

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO.E108 OF 2023

EVANS
.....APPELLANT

MAIRURA
VERSUS

OMWENGA
.....RESPONDENT

(Being an appeal from the judgment of Hon. D. Mikoyan (CM) delivered on 6/11/2023 in Eldoret Chief Magistrate’s Court Criminal Case No. 6586 of 2014)

JUDGMENT

1. **Evans Mairura Omwenga**, the Appellant, was charged before the Eldoret Chief Magistrate Court with two counts of offences. In Count 1, the Appellant was charged with the offence of Forgery of a Document of Title contrary to **Section 350 (1) of the Penal Code**.

2. The particulars of the first Count were that on 19th June 1996 at Ardhi House in Eldoret Township within Uasin Gishu County with intent to defraud, forged a certain document namely Certificate of Lease of Land parcel LR No. Eldoret Municipality/Block 14/783 while purporting that the said Certificate of Lease had been signed by a Land Registrar Daniel Mulili Musyoki.

3. On Count II, the Appellant was charged with conspiracy to defraud **contrary to Section 317 of the Penal Code**. The particulars of the offence in the second Count were that on 19th June 1996 at Ardhi House in Eldoret

Township within Uasin Gishu County with others not before Court with the intent to defraud, conspired to defraud Daniel Chepkairor Chebet a parcel of land registered as LR No. Eldoret Municipality/Block 14/783 measuring 0.2000ha situated within Elgon View estate in Uasin Gishu County.

4. The Appellant pleaded not guilty to the abovementioned charges. The matter proceeded to trial at the conclusion of which the Court found guilty on Count I, convicted and sentenced him to a fine of Kshs. 30,000/= and in default 6 months' imprisonment. The Appellant, being dissatisfied with the decision of **Hon. D. Mikoyan (CM)** he appealed against both conviction and sentence. The appeal is based on very lengthy grounds reproduced in verbatim as follows:

1) The Honourable Magistrate erred in law and fact in holding that the prosecution had proved its case that was premised on a defective charge sheet that lacked clarity and specificity thus rendering it defective for failure to provide adequate particulars of the alleged forgery and in process admitted wrong evidence which resulted in travesty of justice.

2) That the Honourable Magistrate erred in law and fact in admitting the evidence and testimony of the forensic document examiner who clearly stated he never saw the Certificate of Lease itself and concluded his report without seeing it, yet the charge against the accused was premised on forgery of title contrary to Section 350(1) of the Penal Code.

- 3) The trial Magistrate erred in law and in fact in convicting the Appellant in a charge that was preferred using the investigative evidence of the document examiner whose report was arrived and made from electronically generated documents and specimens that resulted in wrong conclusions on the question of forgery of title.**
- 4) The Honourable Magistrate erred in law and fact in holding that the accused forged document of title of land contrary to Section 350(1) of the Penal Code.**
- 5) The Honourable Magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt when in reality the evidence tendered was insufficient, inconsistent and failed to establish a clear nexus between the Appellant and the alleged fraudulent allegations.**
- 6) The Honourable Magistrate erred in law and fact in failing to take into account glaring inconsistencies in the prosecution case and thus give the benefit of doubt in favor of the Appellant.**
- 7) The Honourable court erred in law and fact in failing to reconcile the testimony of the complainant vis-a vis that of the other witnesses.**
- 8) The Hon Magistrate erred in law and fact by proceeding and ultimately delivering Judgment and conviction based on three categories of prosecution witnesses; to wit**

- a) **Incompetent witnesses whose testimony is not credible at all, and have no value in the realm of conveyancing and land related transactions,**
 - b) **Witness, though competent, did not testify and produce evidential information that is compelling to make any a just determination, and**
 - c) **Competent witness whose credible testimony, either the Hon Magistrate ignored and/or twisted in terms of appreciation culminating to that impugned Judgment.**
- 9) **That the Hon Magistrate erred in law and fact by ignoring the import of the legal provisions of the law of conveyance and more specifically attestation of land related agreements and more particularly section 44 and section 38 of the land registration act and all other land conveyancing procedures and thus arrived at a wrong decision.**
- 10) **The Honourable Magistrate erred in law and fact in failing to capture and give legal import of the details of the transfer between the 1st registered owner and the 2nd registered owner who transferred the land to the Appellant.**

- 11) **The Honorable court erred in law and in fact in failing to formulate proper issues for determination thus arriving at a wrong Judgment.**
- 12) **The trial Magistrate erred in law and in fact in his analysis of the evidence tendered verbal and or documentary thus arriving at a wrong finding of law on record.**
- 13) **The trial Magistrate erred in law and in fact in relying on irrelevant and an applicable Judicial precedent in his imputation of the guilt of the Appellant thus rendering a travesty of Justice.**
- 14) **The Honourable Magistrate erred in law and fact in failing to consider the evidence adduced by the defense witnesses and in arriving at his Judgment.**
- 15) **The Honourable Magistrate erred in law and fact in failing to satisfy himself that the accused had no case to answer in view of the compelling evidence on record.**
- 16) **The Honourable Magistrate erred in law and fact in not according the accused the benefit of doubt in view of the overwhelming evidence before it which he deliberately persistently and ultimately chose to ignore to the prejudice of the Appellant.**
- 17) **The Hon Magistrate erred in law and fact in clearly misconceiving and ignoring, the testimony and evidence of PW7,**

the then in Charge Land Registrar Dorothy Chepkosgei Letting who gave a clear analogy of ownership entries as had been captured in the white card and that no moment did she impute any wrong doing on the part of the Appellant.

