counsel

argued that there being no amendment to reflect the correct date, the respondent was bound by his pleadings. Additionally, counsel submitted that the learned Judge went beyond the scope of the reliefs sought by the respondent when he ordered the Minister to re-hear Appeal No. 181 of 1988. Mr. Mutinda further contended that the trial court erred in finding that the directive by the Director of Land Adjudication and Settlement to the Chief Land Registrar to issue a title deed pursuant to the land adjudication officer's decision was erroneous. According to counsel, neither party pleaded that the procedure of issuance of the title document was irregular. Counsel for the appellant cited the decisions in **Margaret Njeri Mbugua vs. Kirk Mweya Nyaga [2016] KECA 288 [KLR]; Galaxy Paints Company Ltd vs. Falcon Guards Ltd [2000] KECA 215 (KLR); and Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited [2015] KECA 14 (KLR)** to buttress the argument that parties are bound by their pleadings and that courts should not grant reliefs not sought.

- 13.** Moving to the next issue, Mr. Mutinda submitted that the trial court erred by failing to hold that the respondent's counterclaim/cross action was time-barred. Counsel submitted that the cross action having been filed 22 years after the appellant was registered as the owner of land parcel ***Mitaboni/Kaiani/1312*** in 1995, the claim violated **section 7** of the **Limitation of Actions Act**, which provides that an action for recovery of land may not be brought after twelve years from

the date the right of action accrued. Reliance was placed on  
**Lucy Mirigo & 550 Others vs.**

**Minister for Lands & 4 Others [2014] eKLR** in support of the contention.

14. Counsel also submitted that the trial court erred by relying on directions issued retrospectively by Odunga J. (as he then was) on 19<sup>th</sup> June 2015 with respect to the interpretation of the judgment in JR Misc. Application No. 304 of 2013. Relying on the decision in **Golden Line International Limited vs. The City Council of Nairobi & 3 Others [2015] eKLR**, counsel submitted that the directions having been issued after the title deed was issued could not apply retrospectively.
15. Asserting that registration under **section 24(a)** of the **Land Registration Act, 2012**, vests absolute ownership of land on the registered person, counsel submitted that the learned Judge's decision to cancel the appellant's title was against the weight of the evidence because the respondent did not prove fraud by the appellant. Reliance was placed on **Peter Kamau Njau vs. Emmanuel Charo Tinga [2016] eKLR** for the submission that fraud must be particularized and proved by evidence on a standard higher than a balance of probabilities, and that it is a grave error to impeach a title without sufficient evidence.
16. Finally, counsel contended that the trial court erred in dismissing the appellant's suit on the ground that consent of the adjudication officer, as required by **section 30(1)** of the **Land Adjudication Act**, was not obtained before the filing of the suit

in 2000. According to counsel, **section 29(3)** of the **Land Adjudication Act**,

which relates to the finality of the adjudication register, did not apply since the suit was filed after the title deed had been issued, meaning that the adjudication process was already complete.

17. On his part, learned counsel Mr. Nzaku for the respondent opposed the appeal through submissions dated 19<sup>th</sup> November 2020. Learned counsel set off by reiterating the holding in **Peters vs. Sunday Post Ltd [1958] EA 424** and **Mwanasokoni vs. Kenya Bus Services Ltd [1985] KECA 82 (KLR)** that the duty of this Court on a first appeal is to re-evaluate the evidence on record before arriving at its independent decision.
18. Turning to the appeal, learned counsel submitted that the registration of land parcels numbers ***Mitaboni/Kaiani/1300*** and ***1312*** on 4<sup>th</sup> April 1995, and the subsequent issuance of title to parcel No. ***Mitaboni/Kaiani/1312*** in the name of the appellant on 10<sup>th</sup> February 2015, was illegal and irregular. According to counsel, these actions were taken during the pendency of the Minister's Land Appeal No. 181 of 1988 concerning the same parcel of land. Mr. Nzaku submitted that the registration of the land and issuance of the title to the appellant was marred with fraud and misrepresentation of facts. He maintained that the appellant, acting on a misinterpretation of the judgment of Odunga J. (as he then was), irregularly and fraudulently obtained title to the disputed parcel of land. Relying on **Kawaljeet Singh Rekhi**

**vs. Peter Wainaina Kamau & 2 Others [2016] KECA 89 (KLR)** and **John Njue Nyaga vs. Nicholas Njiru Nyaga & Another [2013]**

**eKLR** for the principle that he who comes to equity must come with clean hands, counsel submitted that the appellant, having approached the court with unclean hands, was undeserving of the orders sought.

