

**IN THE COURT OF  
APPEAL AT NYERI**

**(CORAM: KARANJA, KANTAI & KORIR,**

**JJ.A.) CIVIL APPEAL NO. 186 OF 2020**

**BETWEEN**

**SUSAN WANGUI** (*Suing for and on behalf/*

*Attorney of* **LUCY MUMBI KIBOCHI.....APPELLANT**

**AND**

**RICHARD KARITU NDERITU.....RESPONDENT**

*(Being an appeal against the judgment of the Environment and Land  
Court at Nyeri (L.N. Waithaka, J.) dated 12<sup>th</sup> March 2019*

*in*

***ELC Cause No. 126 of 2014)***

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

**JUDGMENT OF THE COURT**

1. The appellant, Susan Wangui ("**Susan**") acting on the power of attorney donated to her by Lucy Mumbi Kibochi ("**Lucy**") is dissatisfied with the judgment delivered on 12<sup>th</sup> March 2019 by L.

N. Waithaka, J. of the Environment and Land Court at Nyeri and through the Memorandum of Appeal dated 5<sup>th</sup> December 2020 raises eight grounds, which we reproduce verbatim as follows:

***i. The Learned Judge erred in law and in fact in failing to make a finding that the Plaintiff having followed the legal process to acquire the suit property herein was the legal and lawful owner of the suit property namely Ruringu Prison No. 13 also known as Aguthi/Gatitu/595/13.***

- ii. The Learned Judge erred in law and in fact in failing to make a finding that the Defendant having failed to prove that he had followed the due process in acquiring title No. Aguthi/Gatitu/595/13, the title thereof was liable to being cancelled and the same be issued in the name of the Plaintiff.***
- iii. The Learned Judge erred in law and in fact in failing to make a finding that the Defendant having admitted that his property did not have a building as opposed to the suit property herein was not the owner and his property was thus situated elsewhere.***
- iv. The Learned Judge erred in law and in fact in failing to make a finding that the Defendant having admitted that he had never been in occupation and possession of the suit property was not entitled to any legal interest in the same.***
- v. The Learned Trial Judge erred in law by disregarding the documentary evidence and materials tendered by the Appellant.***
- vi. The Learned Judge erred in law by arriving at a decision which was contrary to law, facts and submissions.***
- vii. The Learned Judge erred in law by failing to appreciate the fact that the process leading to the Appellant's transfer and acquisition of the suit property was lawful.***
- viii. The Learned Judge erred in law and in fact in failing to make a determination on all issues.***

2. To contextualize this appeal, it is imperative that we first appreciate the background and pleadings conveying the parties' positions. Susan, acting on the power of attorney donated to her by Lucy, through the plaint dated 10<sup>th</sup> June 2014, sought to have Lucy declared the lawful owner of the

property known as

**Aguthi/Gatitu/593/13.** Susan also sought to have the certificate of lease issued to the respondent, Richard Karitu Nderitu ("**Richard**"), over the same property cancelled. For the record, it is necessary to point out that the name of the respondent in the plaint is Richard Karimi Nderitu. It was Susan's case that her sister, Lucy, gave her the power of attorney for the purpose of purchasing a piece of land on her behalf. With the power of attorney in hand, she purchased the suit property from one Washington Mugo Kigo through a sale agreement dated 2<sup>nd</sup> April 2011. As will become apparent shortly, the evidence refers to the date of the agreement as 2<sup>nd</sup> April 2001 and not 2<sup>nd</sup> April 2011 as stated in the plaint. According to the appellant, the respondent had, however, impeded the transfer of the suit property to her sister's name.

3. In response, Richard, in a defence and counterclaim dated 21<sup>st</sup> August 2014, denied the appellant's claim. In the counterclaim, he asserted that he was the registered legal owner of the property in question and that the title had been unjustly restricted. He prayed for the dismissal of the suit with costs and the removal of the restriction placed on the title.
4. At the trial, **Susan Wangui** testified as **PW1** and adopted her written statement dated 10<sup>th</sup> June 2014 as part of her evidence in chief. She stated that in 2001, her sister, Lucy, instructed her to acquire a parcel of land on her behalf. Upon inquiry, **Joseph Karanja (PW2)** linked her to one Washington Mugo Kigo

(**“Washington”**), who was the registered owner of Ruringu Prison No. 13, also known as LR. No. Aguthi/Gatitu/593/13. Upon negotiations, she paid Washington a total of Kshs. 1,500,000 as per the written agreement dated 2<sup>nd</sup> April 2001. Together with Washington, they appeared before the Nyeri Municipal Council’s Finance, Staff and General Purposes Committee on 26<sup>th</sup> June 2001, where the application to transfer the plot was approved. She stated that she continued paying for the land rates until 2006 when she learnt that Lucy’s name had been expunged from the register and replaced with that of the respondent.

