

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, J. MOHAMMED & NGENYE, JJ.A.)

CIVIL APPEAL NO. E063 OF 2023

BETWEEN

DAVID W. GACHOGU.....1ST APPELLANT

ANNA WAMBUI NJUGUNA.....2ND APPELLANT

AND

THATHINI DEVELOPMENT COMPANY LIMITED..1ST

RESPONDENT SAFARICOM COMPANY LIMITED 2ND

RESPONDENT

THE LAND REGISTRAR, MOMBASA.....3RD

RESPONDENT

***(An Appeal from the Judgement of the Environment
and Land Court Mombasa (L.L. Naikuni, J.) delivered on
15th February 2023***

in

Environment and Land Court Case No.149 of 2014)

JUDGMENT OF THE COURT

By way of a plaint dated 12th June 2014 the **1st Respondent**,
Thathini Development Company Limited, a limited liability
company duly registered and incorporated in accordance with the

provisions of the Companies Act, Cap 486, filed a suit against the
1st Appellant, David W. Gachogu and **Peter Owen Njuguna**

(the deceased co-owner) in their capacities as the registered proprietors of all that parcel of land known as Mombasa/MN/Thathini/112, (the subject property) measuring approximately thirty decimal five (30.5) hectares, **the 2nd Respondent, Safaricom Company Limited**, a limited liability company duly incorporated under the Companies Act, Cap 486 and the **3rd Respondent, The Land Registrar, Mombasa** a public officer charged with statutory duties relating to land registration within Mombasa County and who registered the transfer of the subject property in the 1st Appellant's and the deceased co owner's names.

In the suit, the 1st Respondent sought the following orders;

- a) *A declaration that the subject property rightfully and absolutely belongs to it; (from para 1, it is the 1st resp who sued, a company)*
- b) *Cancellation of the fraudulent transfer and rectification of the register to restore the land to their name;*
- c) *An injunction restraining the 2nd respondent from any dealings with the subject property;*
- d) *In the alternative, an order compelling the 2nd respondent to enter into a fresh lease with them on lawful and mutually agreeable terms;*
- e) *In default of compliance, a mandatory injunction directing the 2nd respondent vacate the land and*

remove all structures erected thereon; and
f) Costs of the suit.

In the course of the proceedings, the deceased co-owner passed away on 5th July 2009, whereupon, the Record shows that the 1st Respondent filed a Notice of Motion dated 30th March 2015 seeking to substitute him with the 2nd Appellant. However, by consent of parties signed on 25th June 2015, the

application was marked as withdrawn. When the matter was mentioned on 9th March 2017, counsel for the 1st Respondent withdrew the suit against the deceased co-owner.

Thereafter, by way of an amended plaint dated 25th November 2019, the 1st Respondent struck out the name of deceased co-owner as the 2nd Defendant and maintained the suit against the 1st Appellant only. It then sought orders for:

a) a cancellation of the fraudulent transfer and offending entries made in the register in favour of the 1st Appellant and the deceased co-owner; b) the 3rd Respondent to issue a title deed of the subject property in the name of the 1st Respondent; c) damages for loss of use and trespass since 20th July 2005 until vacant possession, to be accessed by the court; and d) costs of the suit be borne by the Respondents.

It was the 1st Respondent's case that it was the lawful and beneficial owner of the subject property, when on or about the 17th March, 2007, the 1st Appellant and the deceased co-owner, who were then serving as directors of the 1st Respondent's company, acting jointly and with the intent to defraud the

company, unlawfully caused the subject property to be transferred into their joint names. The 1st Respondent's contended that the impugned transfer was effected without the authority, sanction, or resolution of the company, and in blatant breach of the fiduciary duties imposed upon the 1st Appellant and the

deceased co-owner, as directors. The 1st Respondent claimed that the transaction, was irregular and fraudulent, and it was subsequently reported to the police for investigation.

The 1st Respondent particularized the alleged acts of fraud as being: that the 1st Appellant and the deceased co-owner, fraudulently transferred the subject property to themselves; that they failed to consult the full Board of Directors before executing the transfer; that they neglected to obtain a valid company resolution passed at a duly convened Annual General Meeting; that they colluded and connived with the 3rd Respondent, the Land Registrar, to facilitate and effect the fraudulent transfer; that they misled the 2nd Respondent into believing that they were the lawful proprietors of the land and that, therefore, had authority to lease it; and that they acted in contravention of the provisions of the Companies Act concerning the management and disposition of company assets.

The 1st Respondent claimed that following the impugned transfer, the 1st Appellant and the deceased co-owner, proceeded to lease a portion of the subject property, specifically the area known as Nguu Tatu Hill, measuring approximately sixteen (16)

metres by twelve (12) metres, to the 2nd Respondent for erection of a telecommunication mast. A lease was executed specifying an annual consideration of Kshs. 160,000, subject to an annual increment of five

per cent (5%), for a term of nine (9) years and eleven (11) months. Pursuant to the lease, the 2nd Respondent installed a base transmission station comprising a tower, equipment shelter, antennae, and related communication infrastructure upon the leased portion.

The 1st Respondent further contended that the 3rd Respondent, as Land Registrar, had abdicated his statutory duty and failed to exercise due diligence in the discharge of his functions by registering the transfer without verifying its authenticity or the authority of the signatories, or their compliance with the requisite company procedures. It was contended that had the 3rd Respondent exercised the prudence expected of his office, the fraudulent transfer would not have been registered, and the 1st Respondent would not have been deprived of its property.

As a consequence, the 1st Respondent asserted that it had been unlawfully divested of its proprietary interest in the subject property and reduced to the position of a squatter on its own property, while the 1st Appellant and the deceased co-owner, continued to benefit from the rental proceeds derived from the

lease to the 2nd Respondent. Despite several demands and the issuance of a formal notice of intention to sue, the 1st Appellant, the deceased co-owner and the other Respondents failed, refused, and neglected to rectify the illegality, thereby compelling the 1st Respondent to institute the suit against them.