19. According to Mr. Nzaku, as clarified in the directions issued on 19<sup>th</sup> June 2015, the High Court did not determine the dispute in favour of the appellant but left the matter open for determination by the proper authority, being the Minister. Counsel pointed to the pendency of the appeal before the Minister and the manner in which the title was issued to submit that the trial Judge was correct in cancelling the title deed issued to the appellant on 10<sup>th</sup> February 2015 so as to pave way for the conclusion of the appeal before the Minister. **Munyu Maina vs. Hiram Gathiha Maina [2013] KECA 94 (KLR)** was cited in support of the proposition that a registered proprietor's title can be challenged in order to determine its legality and propriety.
20. Still contending that the cancellation of the appellant's title was lawful, learned counsel for the respondent argued that nothing barred the Registrar of Lands from cancelling an irregularly procured title. Relying on **section 80** of the **Land Registration Act, 2012** and **Esther Ndengi Njiru & Another vs. Leonard Gatei Mbugua [2020] KECA 753 (KLR)**, counsel submitted that cancellation of a first registration is permitted where it is established that the registration was obtained by fraud, misrepresentation, or mistake. Referring to **Article 40 (6)** of the

**Constitution of Kenya**, counsel argued that property acquired through unlawful means is not protected by the Constitution. Mr Nzaku consequently urged us to dismiss the appeal with costs to the respondent.

21. We have duly considered the record and the submissions by counsel as well as the authorities cited. In our view, the issues for our determination are: whether there was a pending appeal before the Minister; whether the learned Judge erred in issuing the impugned orders; and who bears the costs of this appeal.
22. The first issue we deal with is whether there was a pending appeal before the Minister. In our view, and as conceded by Mr. Mutinda for the appellant in plenary, the existence of the appeal or otherwise is a jurisdictional question that the Court can raise *suo moto*. Thus, in **Ibren vs. Independent Electoral and Boundaries Commission & 2 Others [2018] KESC 75 (KLR)**, the Supreme Court pointed out that:

***“40. A jurisdictional issue is fundamental and can even be raised by the court suo motu, as was persuasively and aptly stated by Odunga, J. in Political Parties Dispute Tribunal & Another vs. Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 stated thus:***

*“25. What I understand the court to have been*

*saying is that it is not mandatory that an*

*issue of jurisdiction must be raised by the parties. The court on its own motion can take up the issue and make a determination thereon without the same being pleaded..."*

***Consequently, while the parties have not given the jurisdiction issue the much premium that it deserves, upon evaluation of the matter before us, it is our considered opinion that the issue of jurisdiction of this court to hear and determine this appeal warrants settlement upfront."***

23. The historical background of the dispute between the parties is not in doubt. Both parties agree that during the adjudication process in 1987, Objection No. 267 of 1987, which had been filed over the disputed parcel of land, was determined in favour of the appellant. The respondent, dissatisfied with the decision, lodged Land Appeal Case No. 181 of 1988 with the Minister. The appeal was determined in favour of the respondent. That would not settle the matter. The appellant challenged the Minister's decision in **Republic vs. District Commissioner Machakos & Another Ex parte Kakui Mutiso [2014] KEHC 309 (KLR)**, where, in allowing the judicial review application, Odunga J. (as he then was) made the following orders:

***"55. In the premises, the orders that commend themselves to me and which I hereby issue are as follows:***

***1. An order of Certiorari is hereby issued removing into Court for the purposes of being quashed proceedings and ruling/judgment of the District Commissioner, Machakos undated and disclosed to the parties therein on 6<sup>th</sup> August 2013 in***

**Machakos Ministers Land Appeal No. 181 of 1988, which decision is hereby quashed.**

**2. Prohibition directed at the Respondent, its servants and or agents or any land officer/surveyor or whomsoever acting on the basis of the aforesaid ruling/judgment from enforcing the order by way of execution, implementation or causing to be implemented the ruling/judgment made in Machakos Ministers Appeal No. 181 of 1988 or in any other manner.**