5. While giving her evidence, she added that before finalizing the purchase, she conducted a search and established that the owner of the suit property was Washington. She also stated that she did not attend a meeting held on 16<sup>th</sup> March 2006 since she was never invited. She additionally testified that on 19<sup>th</sup> September 2013, she received a letter from Nyeri County Government to the effect that there was a discussion relating to the swapping of plots.
6. **Joseph Karanja Kamonjo (PW2)** similarly adopted his undated written statement as his evidence in chief. He stated that in 2001, he was approached by Washington, who requested him to find a buyer for his plot known as Ruringu Prison No. 13. Thereafter, he met the appellant, who was looking for a plot to purchase, and connected the two parties for the transaction. He also testified that upon being paid,

Washington took them to the plot and

handed over the tenants living on the plot to the appellant. According to him, he conducted an official search for plot No. Ruringu Prison No. 13 and established that it was registered in Washington's name. According to **PW2**, plot Ruringu Prison No. 13 was not plot No. Aguthi/Gatitu/595/13.

7. In opposition to the appellant's claim, the respondent testified as **DW1** and adopted his written statement dated 21<sup>st</sup> August 2014 as his evidence in chief. It was his testimony that he purchased the property known as Aguthi/Gatitu/595/13 from Julius Macharia Kingori, and had it registered in his name on 16<sup>th</sup> November 1989. The property had been owned by Julius Macharia Kingori since 1975. He further testified that as of 21<sup>st</sup> October 2005, the land was registered in his name and he had been paying rates for the property. He produced receipts and copies of cheques to evidence the payments. It was also his testimony that, even though he bought the property without buildings, trespassers had erected buildings therein. Further, that upon realizing this, he asked the tenants to vacate the premises.
8. After the hearing, the trial Judge noted that the witnesses had referred to two different plot numbers being Aguthi/Gatitu/595/13 and Ruringu Prison No. 13, and *suo moto* ordered for reports by the Land Registrar and the County Surveyor. In the first report lodged in court on 7<sup>th</sup> March 2017, J.N. Mwamba, the Nyeri County Land Registrar, concluded that there was only one

registration in favour of the respondent being plot no. Aguthi/Gatitu/595/13. Even though the Registrar did not visit the scene before preparing this report, he noted that plot No. Ruringu Prison No. 13 did not exist. The second report was by

S.M. Mwanzama, Nyeri County Land Registrar, filed on 19<sup>th</sup> July 2018. The Registrar, upon visiting the site, found that according to the County Government Plan and RIM, land reference Aguthi/Gatitu/595/13 and Ruringu Prison No. 13 referred to one and the same plot. He also confirmed that the said parcel, which measured 0.0390 hectares, was registered in the name of the respondent, who was issued a lease certificate on 16<sup>th</sup> November 1989.

9. In her judgment, the learned Judge found that the appellant had not made a case for the grant of the orders sought, dismissed her claim, and proceeded to allow the respondent's prayer for an order removing the restriction registered against his title. Those are the orders that have brought the appellant before us.
10. When this appeal came up for hearing, Senior Counsel Dr Gibson Kamau Kuria appeared for the appellant, while learned counsel Mr. Ng'ang'a represented the respondent. Counsel made oral highlights of the written submissions which they had already filed.
11. On behalf of the appellant, Dr. Kamau Kuria, Senior Counsel,

argued through the submissions dated 4<sup>th</sup> April 2024 that the

appeal should be allowed, asserting that the trial Judge erred in framing the issues for determination, leading to a wrong decision. Regarding the question as to who between the appellant and the respondent followed the due process in the acquisition of the plot in dispute, Senior Counsel submitted that the appellant followed the procedure established in the Trust Land Act and the retired Constitution in acquiring the property. Senior Counsel submitted that, on the contrary, the respondent's lease was obtained unprocedurally and illegally. He labelled the respondent a land grabber arguing that what he did before the trial court was to simply dangle an instrument of title without proving ownership thus violating the principle established in **Munyu Maina vs. Hiram Gathiha Maina [2013] KECA 94 (KLR)** that when a registered proprietor's root of title is under challenge, the proprietor must go beyond the instrument and prove the legality of the acquisition of the title, as it is not sufficient to dangle the instrument of title as proof of ownership.