During the trial, the 1st Respondent called three witnesses in support of its case. **Benjamin Achode Malingu, PW1**, testified that he was a qualified accountant and a practicing company secretary residing in Nairobi. He had served as the company secretary of the 1st Respondent since the year 2010. He recorded his witness statement on 15th November 2019 and adopted it as his evidence-in-chief. He relied on the list of documents dated 18th November 2019 and a further list dated 19th November 2019, both of which he produced. His evidence was that the suit was filed because the company's land had been fraudulently transferred by the 1st Appellant and the deceased co-owner, to themselves, and he urged the court to cancel the transfer and restore the property to the company.

Upon cross-examination, PW1 stated that as the company secretary of the 1st Respondent, he was responsible for filing annual returns and undertaking assignments as directed by the Board. He confirmed that the company's main business was to purchase and distribute land among its registered members based on their shareholding. He explained that allocation was done through a secret ballot system, where members picked

parcels according to the shares they held. He confirmed that the 1st Appellant and the deceased co-owner were members and directors of the company and that directors were entitled to allocation like other shareholders. However, he maintained that the 1st

Appellant and the deceased co-owner, had acquired a disproportionately large parcel of land compared to their shareholding. PW1 further stated that the subject property, originally belonged to the 1st Respondent company, and that the 1st Appellant and the deceased co-owner, who were then the Secretary and Director respectively, caused the land to be fraudulently transferred into their names; that the 1st Appellant had subsequently leased part of the land, known as Nguu Tatu Hill, to the 2nd Respondent for the installation of a telecommunication mast. The lease attracted an annual rent of Kshs. 160,000, increasing at 5% per annum which was paid directly to the 1st Appellant and not to the 1st Respondent. He denied that the suit resulted from the construction of the mast and confirmed that a complaint was lodged with the Directorate of Criminal Investigations (DCI) regarding the fraudulent transfer.

On further examination, PW1 testified that according to the company's register, the 1st Appellant held only 61 shares, which entitled him to approximately 1.93 acres, and not the 75.37 acres he had appropriated; that the company's register contained 683 members of whom were holding a total of 136,059 shares. He

admitted that he had no certified records of the 2007 allocations and that the register he produced was for 2010. He confirmed that the 1st Respondent had not filed annual returns for many years and that there

were governance lapses, including non-compliance with the provisions of the Companies Act regarding the minimum number of directors.

Felix Naftali Mutethia PW2, an officer from the Business Registration Service, testified that he had been summoned by the court to produce the official records of the 1st Respondent. He produced the Memorandum and Articles of Association which showed that the company was incorporated on 25th April 1978, with its registered office situated on Plot No. 148, Section XX, Kilindini Road, Mombasa. As at 6th March 2007, the directors were listed as Peter John Mwangi, Peter Njuguna, Alphonse Kinyanjui, David Wanyoike Gachogu, Mbugua Mbeti, Mwaura Kimani, and Njeri Gikonyo

PW2 stated that the company had not held an Annual General Meeting (AGM) since incorporation and had failed to file returns for over nineteen years. He confirmed that the Registrar of Companies had not deregistered the company despite its non-compliance. In cross-examination, PW2 stated that the 1st Appellant was listed as a director in the company's records as of 6th March 2007, and that the company remained legally

registered. However, he reiterated that there was no record of any AGM or resolution authorizing the transfer of the subject property to the 1st Appellant and the deceased co-owner.

Fredrick Mungai Wainaina, PW3, testified that he became a director of the

1st Respondent company through a court order in 2016. He stated that the

company's core business was the purchase and distribution of land to its shareholders. He confirmed that the 1st Respondent had purchased a parcel of land at Mombasa, which was subsequently subdivided and distributed to its 118 shareholders in accordance with their shareholding. According to the company's allocation formula, 360 shares were equivalent to 9 acres, 60 shares to 1½ acres, and 40 shares to 1 acre: that the 1st Appellant held only 61 shares, while the deceased co-owner held 181 shares. Based on their shareholding, they were entitled to a total of approximately 6 acres each, but had instead allocated to themselves 75.37 acres each. He added that the 1st Appellant and the deceased co-owner had signed transfer forms in their names without proper company authority. He confirmed that the telecommunication mast had been erected by the 2nd Respondent in 2005 under a lease initially entered into with the 1st Respondent company, which was later manipulated by the 1st Appellant and the deceased co-owner for their personal gain.

In cross-examination, PW3 admitted that shareholders, including directors, were entitled to allocation of land based on their shares, but insisted that the 1st Appellant and the deceased

co-owner had exceeded their entitlement. He further stated that the location of the subject property where the 2nd Respondent's mast was located was prime land for which the 1st Appellant and the deceased co-owner were not entitled in view of their shareholding, and that

the 1st Respondent had sued them because they were the only two shareholders who had irregularly acquired titles. He urged the court to cancel their title and restore its ownership to the 1st Respondent company.

The 1st Appellant, who was the 1st Defendant before the trial court, denied the allegations set out in the Plaint and prayed that the 1st Respondent's suit be dismissed with costs.

In his testimony as DW1, the 1st Appellant stated that he was a retired public officer and farmer residing in Nairobi, and holder of National Identity Card No. 5378737. He adopted his witness statements dated 28th August 2014 and 6th December 2019 as his evidence-in-chief, together with the documents produced.