18) The Hon Magistrate erred in law and fact by deliberately ignoring the fact in ELDORET ELC NO 256 OF 2013(Justice Munyao Sila) decreed on the issue of ownership of the suit parcel Eldoret Municipality Block 14/783 and certainly and permanently barred the then Defendant now complainant in the impugned criminal proceedings from any of interference in the property.

19) That Hon Magistrate erred in law and fact, by persistently and ultimately ignoring the fact that the complainant, then Appellant in the Eldoret Court of Appeal no 86 of 2017 before a three Judge bench (E.M Githinji, Hannah Okwengu & J. Mohammed, all Justices of the court Appeal) had his appeal against the Eldoret ELC 256 OF 2013 decision withdrawn with costs.

20) The trial Magistrate erred in law and in fact in not holding that ELC Court in Eldoret & Court of Appeal that were previously ceased with the matter had Jurisdiction and competent to make a determination were binding on his conviction and sentence.

21) That the Hon Magistrate erred in law and fact in concluding that supporting documents for the transfer never

existed contrary to the land registrar PW7 whose evidence gave probable reasons as to why they may have been missing.

22) The Hon Magistrate erred in law and fact that the evidence of PW7 who was a very competent witness, was more credible and compelling than any other, and at no time did she say as alluded in the impugned Judgment, that there were no supporting documents in respect of the transfer of the suit property to the accused.

23) The trial Magistrate erred in law and in fact in not holding that ELC Court in Eldoret & Court of Appeal that were previously seized with the matter had Jurisdiction and competency to make a determination that were binding on it and ought to have been taken into consideration in the judgement conviction and sentence

Prosecution Evidence

5. The prosecution in support of its case called a total of 9 witnesses whose evidence is as summarised here below;

6. **PW1** was **Daniel Tanui Chepkairo**. He testified that he is a retired employee of Eldoret Municipal Council. He stated that on 22nd July 2004, they agreed with the late Paul Kibor Kemboi who had land near his land and executed an agreement with respect to the said land being land parcel No. 14/783, for the purchase of the same whose total acreage was half an acre at an agreed price of Ks. 380,000/-. He stated that he paid for the land partly in

cash and partly with cattle. That he paid 6 heads of cattle each then valued at Ks. 60,000/= and that he paid Ks. 200,000/- in cash.

7. He testified that the vendor's witness was his wife and that his wife was his witness and that Chebii & Co. Advocates who was their Advocate drew the Agreement. He produced the said agreement in evidence and the same marked as PMFI-1. He stated that the vendor gave him the transfer forms already signed and that on 23rd July 2004 and he also signed the documents. He produced the transfer forms and the same was marked as PMFI-2. He stated that the transfer forms were however not registered because upon conducting a search, they found the Appellant's name on the property. He stated that the Search Certificate is dated 2nd December 2012 and produced the same which was marked as PMFI-3
8. He testified that they subsequently called the Appellant, one Evans Marura Omwenga and asked him to avail his ownership documents but he failed to do so but only availed a copy of the title deed and so they decided to report the matter at the Eldoret Police Station where they were referred to an Officer called Njeru who recorded their statements and those of their witnesses.
9. He further testified that prior to the sale, Paul had initially given him the land in 1988 to be the farm's caretaker. That the police officers then carried out their investigations. He maintained that the subject land was in Paul Kemboi's name and that there is no evidence from the land registry to show that the Appellant was the owner of the suit land.

- 10.** Upon cross examination, PW1 stated that he had a case before the Environment and Land Court and the Court ruled against him and added that he was not the complainant therein. He testified that he does not know if the Appellant forged the alleged documents but reiterated that his evidence is that he bought land from Paul Kemboi on 22nd July 2004.
- 11.** He stated that he was not the owner of the suit land as at 19th June 1996. He testified that the Green Card indicates that the land exchanged hands from Kemboi to Ongoro and then to Appellant but stated that Mr. Ongoro has not claimed that the Appellant took his land. He further testified that he is the one who placed that restriction that was registered on the suit land on 25th April 2013.
- 12. PW2** was **Susan Chebet** who stated that she is the Woman Representative of Marakwet County and lives in Elgon View Estate in Eldoret. She testified that on 22nd July 2004, her husband who testified as PW1 bought land from Paul Kemboi, and that she was a witness. She testified that PW1 paid Ks. 200, 000/- to Paul Kemboi in cash and 6 heads of cattle whose value was Ks. 30,000/- per head. and the total value was Ks. 180,000/-.
- 13.** She stated that the land that PW1 bought from Paul was No.14/783 and it was half an acre. She testified that Paul was a neighbour and his wife was his witness. PW2 then referred to the copy of the Sale Agreement marked as PMFI-1and testified that Paul's signature on this exhibit was different from the agreement they executed.

- 14.** She stated that the land was transferred to PW1 but she did not see the transfer documents and that they bought the land in the year 2004 and which land they used to take care of since 1998. She testified that the transfer was not registered in favour of PW1 because the land was in the name of Mr. Ongoro who then later transferred it to Evans the Appellant herein. She testified that the Green Card and the Agreement in favour of Mr. Ongoro were however fake.
- 15.** She testified that she did not accompany PW1 to the Lands Registry, and that the document marked as DMFI-1 which she identified as a Transfer of Lease had a forged signature of Paul Kemboi. She further testified that the Green Card was found to be a forged one and that it was not in the name of Kemboi but it was in name of Evans. She then identified the Green Card and hat the same is in name of Ongoro. She stated that this is the document that was under investigations together with the title deed.
- 16.** Upon cross- examination, PW2 stated that her signature was not on the Agreement and further stated that Mrs. Kemboi's signature is also not on the Agreement. She testified that Mr. Chebii did not sign the Agreement and reiterated that she witnessed her husband give out the 6 heads of cattle and cash to the tune of Ks. 200,000/-. She conceded that it was prudent for PW1 to do a search before buying the land and stated that as at the year 2004 the registered owner of the suit land was Evan Omwenga according to the search. She asserted that the Agreement between Ongoro and Evans Omwenga was fake.