12. Counsel for the appellant referred to sections 114 and 115 of the former Constitution to define trust land and the procedure of vesting it in an individual. He argued that the Nyeri Municipal Council alienated the suit property to Washington Mugo Kigo under section 117, who later sold it to the appellant for Kshs 1.5 million in 2001, with approval in 2006. He cited section 53 of the repealed Trust Land Act, which designated the Commissioner of Lands as the county council's agent for lease

interests. He also

asserted that the appellant, having developed the property since 2001, is a bona fide purchaser for value. It was additionally counsel's submission that although fraud by the Municipal Council of Nyeri and the Ministry of Lands was not specifically pleaded, the court sought and obtained evidence of fraud from the Land Registrar during the trial.

13. According to Senior Counsel, the learned Judge overlooked critical issues raised during litigation, particularly the fact that the appellant was a bona fide purchaser for value. Senior Counsel submitted that the appellant had established that he was a bona fide purchaser for value as she proved that she held a certificate of title; she purchased the property in good faith; she had no knowledge of the fraud; she purchased for valuable consideration; the vendor had apparent valid title; she purchased without notice of any fraud; she was not party to any fraud, thus meeting the conditions for the defence of a bona fide purchase as held in **Elizabeth Wambui Githinji & 29 Others vs. Kenya Urban Roads Authority & 4 Others [2019] KECA 706 (KLR)**.
14. Faulting the trial court's holding that the issue of fraud was never pleaded, Senior Counsel relying on **Kinyanjui Kamau vs. George Kamau Njoroge [2015] eKLR** submitted that even where an issue is not pleaded but arises in the course of the hearing and is fully canvassed by the parties, a Judge can decide on such an issue as held in **Odd Jobs vs. Mubea [1970] EA 476**.

15. Senior Counsel, Dr. Kamau Kuria, submitted that the suit property was trust land, referencing the County Land Registrar's designation of the lessor as the County Council of Nyeri, now the County Government of Nyeri. He cited **Fletcher vs. Peck 10 U.S. 87 (1810)**, to argue that issuing a land grant creates a contract of sale, and **Commissioner for Local Government Lands and Settlement vs. Kaderbhai [1930] EACA 12** to assert that the Crown has authority over its land similar to a private owner. Counsel argued that upon the purchase of the suit property by Mr. Kigo, the County Council of Nyeri was obligated to issue a certificate of lease, which it failed to do. He contended that beneficial owners have the right to enjoy their property and that proof of ownership should come from the County Council of Nyeri or the Commissioner of Lands, not the Land Registrar. According to Senior Counsel, as held in **Funzi Development Ltd vs. County Council of Kwale [2014] eKLR**, a registered proprietor obtains an indefeasible title only if the allocation is legal, and courts cannot endorse illegal titles. Adverting to the decision of the Supreme Court in **Dina Management Limited vs. County Government of Mombasa & 5 Others [2023] KESC 30** that the title or lease is an end product of a process and where the issuance of the title did not comply with the law, then such a title cannot be held as indefeasible, Senior Counsel maintained that the appellant's ownership of the suit property should be upheld as she had established ownership and denied knowledge of any

fraudulent dealings in the acquisition of the lease. We were therefore urged to allow the appeal as prayed.

16. In opposition to the appeal through the submissions dated 18<sup>th</sup> April 2024, the respondent's counsel, Mr. Ng'ang'a, contended that the appellant failed to demonstrate ownership with proper documentation, did not adhere to procedural rules regarding pleadings in respect of the allegation of fraud or illegality, and lacked the necessary legal standing as she relied on an unregistered power of attorney. Counsel submitted that the appellant failed to prove proper registration of the property through any legally prescribed manner. It was counsel's argument that the onus was upon the appellant to prove proper registration, which she failed to do, as held by the Environment and Land Court. According to counsel, the respondent filed a defence and counter-claim, and adduced evidence showing that the appellant was a trespasser on the property, and that evidence was never controverted.