The 1st Appellant stated that he was a member and shareholder of Thathini Development Company Limited, and that the company had purchased approximately 4,318 acres of land, including the parcel later registered as the subject property, which was part of the larger estate. He stated that the company had about 650 shareholders, of whom only those who had paid fully for their shares were entitled to titles. He maintained that

the title to the subject property was lawfully registered in his name and that of the deceased co-owner, as a result of a proper subdivision process; that the company had achieved its purpose of purchasing land for allocation, but was unable to complete the process of

subdivision and dissolution. He stated that certain parts of the land, were rocky or hilly, particularly around the area known as Nguu Tatu, and could not be subdivided easily. He further stated that the company had reserved approximately 100 acres for squatters. DW1 asserted that he had fully paid for his shares and lawfully received his portion of land. He denied any allegations of fraud, insisting that the process was transparent and above board.

The 1st Appellant further testified that in 2005, the 2nd Respondent expressed interest in leasing part of the hilly area for installation of a telecommunication mast. Since titles had not yet been issued, the 1st Respondent entered into a lease agreement with the 2nd Respondent; that in 2007, the title of the subject property was issued in his and the deceased co-owner's names, and that thereafter the 2nd Respondent began paying rent directly to them. He confirmed that the payments continued until the commencement of this suit, when the court ordered the rental income to be withheld.

In cross-examination, DW1 confirmed that he had initially owned 600 shares, though the company's records later reflected

that he held only 61 shares. Based on that number, he admitted that he would ordinarily be entitled to a smaller parcel of land. He, however, maintained that the process of balloting for plots had failed, and allocations were instead made by the Board of Directors. He stated that he was a founding member of the company and had signed its

Memorandum and Articles of Association. He contended that Annual General Meetings had been held during his tenure, though he did not produce any minutes or other proof of such meetings; that, according to the company's Articles of Association, the minimum number of directors was seven, but by 2006 only four remained. He conceded that he had no Board minutes authorizing his transfer, but stated that the transaction had been handled in the same manner as other members' allocations. He claimed to have paid the required stamp duty, though he did not produce any receipts. He maintained that his parcel of land was hilly and less valuable than others closer to the ocean or main road.

In re-examination, DW1 stated that the company's records were held by the directors and that, due to delays in subdivision, several members sold their shares to others. He denied any collusion or fraudulent dealings, reiterating that he and the deceased co-owner obtained their titles lawfully.

In their defence, the 2nd Respondent denied the allegations of fraud and negligence as pleaded by the 1st Respondent. It averred that, to the best of its knowledge, the subject property had been duly registered in the names of the 1st Appellant and the deceased

co-owner, as proprietors on 4th October 2007; that it had entered into a lease agreement with the company after conducting all

necessary due diligence through the Land Registry, and that at all material times it acted in good faith as a lawful tenant.

Doreen Ochondo, DW2, testified on behalf of the 2nd Respondent. She stated that she was a legal counsel employed by the company and an advocate of the High Court of Kenya. She adopted her witness statement dated 6th March 2022 and produced the 2nd Respondent's documents dated 9th January 2017 as exhibits.

She testified that, in 2005, the 2nd Respondent identified Nguu Tatu Hill in Mombasa as a suitable site for a telecommunication mast. Following negotiations, a letter of offer was issued on 1st April 2005, and a lease agreement was executed on 20th July 2005 between the 1st and 2nd Respondents for a term of nine (9) years and eleven (11) months. In 2008, the 2nd Respondent received communication from the company indicating that the land had been transferred to Mr. David Wanyoike Gachogu and Mr. Peter Owen Njuguna, the 1st Appellant and the deceased co-owner respectively. It was provided with copies of their title deed, after which the 2nd Respondent regularized its records and began making rent payments to them;

that in 2011, the 1st Respondent, the company wrote to the 2nd Respondent alleging that the transaction was fraudulent. When the 2nd Respondent requested for supporting documents, none were provided, and so payments to the 1st Appellant and the deceased co-owner

continued. In 2012, the 2nd Respondent was notified of the death of the deceased co-owner by the 1st Appellant who then requested that rent proceeds be shared between himself and the deceased's estate, to which instruction the 2nd Respondent complied. However, in 2014, upon receipt of a court order indicating ongoing litigation and alleged fraud, the 2nd Respondent suspended all payments.

On cross-examination, DW2 testified that she did not have a copy of an official search or CR12 form conducted prior to the initial lease. She conceded that the 2nd Respondent did not execute a fresh lease after the transfer of title to the 1st Appellant and the deceased co-owner, but continued operating under the existing agreement. She stated that the 2nd Respondent remained a neutral party and would abide by the court's determination.

The 3rd Respondent, the Land Registrar, also denied all allegations of collusion or negligence in registering the transfer. It was their position that the registration was conducted in accordance with the law and the documents presented.

Chepkemoi Mercy DW3, the Land Registrar at Mombasa, testified that according to the official records, the registered proprietors of the subject property

were the 1st Appellant and the deceased co-owner. She produced certified copies of the green card, official search, and title deed. She also produced the transfer instrument dated 6th March 2007 from Thathini Development Company Limited to the two proprietors.

In cross-examination, DW3 admitted that the transfer instrument bore two signatures and the company seal, but no accompanying board resolution or CR12 form was on file. She stated that, on face value, the signatures appeared authentic and that stamp duty had been paid. She confirmed that had there been any official notice of fraud or irregularity, the Land Registry would have placed a restriction on the title pending investigations.

Having carefully considered the pleadings, the testimonies of all witnesses, the documentary evidence tendered, the written submissions, the trial court found that the 1st Respondent was incorporated in 1978 as a land-buying company under the Companies Act with the primary objective of acquiring and subdividing land among its shareholders in proportion to their paid-up shares, and that it had acquired approximately 4,318

acres of land, including the subject property.

