

**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MURGOR, LAIBUTA & NGENYE, JJ.A.)**

**CIVIL APPEAL NO. E013 OF 2023**

**BETWEEN**

**KATANA NDULE.....APPELLANT**

**AND**

**FIOLABCHEM COMPANY LIMITED.....1<sup>ST</sup>  
RESPONDENT**

**ABDIRAHMAN MAALIM ABDULLAHI.....2<sup>ND</sup>  
RESPONDENT**

**LAWRENCE MUSYOKA ISIKAH.....3<sup>RD</sup>  
RESPONDENT**

***(An Appeal from the Judgment and Decree of the  
Environment & Land Court at Malindi (M. A. Odeny, J.)  
delivered on 15<sup>th</sup> November 2022***

***in***

***ELC No. 46 of 2019)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

By a plaint dated 21<sup>st</sup> June 2019, the Respondents vide ELC Case No.

46 of 2019 filed a suit against ***Katana Ndule, the Appellant*** seeking:

*a)A declaration that they are the lawful and registered owners of the parcels of land known as Kilifi/Mtondia/949 and Kilifi/Mtondia/950, and the subplots created therefrom.*

- b) An order for vacant possession of the parcel of land known as Kilifi/Mtondia/949 and Kilifi/Mtondia/950.*
- c) An order of eviction of the Appellant, his servants and or agents from the suit property and demolition of any structures erected on the suit property.*
- d) A permanent injunction restraining the Appellant, his servants and or agents from remaining on or continuing in occupation of the suit property.*
- e) Costs and interest.*

In response, the Appellant filed a statement of defence and counterclaim dated 14<sup>th</sup> August 2019 seeking:

- a) An order to the Land Registrar, Kilifi Land Registry, cancelling the registration of Title No. Kilifi/Mtondia/108 in the name of the Respondents and cancelling all the subsequent registrations in the names of the Respondents and nullifying all the resultant subdivisions and registrations in the names of the respondents and reinstate the title of parcel of land known as Title No. Kilifi/Mtondia/108 and register the said title in the name of the Appellant as the absolute owner without requiring the Appellant to produce any other document for purposes of registration other than the judgment and decree of this Court.*
- b) An order of permanent injunction against the Respondents, restraining the Respondents, by themselves, their servants and or agents from entering onto the suit properties and from further subdividing the suit properties and or charging, leasing or transferring the suit properties and/or from dealing with the suit properties in any manner whatsoever, and Costs of this suit and interests thereon at court rates.*

The Appellant also filed another suit being ELC No. 17 of

*2019* against Rosemary Auma Oile, Joshua Mutinda Kiteme, Fiolabchem Company Limited, Said Nur Osman, Robin Munyua Kimotho, Abdulrahman Maalim Abdullahi, and Abdi Osman Abdi seeking:

*a) An order to the Land Registrar, Kilifi Land Registry, quashing, revoking and or nullifying the allocation of Title No Kilifi/Mtondia/108 in the name of the 1st Defendant and cancelling all the subsequent registrations in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and nullifying all the resultant subdivisions and registrations in the names of the 3<sup>rd</sup> to 7<sup>th</sup> Defendants and reinstate the title of parcel of land known as Title No Kilifi/Mtondia/108 and register the said title in the name of the Plaintiff as the absolute owner.*

*b) An order of permanent injunction against the Defendants, restraining the Defendants by themselves, their servants and or agents from entering onto the suit properties and from further subdividing the suit properties and or charging, leasing or transferring the suit properties and/or from dealing with the suit properties in any manner whatsoever.*

These suits were consolidated on 22<sup>nd</sup> March 2021.

The Respondents' case was that **Joshua Mutinda Kiteme, PW1**, a director of the 1<sup>st</sup> Respondent, Fiolabchem Company Limited, testified that the company was at all material times the registered proprietor of parcel no. Kilifi/Mtondia/108 (*the suit parcel*) measuring approximately 5.02 hectares. He stated that the property was purchased from Rosemary Auma Oile in 2001 at an agreed consideration of Kshs. 720,000; that, because the company intended to obtain a bank loan to complete payment, a supplementary agreement was executed; and that, when bank valuers inspected the land,

they found the Appellant occupying about one acre and residing in a house which he had put up thereon, having been a caretaker for Rosemary Auma Oile, the seller. PW1 stated that the seller assured him that the caretaker would vacate the land without difficulty and showed him a letter dated 5<sup>th</sup> July 1991 in which the Appellant had requested more time to harvest crops.