17. PW3 was **Peter Arusei** who stated that he stays at Ngeria and also at Elgon View estate within Eldoret Town. He testified that he knows PW1 and that the said PW1 bought land from Paul Kemboi Bor, who is now deceased, and that was about 10 years or 15 years ago. He testified that Paul Kemboi Bor was his uncle and that he used to live with him in Elgon View. He stated that PW1 bought from Paul land situated at Upper Elgon View within Eldoret Town. That the land was half an acre which was a plot. He testified that PW1 gave the late Paul 6 heads cattle for the said half acre of land and PW1 gave him the 6 heads of cattle and he drove them to Paul Bor Kemboi's home. He testified that after Paul Kemboi died he heard about this case.

18. He stated that PW1 did not construct on the land. He testified that PW1 told him that someone had entered his half acre of the land but he did not know the person who entered PW1's land. Upon being cross-examined, PW3 stated he started living with the late Bor when he was 12 years old. He testified that it was the late Paul who sent him for the cattle from PW1 in exchange of the half acre of land. He stated that he was not a party to the parties' land Sale Agreement and he did not witness the parties execute their agreement and did not know if the parties exchanged any money.

19. PW4 was **Samuel Kimaiyo Kosgei**, he testified that he stays at Upper Elgon View in Eldoret. He stated that in October, 2010 at 12:00 midday, he was then coming from a shop and was going home when someone stopped him and introduced himself as Omwenga and he told him that he wanted to go to PW1's place and he took him to PW2 and PW1's home since PW1

was their village elder. He stated that they walked up to PW1's home but he did not know what Omwenga wanted from PW1.

20. That when they reached PW1's place, Omwenga told him to take him behind PW2's land which he complied and that Mr. Omwenga told him that the land behind PW2's home was his even though he told him that the land belonged to PW1. He testified that they returned to PW2's home and they found her son who told them that PW1 was over to PW1 and he did not hear what they talked about. That he left Mr. Omwenga in PW1's office.

21. Upon being cross-examined, PW4 stated that he is not new in this matter. He stated that he met the Appellant in the year 2010 and that he testified in the High Court matter in the year 2014. He stated that one must do a search before purchasing land. He testified that the agreement shows the first owner of LR No. Eldoret Municipality Block 14/783 was Paul Kemboi and the Green Card shows that it then moved to Joseph Ongoro and that from Joseph Ongoro the land went to Evans Omwenga.

22. **PW5** was **Jacob Oduor** a Forensic Document Examiner working with EACCC Nairobi and previously with DCI as a document examiner at DCI Headquarters. He stated that he has 10 years' experience and hold a BA Degree from Kenyatta University. He further stated that he had acquired training on Document Examination from the DCI Headquarters Forensic Lab, National Rabat Uni-Forensic Evidence Inspector in Khartoum, Fost and Freeman Forensic Eq. Co. UK and Regular Forensic Science Systems based in Republic of Latvia, East Europe.

23. He testified that in respect to the matter before Court on 8th September 2014, he received exhibits from Corporal Thomas Otho attached to CID Eldoret Office who submitted the following documents for examination; exhibit marked A1 and A2 bearing known signatures of Daniel Mulili Land Registrar, exhibit marked B, specimen signatures of Daniel Mulili Musyoka, exhibit marked BI, questioned documents, copy of green card for Eldoret Municipality Block 14/783. He stated that these documents were sent to him via an exhibit Memo form dated 5th September 2014 with a request to compare the known signatures in exhibit A1 and A2 with specimen signatures in the exhibit marked B and the questioned signatures in exhibit marked BI and confirm whether they were made by the same hand.

24. He testified that on 9th September 2014, he analysed the signatures as per the request by comparing signature indicated in the exhibit marked BI and specimen signatures in the exhibit marked B and known signatures marked A1 and A2 and his conclusion was that specimen signatures on the exhibit marked B and A1 and A2 were made by the same author. He stated that the disputed signature on the exhibit marked B1 was written in a different style and formation compared to that on the exhibit marked B, A1 and A2, in the sense that the questioned signature had a different stroke at the beginning of the signature, different curves and loops, pen lifts and writing quality.

25. He testified that based on the difference he made a conclusion that the signature in B1 was made by a different author. He stated that he made a report and signed his report dated 9th September 2014 which he then produced. He added that page 4-8 are comparison charts from VAC 5000 a

customized instruction for document examiner. He stated that these are direct print outs from the machine and are not scans. Upon being cross-examined, PW5 stated that he deals with questions of authenticity of documents and that generally, they detect if a document is genuine and whether the signature is forged or not.

26. He conceded that he has not shown that the signature in question was signed by the Appellant and added that he has no evidence that the Appellant is the one who appended the signature of Mulili on the Certificate of Lease. He stated that time is a factor that affects signatures as well as age, sickness, drunkenness and the surface where the paper is placed and added that he has stated these natural variations in his report. He testified that the 4 signatures which are specimens are the same, they have natural variations which are psychological. He stated that they cannot be duplicate or identical, that they will have variations but the personalized forensic traits remain the same. He confirmed that he did not obtain the signatures of Paul Kemboi and also stated that he did not look at the signatures of Evans Omwenga Mairura and Joseph Ongoro.