The trial court further found that the 1st Appellant, who held only 61 shares equivalent to approximately one acre, and the deceased co-director, had unlawfully allocated to themselves 75.37 acres, which was substantially more

than their entitlement, and that the transaction was tainted with misrepresentation, conflict of interest, and abuse of office; that the registration of the title in the 1st Appellant's and the deceased co-owner's names on 4th October 2007 was procedurally defective, as the transfer instrument lacked proper execution, company authorization, and supporting documentation. Citing **Section 143** of the repealed **Registered Land Act** (Cap. 300) and **Section 24** of the **Land Registration Act** (No. 3 of 2012), the court ruled that the title had been obtained by mistake, omission, and misrepresentation, and was therefore liable to cancellation.

The trial court exonerated the 2nd Respondent from liability, finding that it had acted in good faith as a *bona fide* lessee. It had originally entered into a valid lease with the 1st Respondent on 20th July 2005 and later continued paying rent to the 1st Appellant and the deceased co-owner after receiving notice of the transfer supported by a copy of title. The court found that though it should have sought a fresh lease or board resolution, its conduct did not amount to fraud.

As for the 3rd Respondent, the court concluded that there

was no evidence of active collusion but held that the registration had been undertaken without due diligence, as there was no CR12 form or company resolution on record. This omission, while not constituting fraud, amounted to administrative negligence.

The court held that the 1st Respondent had demonstrated, on a balance of probabilities, that the subject property was unlawfully and irregularly obtained. Consequently, the court invoked its powers under **Section 143(1) and (2)** of the **Registered Land Act** (Cap. 300) to order rectification of the register.

In so finding, the trial court entered judgment in favour of the 1st Respondent and ordered that:

- a) *Judgment be entered in favour of the 1st Respondent and against the 1st, 2nd, and 3rd Respondents jointly and severally.*
- b) *the 1st Appellant was directed to surrender the original Certificate of title to the subject property within fifteen (15) days to the Land Registrar, Mombasa, the 3rd Respondent for cancellation and/or revocation and rectification of the entries of the Land Registries to be in the names of 1st Respondent pursuant to the provision of Section 143 (1) and (2) of the Registered Land Act Cap 300 (Repealed)*
- c) *the 1st Appellant was directed to remit all the monies received in respect of the Lease entered between the 1st Respondent and 2nd Respondent from the date of the execution of the Lease on 20th July, 2005 to date without fail.*
- d) *an order that the 2nd Respondent henceforth release all the financial proceeds owed to the 1st Respondent and emanating from the duly executed Lease Agreement between the 1st Respondent and 2nd Respondent within thirty (30) days from the date of the Judgment.*

e) an order be made for the 2nd Respondent to be allowed to continue operating its telecommunication mast erected thereof as per the terms and conditions stipulated in the duly executed lease dated 20th July, 2005 with the 1st Respondent but subject to fresh renewal.

f) an order directing the Board of Directors of the 1st Respondent Company to convene an Annual General Meeting as per the Provisions of Section 275A of the Companies Act within the next three (3) months to deliberate on:-The status of the

company and court case; Elections of and/or appointment of the Board of Directors; Renewal and/or extension of the Lease for the Safaricom Company Limited, the 3rd Defendant herein. Annual returns to the Company registry and any other business.

g) costs of the suit be borne by the 1st Appellant.

Aggrieved, the 1st Appellant filed an appeal to this Court on grounds that the learned Judge was in error in allowing the 1st Respondent's suit without considering and, or, properly evaluating the 1st Appellant's evidence and the fact that they had shares in the 1st Respondent's company and he was entitled to a share of the land just as any other shareholder; in concluding that the 1st Appellant was not entitled to any land despite confirmation by the witness for the 1st Respondent's company that the 1st Appellant and the deceased co-owner were shareholders and entitled to land which conclusion has led to dispossessing the 1st Appellant and the deceased co-owner of their legitimate share of land; in proceeding with the suit where one of the registered co-owners of the land was deceased and erroneously making a finding with regard to the deceased co-owner contrary to the averments in the Amended Plaintiff dated 25th November 2019; in failing to properly analyze the witness evidence with the result that the

court arrived at the wrong conclusion; in reaching the wrong conclusion as on the ownership of the subject property and the Company procedure in allocating land to individual shareholders; in wrongly concluding that the entire land belonged to 1st Appellant in total disregard of the deceased co-owner and

directing the 1st Appellant to surrender the original title deed without a corresponding order to the co-owner or his estate; in ordering the 1st Appellant to release all the monies received from the 2nd Respondent without evidence that he had indeed been paid such money; in relying on extraneous matters which were not the subject of the suit to the detriment of the 1st Appellant and the deceased co-owner; and in condemning the deceased co-owner unheard which decision has led to dispossessing the deceased's estate of its rightful land ownership.

The parties filed written submissions, and when the appeal came up for hearing on a virtual platform, learned counsel **Mr. Oddiaga** appeared for the 1st Appellant, while learned counsel **Mr. Mwaniki** appeared for the 1st Respondent. Learned counsel **Ms Cheruiyot** holding brief for Mr. Kongere appeared for the 2nd Respondent and **Ms. Nzau** holding brief for Mr. Waga represented the 3rd Respondent. There was no appearance for the 2nd Appellant, Anna Wambui Njuguna.

At this juncture Mr. Oddiaga sought leave from the Court to amend the title of the appeal to strike out the 2nd Appellant for the reason that she had been erroneously included as a party. There

being no objection from counsel for the Respondents, this Court ordered that the appeal be amended to strike out the 2nd Appellant, Anna Wambui Njuguna as a party to the appeal.

Counsel for the 1st Appellant relied on the written submissions where it was submitted that the appeal was against the Judgment of the Environment and Land Court delivered on 15th February 2023, which cancelled the 1st Appellant and the deceased co-owner's title to the subject property. It was submitted that the learned Judge failed to properly evaluate the evidence that showed they were *bona fide* shareholders of the 1st Respondent, a land-buying company incorporated for the purpose of acquiring and distributing land among shareholders according to shareholding. The 1st Appellant argued that the evidence presented, including a share certificate and the testimony from the 1st Respondent's own witnesses (PW1 and PW3), clearly established that both the 1st Appellant and the deceased co-owner were legitimate members and, therefore, entitled to allocation of land consistent with their membership, which the trial court failed to consider.