Due to the urgency of securing financing, PW1 caused the one-acre portion occupied by the Appellant to be excised, resulting in the creation of two titles: parcel No. Kilifi/Mtondia/949 measuring 4.61 hectares and registered in the name of the company, and parcel no. Kilifi/Mtondia/950 measuring 0.41 hectares (one acre) and registered in his name. He explained that the latter covered the area occupied by the Appellant.

He further testified that valuation reports were prepared in 2001 to enable him obtain a Barclays Bank loan. A charge for Kshs. 900,000 was subsequently registered and later discharged in 2011. In 2012, the company subdivided parcel No. Kilifi/Mtondia/950 into 39 subplots, most of which were sold to other buyers. According to him, these purchasers had been unable to take possession due to the violent and obstructive conduct of the Appellant, who had turned the suit parcel into a quarry. PW1 contended that the Appellant had initially been allowed to remain on humanitarian grounds, but had now laid claim not just to the one-acre parcel but also to parcel No. Kilifi/Mtondia/949. He asserted that, unless eviction and injunctive orders were granted, they would suffer great

prejudice.

**Rosemary Auma Oile, PW2**, testified that she is a businesswoman residing in Shimba Hills; and that she purchased the suit parcel from one Simon Alfred Mole in 1994. She explained that the seller had obtained the necessary Land Control Board consent in 1991 and that, in 1994, she paid

Stamp Duty and other requisite dues to the Settlement Fund Trustees. She was later issued with the Title Deed for the suit parcel in 2000; that, upon purchasing the land, she found the Appellant working as a farmhand for Mr. Mole and that, at the seller's request, she allowed him to continue in that capacity. In 2001, she sold the land to Joshua Mutinda Kiteme and similarly requested him to retain the Appellant as a worker.

PW2 expressed surprise at the Appellant's claim over the suit parcel, insisting that she was the lawful owner and had lawfully transferred it to Kiteme; and that the Appellant's allegation that he had been allocated the land in 2011 was incredible, given that the Ministry of Lands had already issued her with a title eleven years earlier. In her view, the Appellant's Letter of Offer dated 16<sup>th</sup> March 2011 was fraudulently obtained. She urged that the Appellant be penalized with exemplary costs for wrongfully accusing her of fraud and dragging her into litigation twenty years after she had sold the property.

**Lawrence Musyoka Isikah, PW3**, stated that he was one of the purchasers of the subdivided plots arising from parcel No. Kilifi/Mtondia/949. He stated that, as purchasers,

they subsequently obtained individual titles. Before purchasing, he made inquiries and satisfied himself that the company was the validly registered owner, having purchased the suit property from Rosemary Auma Oile; and that, therefore, the

Appellant's claim had no basis since the Letter of Allotment he relied upon was issued long after a title was issued to Rosemary Oile. He described the Appellant as a trespasser whose claim ought to be dismissed.

**Abdirahman Maalim Abdullahi, PW4**, gave evidence consistent with that of PW3. He testified that he also purchased a subdivided plot from the company after the subdivision of parcel No. Kilifi/Mtondia/949, and that he also obtained a title. He stated that, prior to purchasing, he confirmed that the company was the lawful owner, having bought the land from Rosemary Auma Oile. In his view, the Appellant was a trespasser and his claim should be dismissed.