**3. The costs of this Application are awarded to the Applicant to be borne by the Respondent.”**

24. Upon the filing of an application seeking clarification of the import of the stated orders, Odunga J. (as he then was) on 19<sup>th</sup> June 2015 observed that:

**“3. It is therefore clear that this Court did not and could not have determined the merits of the dispute by determining the owner of the suit land. Having quashed the decision, the Respondent ought to have taken steps pursuant thereto. The effect of the decision of this Court was that the respondent’s decision was quashed leaving the parties in the position they were before the decision was made. Accordingly, the Respondent ought to have taken the matter from that position. For avoidance of doubt the position was that the appeal was still pending and remained undetermined.**

**4. Therefore, the decision of this Court ought not to be interpreted to mean that the appeal was determined by this Court in favour of any of the parties. The determination of the appeal is the mandate of the Respondent, not this Court, and the same ought to be determined in accordance**

***with the law...***

***5. The Respondent, if minded to proceed with the appeal, which as I have held hereinabove remains***

***undetermined, ought to proceed therewith as per the decision of this Court and not deem that this Court directed it to arrive at a particular determination.”***

25. From the foregoing, it becomes abundantly clear that the High Court only quashed the Minister’s decision, meaning that the Land Appeal Case No. 181 of 1988 was revived and unresolved. That being the case, the dispute mechanism provided under the **Land Adjudication Act** remained unexhausted and **section 30(1)** of the **Act** barred the filing of the appellant’s suit in the Environment and Land Court. It is important to reproduce the entire **section 30** in order to appreciate the meaning of **section 30(1)**. The section provides as follows:

***“30. Staying of land suits***

***(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act.***

***(2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.***

***(3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2)***

***of this section may, within twenty-eight days***

**after the refusal, appeal in writing to the Minister whose decision shall be final.**

**(4) The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or executed, if at the time this Act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired.**

**(5) A certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is such land.**

**(6) Every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown."**

26. The provision not only disallows the institution of suits in respect of land in an adjudication section but expressly bars courts from entertaining such suits, save where the adjudication officer has consented to the filing of a case in court. The appellant suggested that permission to approach the Environment and Land Court was granted through the letter dated 7<sup>th</sup> April 2015, written by the Deputy County Commissioner (DCC) Kathiani Sub-County. The letter stated in part as follows:

**"This office is of the opinion that since the case had already been heard in the High Court, the complainant should appeal the case in the Court of Appeal, rather than re-hearing a case that the land has an already issued title deed. (sic) The relevant case file is herewith returned for your further**

**necessary action”** (Emphasis ours)

27. From the said letter, it is clear that by the time the letter was written on 7<sup>th</sup> April 2015, the title deed had been issued earlier on 10<sup>th</sup> February 2015. In the letter, the DCC, who must have been exercising the delegated authority of the Minister, was decrying rehearing a matter where a title deed had already been issued. It must be appreciated that the letter was written before the express order by the trial court directing the Minister to hear the appeal. Be that as it may, the authority to grant exemption to the provisions of **section 30(1)** lies not with the Minister (in this case the DCC) but with the adjudication officer. There is no evidence that the respondent sought any exemption from the appropriate office before approaching the Environment and Land Court.

28. We would in the circumstances of this appeal agree with the respondent that the title deed was issued in misconstruction of the judgment by Odunga, J. (as he then was). Even without the subsequent clarification by the learned Judge, it is apparent that all he did was to quash the decision of the Minister and prohibit the implementation of that decision. The appeal before the Minister, therefore, remained intact, and what was expected was a rehearing of the appeal with the appellant being given an opportunity to be heard.

29. We have said enough to show that Appeal Case No. 181 of 1988 is yet to be heard and determined, and therefore, the appellant's suit before the Environment and Land Court was barred by the

provisions of **section 30(1)** of the **Land Adjudication Act**. We

thus affirm the trial court's finding that the suit was filed contra-statute. Similarly, we also find that the title deed issued to the appellant on 10<sup>th</sup> February 2015 was a product of misrepresentation and an erroneous construction of the High Court orders in the judicial review application.