They further submitted that, the learned Judge failed to re-evaluate the entire evidence and as a result reached the wrong conclusion.

The 1st Appellant submitted further that the 1st Respondent's

allegations of fraud were never proved to the legal standard required; that fraud must be strictly pleaded and strictly proved. Reliance was placed on **Sections 109** and **112** of ***the Evidence Act***, for the proposition that a party alleging any particular fact or matters especially within their knowledge has the burden of proving such

allegations. The case of **Kinyanjui Kamau vs George Kamau [2015] eKLR** was

cited for the proposition that allegations of fraud require a standard of proof higher than the balance of probabilities and that fraud cannot be inferred from the circumstances. The 1st Appellant submitted that the 1st Respondent did not adduce any documentary proof, either company minutes, corporate records that showed the irregular allocation, and no evidence demonstrating that the 1st Appellant and the deceased co-owner acted with fraudulent intent, and that, therefore, the trial Judge wrongly concluded that fraud was established without basis.

A central ground of the appeal, it was submitted, was that the trial proceeded against a deceased co-owner, the late Peter Owen Njuguna, without substitution of a legal representative as required under **Order 24** of the **Civil Procedure Rules**. The 1st Appellant faulted the learned Judge for issuing adverse findings and orders affecting the deceased, including the cancellation of title and purported refund of rental income, even though the deceased's estate was neither represented nor heard; that this, it was argued, violated the principles of natural justice and the constitutional right to a fair hearing under **Article 50(1)** of **the**

Constitution. The case of **Benard Ngugi vs George Kariuki**
[2020] eKLR, was relied
upon for the proposition that proceedings against a deceased
person are a nullity, and the case of **Trouistik Union**
International vs Jane Mbeyu [1993] eKLR, to

support the proposition that substitution of a deceased person is mandatory before orders against the estate of a deceased party can be issued.

The trial Judge was also faulted for ordering only the 1st Appellant to surrender the original title for cancellation, even though the property was jointly owned with the deceased. It was argued that pursuant to **Section 91** of the **Land Registration Act**, joint proprietorship could not be severed or altered without the involvement of both owners or the estate of a deceased owner, and that, as a consequence, the order requiring unilateral surrender by the 1st Appellant was a misapprehension of the law, and the order was incapable of lawful enforcement.

Furthermore, the 1st Appellant submitted that the order directing him to refund rental income allegedly received from the 2nd Respondent was unjustified because no evidence was produced that proved he received any money. It was also submitted that special damages, such as alleged rent paid, must be specifically pleaded and strictly proved, and the case of **Hahn vs Singh [1985] KLR** was cited in support of this proposition; that the 2nd Respondent did not produce bank statements,

payment records, remittance evidence, or vouchers to establish any payment to the 1st Appellant, yet despite the lack of pleadings or proof of payment the court made an order for refund of alleged amounts paid.

The 1st Appellant further submitted that the trial Judge was wrong to issue directions on the convening of AGMs, electing directors, filing annual returns, and renewing the 2nd Respondent's lease, yet such matters were not pleaded by the parties, and neither were they the basis of the dispute; that by issuing orders based on extraneous matters, the trial Judge exceeded his mandate.

In conclusion, the 1st Appellant argued that the trial was conducted as though the 1st Appellant was the sole owner of the subject property, which had resulted in erroneous and unjust orders; that the cumulative errors—including misapprehension of evidence, failure to prove fraud, proceeding against a deceased person, issuing untenable orders, and reliance on extraneous issues—render judgment fit for setting aside, and for an order of retrial to issue in the interests of justice.

Also relying on the written submissions, the 1st Respondent submitted that the Judgment of the Environment and Land Court was sound, well-reasoned, and firmly supported by the evidence tendered during the trial. It was submitted that, the 1st Appellant was a director and shareholder of the company, and that by his own admission, he confirmed that he held only sixty-one (61)

shares, entitling him to one acre only and not to the seventy-five (75) acres comprising the subject property which he transferred to himself and to the deceased co- owner. The 1st Respondent asserted that the transfer and ensuing title was

acquired unlawfully and without proper authority of the company, and that, therefore, the trial Judge correctly ordered its cancellation.

The 1st Respondent further submitted that the 1st Appellant's own testimony was self-incriminating and clearly pointed to the illegality and fraud complained of; that the admission that he was entitled only to one acre, effectively confirmed that the 75-acres he transferred to himself and to the deceased co-owner far exceeded their share entitlement which rendered the transfer wholly unlawful and unjustified; that the trial court properly evaluated all the evidence, in particular, the 1st Appellant's admissions and contradictions and rightly found that fraud was proved; that on this basis, the order of cancellation of the title was lawfully issued.

Further, the 1st Respondent submitted that the appeal has since been overtaken by events, as the 1st Appellant had initially filed an application for stay of execution pending appeal, and a ruling on that application was delivered on 30th September 2023, directing the 1st Appellant to deposit Kshs. 5,500,000 in a joint account as security within thirty (30) days, failing which the

orders of stay would lapse automatically. It was submitted that the 1st Appellant failed to deposit the required security, and as a consequence, the stay orders lapsed, and the 2nd Respondent released the funds it was holding to the 1st Respondent; that additionally, the 3rd Respondent in compliance with the court orders cancelled

the impugned entries in the land register, the sum total of which has rendered this appeal an academic exercise.

For their part, the 2nd and 3rd Respondents informed the Court that they did not file any written submissions.