On his part, the Appellant testified that he was a farmer residing within the Mtondia Settlement Scheme. He stated that he has at all material times been the beneficial owner of approximately 12 acres of land situated at Bofa within the Mtondia Settlement Scheme, originally known as parcel No. Kilifi/Mtondia/108; and that he has been in continuous physical occupation of the entire parcel since 1975, having replaced the original allottee, one Sorotani Biryia. He further stated that, on 16<sup>th</sup> March 2011, the Land Adjudication and Settlement

Department formally allocated the land to him whereupon he paid the requisite fees. He produced the Letter of Offer, payment receipts, and photographs of his homestead. He stated that the Respondent company had never been the registered owner of the suit parcel,

and that the true position was that Rosemary Auma Oile irregularly caused the land to be transferred into her name and later sold it to PW1, who as registered proprietor and who subsequently subdivided the suit parcel into parcel Nos. Kilifi/Mtondia/949 and Kilifi/Mtondia/950, of which parcel No. Kilifi/Mtondia/949 was transferred to the Respondent company. He produced green cards for parcels No. Kilifi/Mtondia/108 and 949 in support of this claim.

He denied ever being a caretaker of Rosemary Oile as alleged by the Respondents and maintained that he had always occupied the entire 12 acres in his own right, and that he had never met or interacted with Rosemary Oile. He denied ever occupying only one acre being parcel No. Kilifi/Mtondia/950, insisting that he has always utilized the entire suit parcel. He contended that the subdivisions were done “on paper only” and not on the ground, and that he had never been allowed to remain on one acre on humanitarian grounds by any of the Respondents or their agents.

He asserted that his occupation was not unlawful as he had been allocated the land by the Settlement Fund Trustees and paid all requisite charges, and was awaiting the discharge

of charge from the SFT. He claimed that it was upon making enquiries at the Lands Registry on 19<sup>th</sup> March 2019 that he discovered that the land was registered in the name of Rosemary Auma Oile on 22<sup>nd</sup> May 2000 and subsequently transferred to PW1 on 30<sup>th</sup>

May 2001, and who subdivided the land into two parcels on 13<sup>th</sup> July 2001, namely parcel Nos. Kilifi/Mtondia/949 and 950, and that parcel No. Kilifi/Mtondia/949 was later subdivided into 39 sub-parcels (parcel Nos. Kilifi/Mtondia/1672-1710). He claimed that the subdivisions and registrations were obtained through mistake, misrepresentation or fraud. He set out particulars of mistake and fraud, including allegations that Rosemary Oile misrepresented herself as the genuine settler, obtained transfer from Settlement Fund Trustees knowing she was not an occupant, and causing herself to be documented as a settler when she was not on the nominal roll.

He further alleged that PW1 also acted fraudulently by failing to ascertain his (the Appellant's) occupation before purchasing and hurriedly subdividing the land. He made similar allegations regarding his acquisition of the suit parcel and the subsequent subdivision into the 39 subplots.

He stated that he had previously filed *Malindi ELC Case No. 17 of 2019: Katana Ndule Chai vs Rosemary Auma Oile & 6 Others*, challenging the transfers as fraudulent. It was his case that all titles created and registered in favour of the Respondents and subsequently transferred to third parties were

obtained through illegal processes and were null and void. He sought rectification of the register by cancellation of the allocation of parcel No. Kilifi/Mtondia/108 to Rosemary Oile and PW1, as well as cancellation of

all subsequent subdivisions and registrations, and reinstatement of the suit parcel in his name.

He contended that the Respondents were not entitled to orders of vacant possession or injunction since the 39 subplots did not belong to them. He counterclaimed for cancellation of all titles emanating from parcel No. Kilifi/Mtondia/108, reinstatement in his name, a permanent injunction restraining the Respondents from entering, subdividing, transferring, or otherwise dealing with the land, and costs of the suit.

Upon considering the pleadings, the evidence presented by the parties, the submissions of counsel and the applicable law, the trial court found that the 1<sup>st</sup> Respondent's suit was properly before the trial court, and that the suit was competent.

On the issue as to whether the suit was time-barred, the trial court determined that the Appellant had not demonstrated any basis under the Limitation of Actions Act to bar the Respondents' claim. The court found that the Appellant entered the land as a caretaker and that, therefore, his occupation was permissive and, as a result, the suit was not time-barred.

Regarding the allegation that the Respondents' registration was fraudulent, the court held that no fraud or

misrepresentation had been proved; and that the entries on the green cards and the documents the

Appellant produced mirrored those relied on by the Respondents and confirmed their chain of title.