27. On further cross-examination, PW5 stated that B1 is written in a different style and formation. He noted that it has a different initial stroke, terminal stroke character construction and design, letter spacing loops and curves, natural pen lifts, writing quality and ink holes. In regard to A1, B1, and A2 and B, he stated that in the report on comparison charts, he indicates the differences. Regarding the charts, he stated that there are no comments and that what he has told the Court in his report. He stated that natural pen lifts

are in his exhibits but there are no comments in the comparison charts. In regard to specimen signatures 1 and 2, he stated that the signatures are not different. He testified that he is not aware of a Title deed and added that he was not given the white card.

28. PW6 was **Daniel Mulili Musyoki**, stated that he is a businessman and that he used to work as a Land Registrar and that he was a land Registrar from 1996 to 2002. He testified that on 2nd September 2014, a police officer came looking for him and the officer introduced himself as Wanga from Eldoret Police Station. He stated that the officer told him that there was a plot which had some issues and he needed him to record a statement and that the officer showed him some documents and also asked for a specimen of his signature which he gave. He testified that he has a copy of the white card.

29. He testified that the officer told him that there was some dispute and he wanted to confirm whether the signature on the document marked as PMFI-9 was his. He stated that the white card relates to Eldoret Municipality Block 14 parcel No. 783 and that the last entry No.6 is a restriction stopping any dealings on the land without the consent of PW1 who is claiming a purchaser's interest. He stated that the registered owner of the land was Evans Mairura Omwenga. He testified that he told the officer that he had retired from service in Jan 2008 and noted that this was 10 years since the document was written. He stated that the officer asked for his specimen signature and he gave it to him.

- 30.** He testified that PMFI-8 was the specimen that he gave and that he also availed to the officer a letter dated 29th November 1995 marked as PMF-6, which he was not able to confirm whether it was him who wrote. He testified that he started working in Eldoret in 1996. He stated that the transfer of Lease document to John Changwo Cherongony was registered on 7th February 1996 but he could not exactly confirm if this was his signature because it was a long time ago.
- 31.** Upon being cross-examined PW6, he stated that in the white card, the 1st registered owner was Paul Kibor Arap Kemboi, the second was Joseph and the 3rd was Evans. He added that in the card, PW1 has never been registered as the owner of the land. He stated that the 1st restriction on the land was put by the registrar for purposes of valuation, and the 2nd restriction was registered on 25th April 2013 by PW1. He told the Court that Evans Mairura was registered on 19th June 1996 and noted that there is a difference of 7 years. He stated that he was a land registrar and knows the process that entails a transfer of title and that the original has to be availed.
- 32.** He stated that Paul Kibor was registered on 28th April 1987 but no Certificate of Lease was issued, Joseph Ongoro was registered on 23rd July 1987 and a Certificate of Lease was issued on the same day and that on 19th June 1996 when the land was transferred to Evans Mairura Omwenga, a Certificate of Lease was also issued the same day.
- 33.** He told the Court that Ongoro must have surrendered the original and executed all relevant documents to facilitate the transfer. He stated that there is no indication that the 1st registered owner transferred the land directly to

Evans Mairura but that it was transferred to Evans Mairura by Joseph Ongoro. He testified that in the process, a transfer form is filled, a consent obtained from the relevant authority and the documents signed by the transferor to the transferee and the land registrar.

34. He testified that there is an abstract registrar in the land registry and it contains all the documents submitted to facilitate a transfer. He stated that all documents must have been there and signed. He told the Court that the officer who came to see him had a copy of the white card and stated that it was after 10 years and that that if the officer had come with the original, he would have recognized his signature.

35. He stated that his specimen signature was taken after 10 years and stated that he has not changed his signature much even after 10 years. He stated that a pen and a paper can perhaps make a slight difference in the signature. He testified that he met the Appellant one time in the year 2015 or 2016 at Karen Shopping Centre. He stated that the custodian of the documents in the land office is the District Land Registrar and added private citizens cannot access documents in the lands registry and that the same are kept in the strong room under key and lock.

36. PW7 was **Dorothy Chepkogei Letting**, Land Registrar County Government of Kisumu and previously at Uasin Gishu County from January 2014 up to May 2018. She stated that on 28th July 2012, she received a letter in respect of land parcel No. Eldoret Municipality Block 14/783 seeking that she records a statement and supplies documents for the mentioned parcel to the investigator. She testified that according to the white card, the land was

1st registered on 28th April 1987 in the name Paul Kibor Arap Kemboi and subsequently transferred to Joseph Ongoro on 23rd July 1987 and Certificate of Lease issued.

37. She stated that on 19th June 1996, the land was then transferred to Evans Mairura Omwenga and a Certificate of Lease issued. She testified that on 25th April 2013, a restriction was placed on the said land and that no dealings which (without the) consent of PW1 allowing for a purchaser's interest order subject to the matter. She stated that they were not able to trace supporting documents from the 1st registered owner to Joseph Ongoro and also the subsequent transfer from Joseph Ongoro to Evans. She the produced the certified copy of the white card as PExh 10.

38. Upon being cross-examined PW7 stated that she was not the land registrar in 1996 and 1997. She testified that initially the land belonged to the Government of Kenya, then it moved to Paul Kibor Arap Kemboi. She stated save for the placing of the restriction upon the land, PW1 was never the registered owner. She testified that the Affidavit of PW1 was availed hence the restriction that was placed. She stated that according to the White card, Evans Mairura Omwenga was the registered as owner on 19th June 1996. She confirmed that only the White Card was taken to DCI for investigations. She testified that she had indicated in her statement with the police that documents that support the transfer of the land to Evans Omwenga could not be traced.