This is a first appeal, where this Court has a duty to review and reassess the evidence that was before the trial court and reach its own independent findings. In so doing, this Court should bear in mind that, unlike the trial Judge, it did not have the advantage of seeing or hearing the witnesses or observing their demeanor. As stated in the case of **Selle & Another vs Associated Motor Boat**

Co. Ltd & Others [1968] EA 123, an appeal of this nature amounts to a rehearing, and the appellate court must reconsider the evidence, evaluate it afresh, and draw its own conclusions, while making due allowance for the fact that it did not observe the witnesses firsthand.

Additionally, we are reminded by the decision in the case of **Mbogo &**

Another vs Shah [1968] EA 93, that an appellate court will not interfere lightly

with the discretion exercised by a trial judge unless it is satisfied

that the judge misdirected himself on a relevant matter, arrived at an erroneous conclusion, or was clearly wrong in a way that has resulted in injustice.

Upon considering the grounds of appeal, the rival submissions of the parties, the record of appeal, and the applicable law, the following issues arise for determination:

*i) Whether the learned Judge wrongly issued findings, and adverse orders against the deceased co-owner without substitution of a legal representative, and whether such proceedings were a nullity for violating **Order 24** of the **Civil Procedure Rules** and the right to a fair hearing;*

ii) Whether the trial court misdirected itself in law by ordering only the 1st Appellant to surrender the original title deed despite the subject property being jointly owned thereby issuing an order incapable of lawful execution;

iii) Whether the 1st Respondent failed to prove fraud to the strict standard required in law.

iv) Whether the trial court wrongly ordered the 1st Appellant to refund monies allegedly received from the 2nd Respondent; and

v) Whether the learned Judge relied on extraneous and unpleaded matters in issuing the orders for refund and directions for the holding of AGMs by the 1st Respondent.

With respect to the issue that the trial court committed a fundamental procedural error by proceeding with the suit and making adverse findings against the deceased co-owner, who was deceased as at the time Judgment was delivered, the 1st Appellant argued that under **Order 24** of the **Civil Procedure Rules**, a suit cannot lawfully proceed against a deceased party unless a legal

representative is substituted within the time prescribed by law, yet no such substitution was undertaken.

It was contended that despite being notified of his death, the trial court ordered cancellation of the jointly held title, and directed refund of rent allegedly

received by the 1st Appellant and the deceased co-owner, having made findings that imputed fraud against the deceased, all of which amounted to condemning the deceased's estate unheard, contrary to the rule of natural justice and **Article 50(1) of the Constitution.**

The Record shows that the deceased co-owner passed away on 5th July 2009. Although the 1st Respondent initially filed a Notice of Motion dated 30th March 2015 seeking to have him substituted by consent, that application was marked as withdrawn on 25th June 2015. Thereafter, on 9th March 2017, counsel for the 1st Respondent formally withdrew the suit against the deceased co-owner, and subsequently filed an amended plaint dated 25th November 2019, in which the deceased co owner's name was struck out, leaving the proceedings to continue against the 1st Appellant alone.

So, from the outset, it is clear that there was no suit filed against the deceased co-owner and consequently, the 1st Appellant's contention that the trial court committed a fundamental procedural error by proceeding with the suit and making adverse findings against the deceased co-owner at the

time of Judgment is unfounded and without basis.

The next issue is whether the trial court misdirected itself in law in ordering only the 1st Appellant to surrender the original title deed, which order

was incapable of lawful execution as the subject property was jointly owned with the deceased co-owner.

The 1st Appellant contended that under **Section 91** of the **Land Registration Act**, joint proprietorship cannot be severed without the participation of all the co-owners or, where one is deceased, the lawful representative of the estate. It was argued that making such an order against only one proprietor was legally impossible and reflected a misunderstanding of the nature of joint ownership, and by so doing the trial Judge issued fatally defective orders.

It is not in dispute that at all material times, the subject property was registered in the names of the 1st Appellant and the deceased co-owner. But a consideration of the title does not disclose the nature of the joint ownership, that is, whether the subject property was held as a tenancy-in-common or joint tenancy or tenancy in entirety.

A joint tenancy is provided for under Section 91(4) of the **Land Registration Act** which states that:

“If land is occupied jointly, no tenant is entitled to any separate share in the land and

consequently -

(a) a disposition may be made only by all the joint tenants;

(b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; or

(c) Each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person and any attempt to so transfer an interest to any other person shall be void.”

And, describing the nature of joint tenancies, the textbooks **Cheshire & Burn’s, Modern Law of Real Property, 16th Edition** and **Megary & Wade, The Law of Real Property, 6th Edition** state that:

“...a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares...” Further, that “there is a thorough and intimate union between joint tenants. Together, they form one person.”

A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities”. The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are

(i) The unity of possession.

(ii) The unity of interest.

(iii) The unity of title.

(iv) The unity of time.

On unity of possession, each co-owner is entitled to possession of any part of the land as the other/s. (P477) One co-owner cannot point to any part of the land as his own to the exclusion of the other/s. If he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other/s, so that an

action for trespass cannot lie against another co-owner. Unity of interest means that the interest of each joint tenant is the same in extent, nature and duration, for in theory of law, they hold just one estate. Unity of title means that each joint tenant must claim his title to the land under the same act or document. This is satisfied by having the joint tenants acquiring their rights by the same conveyance and being so registered as joint tenants. Unity of time means that the interest of each tenant must vest at the same time.

.....

A joint tenancy can be converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders so remain.”

See also **Isabel Chelangat vs Samuel Tiro Rotich & 5 others [2012] eKLR.**

Furthermore, in the case of **Mukazitoni Josephine vs Attorney General**

Republic of Kenya [2015] eKLR, this Court held:

“We have considered the appellant’s contention and the learned judge’s finding. The title document to the property has two names and this is concurrent ownership. There is no indication as to whether the property is held on a tenancy-in-common or joint tenancy or tenancy in entirety. When a property is registered in

more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in joint tenancy and not tenancy-in-common or tenancy in entirety. A tenancy in common or tenancy in entirety means that the interest of each registered owner is determinable and severable; in a joint tenancy, the interest of each owner is indeterminable, each owns all and nothing.