17. Turning to the appellant's power of attorney, counsel argued that the same lacked evidential value. Adverting to **section 4(1)** of the **Registration of Documents Act, Cap. 285**, which requires registration of any document that confers, declares, limits, or extinguishes any right, title, or interest in immovable property, counsel submitted that since the appellant produced an unregistered power of attorney, the power of attorney held no evidential value. Additionally, counsel contended that without a

registered power of attorney, the appellant had no *locus standi* to file the suit in the High Court initially and thus, the appeal is unmerited and should be dismissed.

18. Counsel further argued that the appellant's documents referred to plot number 13, which she admitted did not refer to the suit property. He submitted that the appellant had failed to set out facts that the trial Judge allegedly ignored. In conclusion, counsel urged us to dismiss the appeal with costs.

19. This being a first appeal, we, as per the provisions of **rule 31(1)(a)** of the **Court of Appeal Rules**, owe a duty to the parties to re- appraise the evidence on record and draw inferences of fact in order to arrive at our own independent decision. This mandate has been reiterated by the Court in a plethora of decisions, including **Odera t/a A J Odera & Associates vs. Machira t/a Machira & Co Advocates** [2013] KECA 208 (KLR), where it was held that:

**“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

20. In exercising the said mandate, we bear in mind the holding by Hancox, Ag JA in **Makube vs. Nyamuro** [1983] eKLR that:

**“However, a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension**

**of the**

**evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”**

21. In delivering on our mandate as prescribed above, we have read through the record and appreciated the tenor of all the authorities referred to by counsel. In our view, this appeal will be determined by answering the questions as to whether plot Ruringu Prison No. 13, and L.R. No. Aguthi/Gatitu/593/13 refer to one and the same property, and who the legally recognized owner of the property is.
22. The first issue in this appeal is pretty straightforward, and one need not look any further than the second report by S.M. Mwanzama, Land Registrar, Nyeri County, filed on 19<sup>th</sup> July 2018. This report was necessitated by the fact that while the appellant referred to her property as Ruringu Prison Plot No. 13, the respondent claimed his property was Aguthi/Gatitu/595/13. Both parties were present during the Land Registrar’s visit to the disputed property, and counsel on record for the parties had an opportunity to address the trial court on the report prepared after the visit. In the report, it was established that according to the County Government Plan and RIM, LR No. Aguthi/Gatitu/ 595/13 and Ruringu Prison No. 13 referred to the same parcel of land. From the foregoing, we find no merit in the appellant’s assertion that the learned Judge erred in failing to find that the respondent’s property was situated elsewhere. We therefore proceed to affirm the learned Judge’s finding that

plot Ruringu

Prison No. 13, and LR. No. Aguthi/Gatitu/593/13 refer to one and the same property.

23. Turning to the issue of who between the appellant and the respondent proved ownership of the suit property, we note that both the appellant and the respondent asserted ownership over the suit property. For the appellant, it was her case that she acquired the suit property on behalf of her sister, Lucy, from one Washington through a sale agreement dated 2<sup>nd</sup> April 2001. On his part, the respondent asserted that he acquired the property in 1989 from one Julius Macharia Kingori, who had owned the property since 1975.
24. **Section 107** of the **Evidence Act** provides that a person desiring any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove the existence of those facts. It would follow that both the appellant and the respondent had the burden of proving their respective claims of ownership of the suit property. Interestingly, whereas the appellant asserted possession of the suit property, the respondent produced a certificate of title over it. In the circumstances, **section 116** of the **Evidence Act** comes into play as it provides that *“when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”*

25. In answering the question as to who the owner of the suit property is, we will start by referring to two decisions. First, the Court in **Mbarak vs. Freedom Limited [2024] KECA 160 (KLR)** observed as follows:

**“It must be borne in mind, though, that the right to immovable property is not entirely dependent on formal registration and issuance of a certificate of title thereto, particularly where the process is shown to have been tainted with irregularity. Whatever the case, possession carries the day as was held in the case of Bandi vs. Dzomo & 76 others (supra) reiterating the holding in Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, where the court underscored the following principle: that all titles to land are ultimately based upon possession; that the title of the man seised prevails against all who can show no better right to seisin; that possession is nine-tenths ownership; and that the slightest amount of possession would be sufficient (see the Privy Council decision in Ghana of Wuta-Ofei vs. Danquah [1961] All ER 596 at 600).”** [Emphasis ours]

26. Secondly, we refer to the holding of the Supreme Court in **Dina Management Limited vs. County Government of Mombasa & 5 Others [2023] KESC 30 (KLR)** that establishing a good root of the title is the first step in establishing whether a party is a bona fide purchaser for value. This is what the Court said:

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

**Indeed, the title or lease is an end product of a**

**process. If the process that was followed prior to**

**issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...**

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

27. The foregoing pronouncements guide us. In this case, however, it must be noted that the appellant did not move to challenge the respondent's title directly. She never alleged that the same was obtained irregularly. No evidence was put forth to impeach the respondent's title. In fact, the record shows that the appellant's case was that her property was different from that owned by the respondent. The respondent in this case tabled a lease whose origin was traceable to 9<sup>th</sup> July 1975, when the property was leased to Macharia Kingori, who later sold it to the respondent on 14<sup>th</sup> November 1989. It is important to point out that the appellant, in all his documents, referred to the suit property as Ruringu Prison No. 13. It is only in her search on 13<sup>th</sup> January 2014 that she referred to the property as Aguthi/Gatitu/593/13. That search confirmed that the property belonged to the respondent.

28. From the foregoing, we agree with the learned Judge that on a balance of probability, the respondent established his ownership over the suit property. As already stated, the appellant did not impeach the respondent's title, nor did she challenge the process through which the respondent acquired his title. In the

circumstances, there was no basis for the learned Judge to proceed to interrogate the root of the title as it was not an issue placed before her. It must be recalled that a title deed serves as a prima facie proof of ownership and can only be denounced where there is cogent evidence to challenge the process of its acquisition. And as we have already appreciated, in this appeal, the appellant had no corresponding title for comparison with the respondent's title. All she did was to assert possession of the suit property.

29. We have also considered the record, and we find that contrary to the appellant's assertion, the learned Judge properly appreciated the applicable law where fraud is alleged. As pointed out by the Court in **Pamba Ong'weno Amila vs. John Juma Kutolo [2015] KECA 867 (KLR)**, fraud is a conclusion of law, and the facts alleged to be fraudulent must be set out, and evidence led thereon to prove fraudulent intent. It has also been held in **Kagina vs. Kagina & 2 Others [2021] KECA 242 (KLR)** that fraud must be proved as a fact by evidence whose standard of proof is beyond a balance of probabilities but not as high as the standard of beyond reasonable doubt applicable in criminal proceedings. In this case, the appellant neither pleaded fraud nor particularized the elements of fraud or proved fraud.
30. The appellant also faults the learned Judge's analysis and framing of issues for determination. We find no merit in this assertion. The Court has on numerous occasions cemented the

dictum that parties are bound by their own pleadings. For instance, in **Ann Wairimu Wanjohi vs. James Wambiru Mukabi** [2021] KECA 476 (KLR), the Court 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.”**

31. Having considered the record, we do not think that the learned Judge erred in framing the issues as she did. The dispute revolved around ownership of the suit property, which she correctly addressed. Secondly, as we have already pointed out, none of the parties pleaded fraud, and therefore, the learned Judge was not duty-bound to enter that arena. Doing so would amount to challenging the well-established rules of the game as far as plea and proof of fraud are concerned. Thirdly, the

learned

Judge moved to assess which between the plaint and the counterclaim was meritorious. Upon finding in favour of the respondent's title, which decision we affirm, it followed that the counterclaim was to be allowed as prayed. Consequently, we also affirm the reliefs granted by the learned Judge.

32. Ultimately, it is now clear that this appeal lacks merit and is for dismissal. This appeal is therefore dismissed with costs to the respondent.

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

**W. KARANJA**

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

**S. ole KANTAI**

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

**W. KORIR**

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

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

*Signed*  
**DEPUTY REGISTRAR**