On the broader issue of ownership, the court found that the Respondents were the lawful and registered proprietors of the subdivided parcel Nos. Kilifi/Mtondia/949 and Kilifi/Mtondia/950 as well as the sub-plots emanating therefrom. The court found that the Appellant's assertion that he was the beneficial owner of the original 12-acre parcel, and his claim that he was awaiting issuance of title from the Settlement Fund Trustees lacked evidential support. To the contrary, the court held that the Respondents' documentation tracing the land's history from the Settlement Fund Trustees, to PW2, and thereafter to the 1<sup>st</sup> Respondent and purchasers of the subdivided plots was comprehensive and conclusive. Further, the court observed that the suit parcel no longer existed, having been lawfully subdivided and, consequently, the cancellation orders sought in the counterclaim were incapable of being granted.

In totality, the trial court held that the Respondents had proved their case on a balance of probabilities while the Appellant had failed to establish his counterclaim. The

Respondents' titles were upheld as valid, and the Appellant's continued occupation was declared unlawful. The Court issued declaratory orders confirming the Respondents as lawful proprietors and directed the Appellant to give vacant possession within forty-five days failing

which eviction would issue. The court further ordered the demolition of the structures thereon and granted a permanent injunction restraining further occupation unless the Appellant accepted the alternative arrangement concerning parcel No. Kilifi/Mtondia/950. Costs and interest were awarded against the Appellant.

Aggrieved, the Appellant filed an appeal to this Court on the grounds that the learned Judge was in error in finding that suit parcel belonged to one Simon Mole, and that he had lawfully sold it to Rosemary Auma Oile; in finding that the Appellant was on the suit parcel as a caretaker of Simon Mole and had, with the permission of Rosemary Auma Oile, remained thereon after he had requested for, and was granted, permission to harvest his crops and vacate the suit parcel; that the trial Judge failed to appreciate the Appellant's claim and evidence; in finding that the Appellant had not proved fraud on the part of the Respondents; in finding that the Respondents had proved on a balance of probabilities that they were the lawful owners of parcel Nos. Kilifi/Mtondia/949 and 950 and the subplots created therefrom; and in granting a relief that had not been sought either by the Appellant or the Respondents.

Both the Appellant and the Respondent filed written submissions and, when the appeal came up for hearing on a virtual platform, learned counsel **Mr. Shujaa** appeared for the Appellant while learned counsel **Mr. Waweru**

appeared for the Respondents. On behalf of the Appellant, counsel submitted that the learned Judge failed to carry out a proper evaluation of the evidence, thereby arriving at conclusions that were wholly unsupported; that the Judge wrongly found that the original title of the suit parcel belonged to one Simon (Alfred) Mole, and that he had lawfully sold the parcel to Rosemary Auma Oile; that this finding had no evidential foundation as the Respondents did not produced any documentation from the Settlement Fund Trustees showing that Simon Mole was ever allocated the suit parcel. It was submitted that the only document relied upon was a letter dated 5<sup>th</sup> July 1997 allegedly authored by the Appellant that referred not to the suit parcel but to Plot No. 492/D, Tezo/Roka Settlement Scheme, a distinct parcel unrelated to the suit parcel; that, even if one was to presume that Col. (Rtd.) S.A. Mole mentioned in that letter was the same person that the Respondents referred to as "Simon Mole," the letter still did not mention the suit parcel, and nor did it establish ownership, allocation, or possession thereof.

The Appellant further submitted that the evidence which he produced, demonstrated that the original allottee of the suit

parcel was one Nancy Mkui Nene, whose name appeared in the nominal roll of the Settlement Fund Trustees, which was not challenged, nor did the Respondents produce any correspondence or official records showing that the suit parcel was ever re- allocated to Simon Alfred Mole following Nancy Mkui Nene's failure to meet

settlement conditions. Moreover, the Appellant pointed to documents showing that, on Nancy Nene's failure to fulfil the Settlement Fund Trustees' conditions, the property was re-allocated to the Appellant and not to Simon Mole. Counsel argued that the trial Judge did not consider this material evidence, nor did she give reasons for rejecting it.