A joint tenancy cannot be severed unless one of the four unities of title, time, possession or interest is broken. A joint tenant has the right to the

entire property or none - since the other joint tenant also has a right to the entire property. This is expressed in latin as totum tenet et nihil tenet, a joint tenant holds everything and nothing (see Re Foley (deceased) Public Trustee - v- Foley & Another (1955) NZLR 702). In Stack -v- Dowden (2007) UKHL 17, the House of Lords expressed itself as follows:

“The starting point where there is sole legal ownership (a sole name case) is sole beneficial ownership. The starting point where there is joint legal ownership (a joint name case) is joint beneficial ownership. The onus is upon the person who seeks to show that the beneficial ownership differs from legal ownership. The onus of rebutting the presumption is heavier in joint name cases. The amount of interest (s) would be declared on evidence.”

In the instant case, the title to the subject property does not indicate that the co-owners have separate interests nor are tenants-in-common or tenants in entirety. The proprietary interest of Mr. Felicien Kabuga extends to the whole property; the appellant has not demonstrated that in law, she has exclusive interest and that Mr. Felicien Kabuga, who is a registered joint owner, has no interest in the property. The burden of proof to sever and exclude Mr. Felicien Kabuga from the joint property rests with the appellant and this burden cannot be discharged by way of preliminary objection - it requires cogent evidence. In the absence of evidence, the legal presumption remains that a property registered in joint names

is indivisible and not severable.”

It is not lost on us that the subject property registered under the Registered Land Act (now repealed) was bound under the doctrine of *jus accrescendi*.

The doctrine of *jus accrescendi* is of common law origin. The textbook ***Gray & Gray in Elements of Land Law, 5th Edition, at paragraphs 915 and 916***, elucidates further on the doctrine in the following terms:

“It has been said that the right of survivorship (or jus accrescendi) is the “grand and distinguishing” incident of joint tenancy. On the death of one joint tenant the entire co-owned estate “survives to” the remaining joint tenant or tenants. Ultimately, in the manner of the medieval tonting, the last surviving tenant becomes the sole owner - the winner takes it all.”

Re-emphasizing the position, ***Megarry and Wade, The Law of Real Property, 16th Edition, Chapter 9***, reads at pages 475-476 thus:

“On the death of the joint tenant, his interest in the land passes to the other joint tenant by the right of survivorship. This process continues until there is one survivor who holds the land as sole-owner.”

The doctrine of *jus accrescendi* (right of survivorship), previously under ***section 102(1)*** of the repealed ***Registered Land Act*** and now reflected in ***section 91(4)(b)*** of the ***Land Registration Act***, provides that a deceased joint tenant's interest passes directly to the survivor and does not form part of the estate.

The writer ***P. L. Onalo*** in ***Land Law and Conveyancing in Kenya*** at pages 19 to 20 on joint tenancy states that:

“Under joint tenancy two or more persons are treated as one owner. As between themselves they have separate rights. A joint tenancy is distinguished from a tenancy in common by the right of ownership under the principle of jus-accrescendi i.e the right of survivorship.

Jus - accrescendi. When one of the joint tenants dies, the survivor becomes the sole owner of the whole interest or right in land. The rules of intestacy do not apply to the joint tenancy and at the same time he cannot dispose of his interest under a will. He thus passes nothing to his heirs. But when he becomes a sole owner, he can pass the whole to his

heirs. A joint tenant can thus leave nothing or can have the whole. In the joint tenancy there is the unity of title, of possession and time.”

Given that the subject property was registered in the joint names of the 1st Appellant and the deceased co-owner, and there is no evidence that the joint tenancy was ever severed during the deceased's lifetime, the doctrine of survivorship fully applied to the circumstances of this case. Upon his death, on 5th July 2009, the deceased co owner's entire interest in the subject property automatically vested in the 1st Appellant by operation of law, with the result that he became the sole owner of the whole interest of the subject property. As such, the trial court could rightfully enter Judgment solely against him in the relevant terms.

The next issue is whether the 1st Appellant and the deceased co-owner lawfully acquired the subject property and whether the trial Judge failed to uphold the sanctity and indefeasibility of title.

In this regard ***Section 26(1) of the Land Registration Act*** provides:

“(1) ...the title of that proprietor shall not be subject to challenge, except—

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b)Where the certificate of title has been acquired illegally, un- procedurally or through a corrupt scheme.”

It therefore goes without saying that the statutory framework makes it clear that the protection of indefeasibility of title accorded to registered titles is not absolute in the face of illegality, fraud, or procedural irregularity.

This Court in the case of **Embakasi Properties Limited & another vs**

Commissioner of Lands & another [2019] eKLR expressly addressed the question,

thus:

“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.”

The Court further emphasized that **Section 26** of the **Land Registration Act, 2012** confirmed the certificate of title as *prima facie* evidence of ownership, but also that:

“...there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired ‘illegally, unprocedurally or through a corrupt scheme.’”

This position was reaffirmed in the case of **Chemey Investment Limited vs**

Attorney General & 2 Others [2018] eKLR, where the Court stated that Kenyan

courts have consistently declined to recognise titles obtained illegally or fraudulently simply because the name appears in the register, citing decisions such as the cases of **Niaz Mohamed Jan**

Mohamed vs Commissioner for Lands & 4

Others [1996] eKLR; Republic vs Minister for Transport & Communications & 5

Others ex parte Waa Ship Garbage Collectors & 15 Others KLR (E&L) 1, 563; John

Peter Mureithi & 2 Others vs Attorney General & 4 Others [2006] eKLR; Kenya

National Highway Authority vs Shalien Masood Mughal & 5 Others [2017] eKLR;

Arthi Highway Developers Limited vs West End Butchery

Limited & 6 Others [2015] eKLR: and Milan Kumar Shah &

Others vs City Council of Nairobi & Others, HCCC No. 1024

of 2005.