39. She stated that the parcel file is not available. That there was a transfer from Arap Kemboi to Ongoro then Ongoro transferred to Evans Mairura. She stated that she has two transfer forms from Paul Kibor Kemboi to Joseph Ongoro. She testified that what they use for the transfer of land in Court is a free bond or transfer of Lease respectively but an Agreement does not transfer land.

40. Upon being further cross-examined, PW7 stated that transferor and transferee must have executed the Lease for a transfer to be executed. She confirmed that the Land Registrar is the custodian of such documents, submitted for a transfer to be effected. She testified that documents could have been displaced at the Registry and that the Appellant is not to blame.

41. In re-examination, she clarified that in this leasehold, the documents that they ought to have are a) the original certificate of lease, b) transfer of lease documents duly executed by both parties, c) consent to transfer from Paul to Ongoro, d) rate clearance certificate, e) payment of stamp duty, f) registration fees payment. She stated that none of these documents are available and she did not know what happened to the and that it is irregular that they didn't trace all the documents. She stated that the documents are usually archived in the registry and that sometimes documents get misfiled and other times they can be plucked out in collusion with interested parties.

42. **PW8** was **Boniface Cheruiyot**, an Advocate and Legal Officer at Uasin Gishu, County Government. He stated that he is in Court on behalf of the County Attorney who was vide the letter dated 18/04/2018 asked to testify.

He told the Court that he was worked with Mr. Lelei for 2 years and his is conversant with handwriting and signature. He stated that they were asked to confirm if parcel number 14/783 per the Land Rates Clearance Certificate was authentic and it was their conclusion that the property rate request was a forgery. He then produced the letter from the DCI and accompanying documents.

43. Upon being cross-examined PW8 confirmed that he has not produced any register of files open at the County Government of Uasin Gishu. He further confirmed that he has not produced the list of print outs of 2/12/2015- Rate payments and also he has not highlighted any features to show that the forgery request from is not genuine, nor any Forensic report to confirm the forgery. He also confirmed that he has no Report if investigations save for the letter marked as PExh 11.

44. He stated that the County Government does not issue titles. He testified that they receive rates against people who ought to pay rates. He told the Court that Paul Kibor had been paying rates, from the year 2012 to the said time. In regard to DMFI-8, PW8 confirmed that he has seen HC SUCC No.319/2014 in relation to the estate of Paul Kibor Kemboi and noted that the deceased died on 17/10/2013 according to the said Succession Cause. He told the Court that as of the year 2019 all rates were paid. He testified that they do not know who is the registered owner of the parcel at the rates section.

45. PW9 was **Sergeant Samson Owaga** based at the DCI Kisumu West and was formerly at DCI Eldoret. He testified that in the year 2012, when matter in question came to the attention of Eldoret Police Station, it was handled by Sergeant Owuor then when it came to DCI Eldoret, he investigated the same. He told the Court by then the complainant, PW1 had recorded a statement and even Paul Kibor. He told the Court that he now has PExh11 where, they wrote pursuant to investigations. He testified that he also wanted to know who the registered owner is. He stated that the County Government indicated that the Appellant herein was never the registered for rates in respect to the land in question,

46. He told Court further that there was a Civil Matter at the Land and Environment Court so he wrote to the ELC Registrar seeking pleadings in that case where the Plaintiff therein now the Appellant is asserting ownership. He testified that Paul Kibor denied transferring his land to Ongoro. He stated that Paul Kibor passed on but he could not recall the date of death but after recording his statement, he sought from the Land Registrar the transfer of Lease between Paul Kibor and Joseph Ongoro. He testified that he then summoned PW1 who confirmed the contents of his statement. He testified that PW1 stated that he purchased Block 14/783 from Paul Kibor at Ks. 380,000/- thereabout and paid in full, that the transfer of Lease was executed and he then immediately took possession in 2004 and he put a perimeter wall which land is adjacent to his present residence.

47. He stated further that the Appellant was claiming ownership as well, so inquired from the land registrar through a letter to no avail. He then sought Court orders to enforce the same against the registrar and that only a copy of

the White Card was availed but not the transfer of Lease from Paul Kibor to Joseph Ongoro then to the Appellant.

48. He stated that the Land Registrar then recorded a statement to the effect that the registered documents were not traced. He testified that they traced documents from the questioned signature therein, since Paul Kibor Kemboi denied such transaction, they took his known signature and that signature in police statement for forensic analysis and later a report came stating that the signature on the transfer Lease was a forgery, that is report one.

49. He added that two was the one which has the signature of Paul Kibor Kemboi and another Forensic report in respect if the signature if the Land Registrar transferring the land. He told the Court that the PExh 5 which is the Forensic Report is dated 9/09/2015. On cross examination, PW9 reiterated that he is the investigating officer in this case and when when he was transferred another Investigating Officer took. He stated that it was PW1 who complained but not Paul Kibor Kemboi.

Defence Evidence

50. At the close of the prosecution case, the learned trial Magistrate found the that the Appellant to have a case to answer and accordingly placed him on his defence. He gave a sworn statement of defence and called three witnesses and their evidence as herein summarised below.

51. DW1 was **Peter Nyachenga Anassi** who testified that he is an Advocate of the High Court Kenya and the Appellant is known to him. He testified that Paul Kibor Kemboi was his client in the 1980's when he acted for him to

transfer land businesses for him. He testified that regarding LR No. Eldoret Municipality Block 14/783, he did a transfer of Lease between Paul Kibor and one Joseph Ongoro who was purchasing the piece of land for a consideration of Ks. 25,000/=. He availed a copy of the transfer of Lease dated 16th July 1987 and the same was marked as DExh 10.