On the finding that the Appellant was on the land merely as a caretaker, counsel submitted that this conclusion was equally unsupported. The Appellant denied authoring the letter of 5<sup>th</sup> July 1997, and no handwriting analysis or corroboration was provided; that, in any event, the parcel mentioned in the letter was entirely different. Counsel submitted that no evidence was tendered showing that Tezo/Roka Settlement Scheme was the same as Mtondia Settlement Scheme, or that Plot No. 492/D referred to in the letter was the same land as the suit parcel. Moreover, counsel pointed to the contradictory nature of Rosemary Auma Oile's testimony in which she claimed on the one hand that the Appellant was a caretaker but, on the other hand, stated that she did not allow him to remain on the land, and that she avoided the land altogether because the Appellant allegedly "threatened her life." Counsel

argued that these contradictions rendered her testimony unreliable and incapable of supporting the trial Judge's finding that the Appellant was a permissive occupant.

Counsel further submitted that the learned Judge failed to appreciate that the Respondents had not discharged the burden of proving their root of title; that PW2 claimed to have purchased the suit parcel from Simon Alfred Mole on 5<sup>th</sup> September 1994, but that no evidence was produced to show that Simon Mole was allocated the suit parcel, or that he had paid the requisite fees charged by the Settlement Fund Trustees; and that PW2 admitted that she, and not Mole, had paid the fees. Counsel argued that an offer or letter of allotment, without satisfaction of conditions and issuance of title, did not create any proprietary interest. In support, counsel cited this Court's decision in the case of **Wreck Motors Enterprises vs Commissioner of Lands & 3 Others, Civil Appeal No. 71 of 1997**; and **Joseph Arap Ng'ok vs Justice Moiwo Ole Keiwa, Civil Application No. 60 of 1997**, for the proposition that title to property comes into existence after issuance of a letter of allotment, and when the conditions are met; that, since Simon Alfred Mole did not satisfy any conditions of allocation, and did not acquire a legal title, he could not have transferred any interest to Rosemary Oile; and that, therefore, the alleged sale to her was a nullity, and PW2's registration was obtained through fraudulent

misrepresentation.

Counsel further argued that the Respondents' titles were impeachable under **Section 26(1)(b)** and **Section 80** of the **Land Registration Act** as titles obtained "*illegally, unprocedurally or through a corrupt scheme*" and may be

cancelled even in the hands of an otherwise innocent third party. Reliance was placed on **Elijah Makeri Nyangw'ra vs Stephen Mungai Njuguna & Another [2013] eKLR** for the proposition that a registered proprietor's title is not absolute where its root is tainted.

It was further submitted that the suit was time-barred by virtue of **Sections 7** and **17** of the **Limitation of Actions Act**; that the discovery of the Appellant's occupation dated back to the year 2000 or 2021 when PW2 became registered; that time begins to run from the moment the true owner is dispossessed or his right of possession is infringed, and that changes in ownership do not stop time from running until a suit is filed or possession is acknowledged; and that, since the suit was filed in 2019, counsel argued that the Respondents' right of action had been extinguished by virtue of **Section 7** of the **Limitation of Actions Act**. It was also argued that the Respondents lacked *locus standi* as they were not the registered proprietors of parcel Nos. Kilifi/Mtondia/949 or 950 at the time the suit was filed.

Finally, counsel submitted that the learned Judge improperly granted a relief not sought by either party being,

the “alternative” order permitting the Appellant to take up parcel No. Kilifi/Mtondia/950 upon payment of stamp duty; that a court has no inherent jurisdiction to award relief where no such plea was made in the pleadings.

On their part, counsel for the Respondents submitted that the appeal lacks merit and that the trial court correctly appraised the evidence and arrived at the right conclusion in their favour. They argued that Rosemary Auma Oile was the lawful and registered owner of the suit parcel having purchased it from one Simon Mole, processed the title, and obtained registration on 22<sup>nd</sup> May 2000 as shown in the green card; that her testimony explaining how she acquired the land was never challenged by the Appellant during the trial; and that, therefore, it cannot be raised on appeal.