The Court concluded that:

“...sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment...”

Of fundamental importance therefore, where the legitimacy of title is questioned, the registered proprietor must demonstrate the legality of the process of acquisition. As clearly articulated in the case of **Munyu Maina vs Hiram**

Gathiha Maina [2013] eKLR, this Court held:

“...when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership... the

registered proprietor must go beyond the instrument and prove legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances...”

The Supreme Court adopted the same approach in the case of **Funzi**

Development Ltd & Others v County Council of Kwale
[2014] eKLR, holding that:

“...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality...”

And in the case of **Dina Management Limited vs County Government of**

Mombasa & 5 others [2023] eKLR, the Supreme Court further reinforced the

principle thus:

“Article 40... entitled every person to the right to property... [but] Article 40(6) limited the rights as not extending them to any property that had been found to have been unlawfully acquired. As the 1st registered owner did not acquire title regularly, the ownership... could not ... be protected under Article 40.”

Concerning the allegations of fraud, it is trite law that he who alleges must prove.

In the case of **R. G. Patel vs. Lalji Makani [1957] E.A. 314**, the East Africa Court of Appeal the predecessor of this Court held that:

“Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

And, in the case of **Demutilla Nanyama Pururu vs Salim**

Mohamed Salim, CA No. 138 of 2018, this Court held:

“...since the respondent was making serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely beyond balance of probabilities; in cases where fraud is alleged, it is not enough to simply infer fraud from facts.”

The evidence before the trial court overwhelmingly supported the finding of irregularity and fraudulent conduct on the part of the 1st Appellant. The 1st Appellant himself admitted during cross-examination that he held only 61 shares, entitling him to a mere one acre, while the deceased co-owner only held 181 shares. Despite this, they allocated themselves 75.37 acres which was well beyond their share entitlement. Their illegal actions were carried out without the decision of 1st Respondent's AGM, or the passing of relevant Board resolutions. No minutes, or documentation authorizing the transfer of the company's land to the 1st Appellant and the deceased co-owner were produced, a fact that was confirmed by the 1st Appellant himself. The Registrar of Companies, PW2 confirmed that the company had never held an AGM since 1978, while the Land Registrar admitted that no CR12 or company resolution was submitted at the time of the registration of the transfer. In the face of these glaring anomalies, the 1st Appellant's explanation on the root of his title was substantively wanting. It becomes evident that his actions and the process of transfer of the subject property from the 1st Respondent to himself and the deceased co-owner without due

authority was procedurally defective, irregular, and fraudulent and we are satisfied that the trial court was right in so finding.

Turning to the trial court orders that the 1st Appellant refund the rental income paid, a consideration of the amended plaint does not disclose that the 1st

Respondent pleaded or prayed for remittance or refund of the income received by the 1st Appellant and the deceased co-owner. More specifically, the prayers were for cancellation of title, rectification of the register, damages for trespass, and costs. Nowhere did the 1st Respondent seek restitution or reimbursement of rental proceeds. It is a settled law, that a court of law cannot grant a remedy that has not been specifically pleaded or prayed for by the parties and that a court may determine only those issues that arise from the pleadings.

This Court in the case of **Galaxy Paints Co. Ltd vs Falcon Guards Ltd [2000] eKLR** held that:

“It is a cardinal rule of pleadings that issues for determination flow from the pleadings and a court may only pronounce judgment on the issues arising from the pleadings.”

Accordingly, even though the trial court rightly found that the 1st Appellant unlawfully benefitted from the lease, it was not entitled to award a relief that was neither pleaded nor prayed for. The order directing the 1st Appellant to refund the rental income was outside the scope of the pleadings and, therefore, such order was incapable of being granted. As a consequence, we find it

necessary to interfere with that part of the trial court's decision by setting it aside.

A similar fate would befall the trial court's orders pertaining to the wide-ranging directives requiring the 1st Respondent to convene an Annual General

Meeting, hold elections for directors, file annual returns with the Registrar of Companies, and negotiate renewal of the 2nd Respondent's lease. Again, these issues were not within the remit of the trial court to determine. The same rationale would apply to the 1st Appellant's argument that the trial court ought not to have deprived them of the entire parcel of land but should have left them a portion since the trial court had no powers to enter into the affairs of the 1st Respondent and to allocate land to them. In effect, the trial court having gone beyond its jurisdiction to direct the internal affairs of the 1st Respondent company, we find it necessary to interfere with those orders so as to set them aside.

Accordingly, it is our finding that the learned Judge rightly concluded that the 1st Appellant irregularly and unlawfully procured the transfer of the subject property into their names, with the result that we uphold the cancellation of the title and rectification of the register. As pertains to the orders directing the convening of an Annual General Meeting, election of directors, filing of annual returns, and renegotiation of the 2nd Respondent's lease we find them to have been extraneous, having been neither pleaded nor prayed for, and, as a consequence, we set aside

orders; c), e) and f) of the trial court's final orders.

In sum, the appeal partially succeeds in that, the orders for cancellation of title and rectification of the register in favour of the 1st Respondent be and are

hereby affirmed, while the orders relating to refund of rental income and the corporate directives are hereby set aside. In view of the appeal having partially succeeded, each party shall bear its own costs.

It is so ordered.

Dated and delivered at Malindi this 20th day of February, 2026.

A. K. MURGOR

.....
JUDGE OF APPEAL

**JAMILA
MOHAMMED**

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

G. W. NGENYE-MACHARIA

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

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

signed

DEPUTY REGISTRAR