52. He also produced a Rate Clearance Certificate dated 17th June 1987 and the same was marked as Dexh11, a Rent Clearance Certificate dated 31st December 1987 and the same marked as Dexh 12, the letter of undertaking to the Land registrar dated 2/07/1987 and the same was marked as Dexh13, the Land Registrar's letter of Consent of transfer of several pieces of plots including plot No.783 dated 2nd July 1987 and the same was marked as Dexh14. He testified that he acted for Paul Kemboi in several other pieces of land.

53. Upon being cross-examined **DW1** stated that he did not include the identification number in the transfer of Lease in DExh10 because the identification number was not a requirement and it would have been important if the Land Registrar had requested that the same be included. He stated that both Joseph Ongoro and Paul Kemboi appeared before him, Paul Kemboi agreed that he had received the consideration but he could not recall if there was a sale agreement nor can he confirm if there is one in existence at the time that he was testifying. That he witnessed the transfer and stamped it and appended his signature.

54. DW2 was Ian Nyaribo who testified that he is an Advocate of the High Court of Kenya. He stated that in the year 1996, he was requested by an old family friend, one Mr. Mairuri Omwenga to help him scout for land in Eldoret. That there was one Ongoro who wanted to sell land in Elgon View Estate. He testified that he prepared the Sale Agreement between Mr. Ongoro and Mr. Mairura. That they conducted due diligence and noted that Mr. Kemboi initially owned the property and sold it to Mr. Ongoro. He testified that they undertook all the consequent process and then transferred the property to Mr. Mairura in 1996, which is 27 years ago and issued Mr. Mairura with a title deed.

55. He further testified that he visited the Lands Office (**sic**) and there was PW1 who shared a fence and he noted a water pen where PW1 would water his cows was on Mr. Mairura's plot. He testified that he was later surprised when Mr. Mairura informed him that PW1 had purchased the land yet Mr. Ongoro was the registered owner way back in 1987. He testified that the law firm of Nyaundi Tuiyot & Associates caused the transfer and that even though 27 years later they do not have the Sale Agreement, he confirms the said transaction. He testified that they issued receipt for the consideration paid by Mr. Mairura from Nairobi. He then produced the RTGS document dated 20th June 1986 and the same was marked as DExh15, Receipt for Ks. 82, 000/- dated 5th May 1996 which was marked as DExh 16(b).

56. In cross-examined **DW2** stated that Mr. Ongoro was a client, that they did an Agreement, and that it was 27 years ago and they could have only kept it for a maximum of 12 years. He stated that they effected the transfer and they must have paid for rates. He told Court that he does not have documents in

relation to the transfer herein and he also does not have the rate or rent Clearance Certificate and conceded that it is not possible that they effected the transfer of the land without the said clearances and payments.

57. DW3 was Richard Kaino. He stated that he is a Court Administrator Eldoret Law Court and that he had with him the file with respect to **Eldoret ELC No.256 of 2013** wherein judgment was sought for permanent injunction against Defendant from interfering in any way with Plot No.783, a declaration that the Plaintiff is the lawful owner therein and that Mesne profit be paid by the Defendant.

58. He testified that there was a judgment entered in favour of the Plaintiff and against the Defendant in the case, that a permanent injunction did issue against the Defendant and/or his agents with respect of the land in question and an award of Ks. 200,000/= in general damages made together with costs. That the prayer for mesne profits was denied.

59. That the Counter Claim filed dismissed on 5th November 2014 by Justice S. Munyao. He further stated that a Notice of Appeal was filed on 3rd December 2014 in **Court of Appeal Case No. 86/2017** was withdrawn with costs to the Applicant. He further testified that he also had with him the file in ELC No. 18 of 2011 wherein the parties were Festus Kiptoo v. Evans M. Omwenga in which the Plaintiff sought a declaration that the Plaintiff is the legitimate owner of the Plot in question, for the cancellation of Lease or title issued to Plot No. 783 in the name of the Defendant, and a declaration that Paul Kibor Kemboi is the owner of plot No. 783.

- 60.** He stated that in this particular file he had seen the notice of act in person by the Plaintiff dated 5th April 2018 then the Notice of withdrawal of the suit received in Court on 24th April 2018.
- 61.** He also testified that he has **Eldoret Court of Appeal Case No. 103/2017** where the parties are Festus Kiptoo v Evans Omwenga and 3 others. That therein, the Applicant sought leave to withdraw the Notice of Motion dated 14th December 2017. He then produced the all the mentioned Court files which were marked as follows; **ELC No.256/2013** was marked as DExh17, **CA No.86/17** was marked as DExh18, **ELC No.18 of 2016** was marked as DExh19 and **Misc. App No.17 of 2017** was marked as DExh 20.
- 62.** The Appellant testified as **DW4**. He stated that he is a lecturer at University of Nairobi, Engineering and also practices as such. That he worked in Eldoret town as a Consultant with the World bank on Motorized transport and was the Project team leader together with the Municipal Engineer, Town Planner, Social Community Development where Daniel Chebet (PW1) was a Social Worker He described Chebet as his friend.
- 63.** He testified that he did ask Advocate Nyaundi to search for him a piece of land. That he found one and after due diligence he informed him of Eldoret Municipality Block 14/783 in Elgon View registered under Joseph Ongoro. He then produced a copy of the Green Card which was marked as DMFI-10.