On the Appellant's allegation that he was not a caretaker, the Respondents relied on Rosemary Oile's oral evidence and Witness Statement dated 24<sup>th</sup> June 2021, which was adopted in full where she expressly stated that the Appellant had been allowed to stay on the land as a caretaker by Simon Mole, by Rosemary Oile herself, and later by the 1<sup>st</sup> Respondent. They argued that the evidence was clear and consistent, and that the trial Judge rightly accepted it.

On the allegations of fraud, the Respondents adopted their submissions in the trial court and stated that the Appellant had omitted from the Record of Appeal a set of 12 crucial

documents listed in the Respondents' Supplementary List of Documents dated 24<sup>th</sup> June 2021 despite those documents having been produced and relied upon at the trial; that the documents included the transfer from Simon Mole to Rosemary Oile, the

letter of consent, multiple receipts for payment to the Settlement Fund Trustees, letters between Mole, Nancy Nene, and the Appellant, and the green card for the suit parcel. It was submitted that these documents traced the full chain of ownership and demonstrated that Rosemary Oile's acquisition and the subsequent transfer to the 1<sup>st</sup> Respondent was lawful. The omission of these documents by the Appellant, they argued, was willful and deliberately intended to perpetuate a fraud.

Further, it was submitted that the Appellant's entire claim of ownership was anchored solely on a Letter of Offer dated 16<sup>th</sup> March 2011, which came more than a decade after Rosemary had already acquired her title in 2000 and after the 1<sup>st</sup> Respondent was registered in 2001; that, since a letter of offer is not a title document, it was submitted that the suit parcel was no longer available for allocation to the Appellant or any person by that time.

It was also submitted that the Appellant cannot introduce on appeal new arguments based on limitation of actions or adverse possession, as these were never pleaded in the Appellant's Complaint, Defence or Counterclaim; and that parties

are bound by their pleadings.

On the issue concerning parcel No. Kilifi/Mtondia/950, the Respondents confirmed that the 1<sup>st</sup> Respondent had testified that he was willing, purely on humanitarian grounds, to surrender the one-acre portion containing the Appellant's homestead, and that he maintained that position.

This is a first appeal, and this Court is obligated to reconsider, re- evaluate and re-analyse the evidence afresh and draw its own independent conclusions in accordance with **Rule 31(1)(a)** of the **Court of Appeal Rules, 2022**. However, in doing so, it should be borne in mind that the witnesses were neither seen nor heard and as such due allowance should be allowed for that limitation.

This Court in the case of **Kenya Ports Authority vs Kuston (Kenya)**

**Limited [2009] 2 EA 212** clearly stated this duty 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.”***

Furthermore, this Court will only interfere with the factual findings of a trial court where the decision is based on no evidence, or on a misapprehension of the evidence, or where the court is shown to have acted on wrong principles, as stated in the case of **Mwanasokoni vs Kenya Bus**

**Services Ltd [1985] KLR 931.**

Guided by these principles, and having considered the Record of Appeal, the Judgment of the learned trial Judge, the grounds of appeal, the submissions of counsel and the applicable law, we find that the issues that

arise for determination are: i) whether the Respondents proved ownership of the suit parcel; ii) whether the Appellant was entitled to ownership of the suit parcel by allotment or whether he was entitled to ownership by virtue of occupation; iii) whether fraud was proved as alleged; and iv) whether the learned Judge was in error in granting a relief not sought by either party.

Beginning with whether the Respondents proved that they legally owned the suit parcel and the ensuing subdivided portions, the Appellant faulted the trial Judge for finding that the suit parcel belonged to the Settlement Fund Trustee who subsequently allocated it to one Simon Mole, who lawfully sold to Rosemary Oile, PW2. The Appellant's primary contention was that the original allottee of the suit parcel was one Nancy Mkui Nene, and that there was no evidence that the Settlement Fund Trustees (SFT) ever allocated the land to Simon Alfred Mole. As a consequence, he argued that, Rosemary Oile could not have lawfully acquired the land from Simon Mole.

Under **Section 107 (1)** of the **Evidence Act**, the burden of proof in civil matters lies with the party who seeks the court's intervention. Such party must prove the facts asserted

to the standard as required by law.