30. The next issue is whether the learned Judge erred in issuing the orders as he did. For avoidance of doubt, the orders of the learned Judge were as follows:

***“31. Consequently, the court makes the following orders:***

***a. The Plaintiff's Complaint dated 9<sup>th</sup> March, 2000 and amended on 8<sup>th</sup> November, 2017 is hereby dismissed.***

***b. The Title Deed that was issued to the Plaintiff on 10<sup>th</sup> February, 2015 in respect of a parcel of land known as Mitaboni/Kaiani/1312 is hereby cancelled.***

***c. The Minister to re-hear Land Appeal No. 181 of 1988 as directed by the High Court in Judicial Review Miscellaneous Civil Application No. 304 of 2013.***

***d. The Plaintiff to pay the costs of the suit and the Defendant's cross-action”***

31. The appellant contends that neither of the parties pleaded for the above orders. That parties are bound by their pleadings is not novel but trite. In **Independent Electoral and Boundaries Commission & Another vs. Mule & 3 Others [2014] KECA 890 (KLR)**, the Court affirmed this principle of law when it stated that:

***“As the authorities do accord with our own way***

**of  
thinking, we hold them to be representative of  
the**

**proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.”**

32. Also, in **Ann Wairimu Wanjohi vs. James Wambiru Mukabi** [2021] KECA 476 (KLR) it was held that:

**“We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties. In accordance with the Civil Procedure Rules, the parties should also either provide a list of agreed issues, or if there is no agreement, each provide their own list of issues so that the court can settle the issues. Although it is desirable that where necessary the pleadings should be amended to bring in all the issues, Odd Jobs vs Mubia (supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court. However, such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings.”**

33. In the amended statement of defence and cross action dated 23<sup>rd</sup> October 2017, the respondent named the County Lands Registrar, Machakos, as the 2<sup>nd</sup> defendant. Prayer (b) in the cross action was to the effect that:

**“An order directed to the 2<sup>nd</sup> defendant (Machakos County Land Registrar) to cancel title deed issued on 10<sup>th</sup> February 2016 to the 1<sup>st</sup> defendant (the appellant herein) and restoring *status quo ante*.”**

34. Looking at the above excerpt from the respondent's pleading, we do not agree with the argument by the appellant that the orders granted by the learned Judge were not sought. The respondent was clear that he was seeking the cancellation of the title deed issued to the appellant in respect of the land in dispute, and the misdescription of the date of issuance of the title deed in our view is immaterial in the circumstances.

35. Similarly, we do not think that the learned Judge erred by directing the Minister to re-hear Land Appeal No. 181 of 1988 as per the order of the High Court in Judicial Review Miscellaneous Civil Application No. 304 of 2013. That was an appropriate order in line with the fact that there was a pending appeal before the Minister and considering the contents of the letter dated 7<sup>th</sup> April 2015 by Kathiani DCC expressing disinclination to hear the appeal. Indeed, the order was in tandem with the decision of the Supreme Court in **Geo Chem Middle East vs. Kenya Bureau of Standards [2020] KESC 1 (KLR)** that:

**“As is the practice in all other disputes, where an Appellate Court holds that a lower Court has wrongly declined to determine a matter in the “mistaken” belief that it lacks jurisdiction to do so, the Court has to remit that matter to the lower Court directing it to exercise its jurisdiction. Only after the lower Court has complied with such an order, would a substantive appeal lie to the Appellate Court.”**

36. Before we conclude, we appreciate that the parties have extensively submitted on the issue as to whether the respondent's counterclaim was barred by the Limitation of

Actions Act. In our

view, having found, as we have done, that the respondent's appeal is yet to be heard by the Minister, the issue of limitation of time does not lie for consideration in this judgment. If any party is desirous of raising the issue, then the same must be subjected to the appellate hierarchy as by law established.

37. Consequently, we find this appeal to be without merit and we dismiss it. Considering that costs follow the event unless, for good reason, the Court directs otherwise, and there being no good reason to depart from the norm, the respondent shall have the costs of the appeal from the appellant.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of October 2025.**

**S. GATEMBU KAIRU, C.Arb, FCIArb.**

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

**MUMBI NGUGI**

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

**W. KORIR**

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

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR.**