- 64.** He stated that Eldoret Municipality Block 14/783, was registered in the name of Paul Kibor Arap Kemboi on 28th April 1987, then registered in name of Joseph Ongoro on 23rd July 1987 and then registered in the name of Evans Mairura Omwenga on 19th June 1996. That thereafter no other person was registered. He testified that he had the original Certificate of Lease which he produced and was marked as DExh 21.
- 65.** He testified that he paid Joseph Ongoro through M/s Nyaundi Tuiyot Advocate and produced the receipt for sale of land dated 4th May 1986 which was marked as DExh 16(a) and (b) and DExh 15 (*sic*). He stated that he confirms that Mr. Annasi Advocate facilitated the transfer of the land to Mr. Ongoro from Mr. Kibor and that the transfer was properly done before he bought the land. He produced as DExh 10 the transfer of Lease of Eldoret Municipality Block 14/783 from Paul Kibor Arap Kemboi to Joseph Ongoro receipt No. B344700 for Ks. 100/- dated 23rd July 1987.
- 66.** He testified that during his time working in Eldoret, PW1 became known to him but he did not know his residence but later in the year 2003-2004, he met him and realized that they shared a boundary and he introduced him to his land and asked him to utilize the same since he did not reside in Eldoret. He testified that before the year 2012, he would pass by the plot and PW1 was then retired. That in the year 2012, he learnt of a masonry wall fencing off his property and PW1 then shouted that he had purchased the Plot from Mr. Kemboi Kibor.
- 67.** He stated that PW1 said that all the land in the vicinity belonged to Kibor and that Kibor engaged Advocate Chebii. He stated that the Sale Agreement

made on 22nd July 2014 and marked as PMFI-1 between Paul Kibor Kemboi as the vendor and PW1 as the purchaser was not witnessed and neither does it show the maker. That further, the Transfer of lease marked as PMFI-2 which too was not witnessed. He told Court that when he saw the documents by PW1, he opted to pay him for putting up the wall even though he did not have right to and that is how he filed **ELC No.256/2013** which case was determined in his favour

68. That the complainant's Notice of Appeal was withdrawn and then one of Festus Kiptoo, a son to the late Kibor filed a **Succession Cause in CMCC No.19/2015** claiming that the land belonged to his late father. The Appellant testified that in **ELC No.256 of 2013**, Festus Kiptoo was amongst the Defence Witnesses on the basis that his father sold the land to PW1 and that in **ELC No. 19 of 2015**, he claimed interest for the estate of the late Kibor but the suit was withdrawn. He stated that in ELC No.256 of 2013, the Court rendered itself that the purported Sale Agreement had no basis for lack of attestation.

69. DW4 further testified that the complainant has not produced any document to show that the land belonged to him. That the Sale Agreement was prepared by Mr. Komen a clerk at M/s Chebii Advocate. He referred to the Affidavit sworn by one Philip Kipchirchir Komen on 22nd February 2020 stating that he was sworn in **(sic)**, and he stated that the Sale Agreement was made before his Admission to the Bar.

70. He stated that in the present case he is charged with forgery of a Certificate of Lease but there is no such evidence or document to confirm that he forged

the Certificate of Lease. He testified that the Forensic Report dated 9th September 2014 refers to copy of the Green Card for Eldoret Municipality Block 14 but land in question Block 14/783 but the owner of Block 14 is undisclosed and neither do the annexures to the Forensic report indicate the land parcel under investigation or whose signatures have been examined.

71. He testified that in Count II, he is charged with conspiracy to defraud PW1 but PW1 has not produced any document to prove ownership of the subject matter. He stated that in the year 1996, Kibor had no interest in the land and neither did Ongoro have any other transfer to him and that in the year 2014, Kibor had no interest to sell th PW1. That instead he was being defrauded by PW1 and Mzee Kibor and that it is PW1 who should be charged.

72. He testified that the land registrar supplied all the required documents to the Investigating Officer who also confirmed that they had supplied the same to the Court, but there are no documents submitted by investigating officer to support this case. He added that no Forensic examination was done on the Certificate of Lease for Kibor and Ongoro. Further, that Kibor did not allege forgery of the Certificate of Lease issued to Ongoro.

73. He testified that his Certificate of Lease has not been cancelled by a Court of law and pointed out that **Succession Cause No. 319/2014** relates to Estate of Paul Kibor Kemboi and he had no assets. He then produced the following documents in support of his case; The Affidavit in Eldoret Succession Cause No. 319/2014 marked as DExh 22, The Statutory declarations by Kipchum Kenei marked as DExh. 23 and Dexh 7 being the Caution

74. Upon cross examination, DW4 stated that he purchased the land in 1996, that the payment receipts confirmed the transaction, that a Sale Agreement was done in the year 1996 after he paid the first deposit in May and he signed the Sale Agreement and then he left everything with his Advocate. He stated that consideration was Ks. 82,320/- and that he met Ongoro in Advocate Nyaundi's Office.
75. He testified that they met once with Ongoro and that Advocate Nyaundi showed him the land. He stated that they had a common Advocate and added that he signed the transfer from Ongoro to himself, but the same was not in Court. He testified that he paid for rates and rent and he was given receipts but he did not have them. He told Court that Mr. Ongoro showed him the Title but not the Sale Agreement with Mr. Kibor.
76. Before proceeding to the submissions filed by the parties, and having summarized the evidence in its entirety as above, before the court proceeds to analyze, re-evaluate and re-consider the said evidence to enable it draw its own findings and conclusions so as to determine whether the trial Magistrate's finding should be supported, it is important that the court points out the following anomalies that it has noted at this stage because the same will significantly impact on the court's determination.
77. In determining appeals from the subordinate courts, this Court being a first appellate is enjoined to apply the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa that set out what the duty and task of such an appellate court. The court therein stated thus;

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424.”

78. In compliance with these principles then, the court in the course of perusing the proceedings of the trial court while summarising the evidence for purposes of this judgement noted that both the prosecution as well as the defence witnesses relied substantially upon various documents which they availed to court in the course of their individual testimonies.