This Court in the case of **Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi**

**& another [2005] 1 EA 334** held that:

***“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”***

In this case, the Appellant having directly challenged the validity of the Respondents’ title, the evidentiary burden shifted to the Respondents to demonstrate that the process through which they acquired the suit parcel was lawful, regular and compliant with the applicable statutory requirements.

This principle was well articulated by this Court in the case of **Embakasi**

**Properties Limited & Another vs Commissioner of Lands & Another [2019] eKLR**, where it was emphasized that, although a certificate of title is generally conclusive evidence of proprietorship and confers absolute and indefeasible ownership, such protection is not without limits. The Court observed:

***“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... Section 26 of the Land Registration Act confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner... but offers no protection where the title is acquired by fraud or misrepresentation, or where it has been acquired illegally, unprocedurally or through a corrupt scheme.”***

In finding that the Respondents were the lawful registered proprietors of the suit parcel, the subdivided parcel Nos. Kilifi/Mtondia/949 and

Kilifi/Mtondia/950 and the sub-plots emanating therefrom, the trial court had this to say:

***“I find that the original title Kilifi/Mtondia/108 measuring approximately 12 acres, was under the Mtondia Settlement Fund Trustees and that the plaintiffs have demonstrated how the property was transferred from the settlement fund trustees to PW2. They attached a copy of transfer dated 5<sup>th</sup> of October 1994, a letter of consent dated 19<sup>th</sup> December 1991 and receipts there of the plaintiff is also produced a sale agreement between PW2 and the director of the first plaintiff dated 26<sup>th</sup> February 2001”***

The Record shows that the Respondents indeed discharged this burden by producing the Land Control Board consent, Settlement Fund Trustees receipts, the transfer executed by Simon Mole, stamp duty records, and the title issued in 2000. The copy of the green card produced shows that, indeed, parcel No. Kilifi/Mtondia/108 was registered in the name of the Settlement Fund Trust in September 1980 and then transferred to Rosemary Auma Oile on 22<sup>nd</sup> May 2000 and a title deed issued simultaneously. None of these documents were impeached by the Appellant through evidence of fraud or illegality. And, even though some of them appear to have been omitted from the record, we have no reason to doubt that they were before the trial court as indicated above.

On the other hand, was the Appellant entitled to ownership of the suit parcel by virtue of the Letter of allocation, or by having occupied the suit parcel since 1975 as alleged?

Much as the Appellant asserted that he was the lawful allottee of the suit parcel and claimed to have been in occupation thereof since 1975, his evidence in this regard was sparse, as he only produced a Letter of offer dated 16<sup>th</sup> March 2011, which was issued more than a decade after the suit parcel was registered in Rosemary Auma Oile's name in May 2000, and long after the parcel had been subdivided in 2001. More critically, he presented no documentary proof that the Settlement Fund Trustees allocated the suit parcel to him, nor did he produce any evidence showing compliance or any steps taken towards perfecting his alleged allocation. Similarly, we find that nothing turns on the mention of Nancy Mkui Nene as any alleged allotment was not substantiated or supported by evidence in any way.

As concerns the Appellant's occupation, the trial court found that he was on the land as a caretaker for Simon Mole and later for Rosemary Auma Oile and PW1. This finding was grounded on the Respondents' consistent testimony, particularly the letter dated 15<sup>th</sup> June 1991 from Simon Mole to the Appellant in which he acknowledged that he was to leave the land, but requested for time to harvest his crop which

evidence was not rebutted by any independent evidence from the Appellant. He did not also call any witnesses, produce evidential documents or any credible material showing that his occupation was as of right, hostile, or proprietary. His bare denial could not outweigh the Respondents' consistent and unchallenged evidence.

Consequently, the Appellant failed to demonstrate that he possessed any legally recognizable interest arising from occupation of the suit property.

Turning to the allegations of fraud, the Appellant accused Rosemary Oile of obtaining registration irregularly and misleading the Settlement Fund Trustees. However, in law, fraud is a grave allegation that requires to not only be expressly pleaded, but also strictly proved to a standard higher than the ordinary balance of probabilities. See **Central Kenya**

**Ltd vs Trust Bank Limited**

**& 4 Others, Civil Appeal No. 215 of 1996 [1996] eKLR.**

The Record does not disclose that the Appellant provided any evidence in support of the allegations of fraud. Notably, he did not summon any official from the Lands Registry or the Settlement Fund Trustees to challenge the authenticity of the Respondents' documents, nor did he produce any records suggesting that the transfer to Rosemary was fraudulent or irregular. His claim rested largely on suspicion, speculation and unsubstantiated inferences, none of which meet the legal standard required to impeach a registered title under **Sections 26(1)(b) and 80** of the **Land Registration Act**.

On their part, the Respondents produced a comprehensive and coherent chain of documentary evidence tracing their land's ownership from Simon Alfred Mole to Rosemary Auma Oile in 1994, the SFT receipts, the Land Control Board consent of 1991, the payment of stamp duty, and the issuance of a title deed to Rosemary in 2000. This was followed by the sale to

PW1 in 2001, the subdivision into parcel Nos. Kilifi/Mtondia/949 and 950, and the subsequent creation of the 39 subplots. These documents were not shaken in cross-examination, and neither was their validity challenged. We so find as did the learned trial Judge.

Against the totality of this evidence, it is clear that the Appellant did not prove ownership or fraud, or the existence of any interest capable of defeating the Respondents registered titles. He failed to meet the evidentiary and legal standards imposed by **Sections 107-109** of the **Evidence Act** and the applicable jurisprudence. On the basis of the evidence on record, we are satisfied that the trial court was justified in concluding that the Appellant failed to prove his case, and we so find.

A central point of contention in this appeal concerns the existence, status, and legal continuity of the suit parcel. The Appellant's entire claim was anchored on the assertion that the suit parcel continued to exist in its original form, and that he remained the beneficial or lawful owner of the entire 12 acres. For this reason, he urged the court to cancel all subsequent titles and reinstate the original parcel in his name.

A re-evaluation of the evidence, however, demonstrates that this position was not sustainable either factually or legally. This is because the documentary record produced by the Respondents, and which the learned trial Judge accepted, clearly shows that the suit parcel ceased to exist as a

single, identifiable parcel in the year 2001. Following the transfer of the property to PW1, the land was lawfully surveyed and subdivided into two distinct parcels, namely parcel Nos. Kilifi/Mtondia/949 and Kilifi/Mtondia/950, as reflected in the green card entries. Subsequent to this, parcel No. Kilifi/Mtondia/949 underwent a further subdivision into 39 individual plots, each eventually issued with its own title. By the time the Appellant allegedly received his Letter of Offer in 2011, the suit parcel was already non-existent for over a decade. In view of the foregoing, we find that the Appellant's reliance on a Letter of Offer of 2011—issued long after the suit parcel had ceased to exist—could not, in law or fact, defeat the Respondents' lawfully registered titles. As a result, the question of reinstatement of that parcel or cancellation of subsequent titles did not arise. Furthermore, the allegations of fraud were unsupported by evidence, and his claim of beneficial occupation was contradicted by consistent testimony showing that he was on the land as a caretaker.

Finally, as to whether the learned Judge granting a relief that had not been sought, the final orders in the Judgment provided for the demolition of structures and a permanent

injunction restraining further occupation by the Appellant in the event that he is unwilling to occupy parcel No. Kilifi/Mtondia/950. Essentially, the court orders were in terms of the prayers sought. Accordingly, this ground is without merit.

As such, we are satisfied that there was no misdirection, or misapprehension of evidence or the law, or misapplication of wrong principles by the trial court, with the result that the Appellant did not prove his case to the required standards while the Respondents successfully demonstrated the validity of their titles.

In sum, the Appeal is without merit and is accordingly dismissed with costs to the Respondents.

***It is so ordered.***

***Dated and delivered at Mombasa this 30<sup>th</sup> day of January, 2026.***

**A. K. MURGOR**

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

**DR. K. I. LAIBUTA CARb, FCIArb.**

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

**G. W. NGENYE-MACHARIA**

**DEPUTY REGISTRAR**

***I certify that  
this is a  
True copy of the  
  
original Signed***