79. In this regard, this case then falls in the category of a documentary cases in the sense that everything remaining equal, it is essentially a case whose determination to a very large extent hinges upon, and is dependent on, the

documentary evidence adduced by both the prosecution and the defence in support of their respective cases.

80. This is because by their very nature, these documents in concert and corroboration with the testimony of the witnesses are crucial not only in aiding the court place the evidence of the witnesses into context, but also in determining the coherence, truthfulness, cogency and therefore reliability of the entirety of the evidence of both the prosecution and the defence case in reaching a determination that is supported by the evidence on record as the case should be, and nothing else.

81. As is the norm, these documents were marked for identification as appropriate in the course of proceedings. However, the record shows that even as the documents were marked for identification, a majority of them were never produced and were also not available in the court file for the courts perusal. As I shall proceed to demonstrate below, out of a total of 37 documents that were marked for identification, only 15 documents were produced but even then, only a total of 4 documents can be traced in the court file.

82. From the testimony of all the prosecution witnesses, the record shows that that relevant documents that were referred to in support of the Prosecution case are as follows;

- i. Sales agreement marked as PMFI-1
- ii. Transfer Document marked as PMFI-2
- iii. Search Certificate marked as PMFI-3

- iv. Exhibit Memo marked as PMFI-4
- v. Forensic Report marked as PMFI-5
- vi. Application for consent to transfer marked as PMFI-6
- vii. Transfer of Lease marked as PMFI-7
- viii. Specimen signatures of Daniel marked as PMFI-8
- ix. Certified copy of green card marked as PMFI-9
- x. Green card marked as PMFI-10
- xi. Letter dated 16th May 2018 marked as PMFI-11(a)
- xii. Rate Payment for Paul Kibor marked as PMFI-11(b)
- xiii. Rate payment for Evans Morara marked as PMFI-11©
- xiv. Certificate of lease marked as PMFI-12

83. The proceedings show that out of all these documents, only PMFI-10 and PMFI-11(a), (b) and (c) were produced as PExh 10, 11(a), (b) and (c) respectively. The production of these documents notwithstanding however, only PExh 10 is in the court file.

84. On the part of the defence case, from the testimony of the witnesses, the proceedings show that relevant documents that were referred to are as follows;

- i. B2 marked as DMFI-1
- ii. B3 marked as DMFI-2
- iii. B4 marked as DMFI-3
- iv. B5 marked as DMFI-4
- v. B6 marked as DMFI-5

- vi. Green card marked as DMFI-6
- vii. Caution marked as DMFI-7
- viii. Succession Cause No. 314/2014 marked as DMFI-8
- ix. Incident Report marked as DMFI-9
- x. Transfer of lease marked as DMFI-10
- xi. Rate clearance certificate marked as DMFI-11
- xii. Letter to Registrar marked as DMFI-12
- xiii. Land Registrar letter to consent marked as DMFI-13
- xiv. Application for transfer marked as DMFI-14
- xv. Transfer receipt marked DMFI-15
- xvi. Receipt of sale marked as DMFI-16(a) and (b)
- xvii. Judgement in ELC case No. 256/2013 marked as DMFI-17
- xviii. Ruling in CA case NO. 86/2017 marked as DMFI-19
- xix. Succession Cause No. !8/2016 marked as DMFI-20
- xx. Miscellaneous CrCase No. 107/2017 marked as DMFI-20
- xxi. Certificate of Lease marked as DMFI-21
- xxii. Affidavit in Eldoret Succession Cause 319/2014 marked as DMFI-22
- xxiii. Statutory declaration by Komen marked as DMFI-23

85. Again, the proceedings of the trial court show that out of all these documents, only DMFI-7, DMFI-10, DMFI-11, DMFI-12, DMFI-13, DMFI-17, DMFI-18, DMFI-19, DMFI-20, DMFI-21, DMFI-22 and DMFI-23 were produced and are marked as DExh 7, 10, DMFI-11 which is marked as DExh 11& 12 simultaneously, 13, 14, 17, 18, 19, 21, 22 and 23. However of all the documents marked as having been produced, only Dexh 10, 22 and 23 are in the court file.

- 86.** In the absence from the court file of even the documents that were marked as produced, the court was left handicapped and flying blind so to speak. The court therefore proceeded to read the impugned judgement in a bid to see if the same is sufficiently comprehensive and coherent with respect to the documents that were produced and his analysis of the same such that his summation of the evidence in his judgement could assist the court in reaching a more informed and therefore just and fair determination of this appeal.
- 87.** Regrettably, from the manner in which the judgement has been penned, I must simply state, and respectfully so, that the said judgement was of no help at all. Whereas I noted that the Learned Magistrate at page 3 of the judgement had observed that occasionally, through transition of courts, as was the case herein, numbering of exhibits lose consistency, but then proceeded to state that this however is not fatal as the court will give a better description of any document produced where its labelling during the proceedings is not clear, the judgement in its rendition showed otherwise.
- 88.** From the entirety of the judgement, I noted that there is no aspect of it that has meaningfully and/or substantially referred to and/or analysed any of the documents relied upon by the Prosecution and/or the defence, whether in pointing out which of the documents were available at the time of writing the judgement, and which ones were not, and how he analysed and applied himself to the totality of the documents that he had at hand as at the time of writing the judgement in reaching his determination, and how the non-availability of any of the documents impacted his decision.

89. In a scenario such as this, where the judgement itself as rendered is not of much assistance to the court, if the entire evidence of both the prosecution and the defence in terms of the testimonies of their respective witnesses, both oral and documentary, were properly on file and the flow is easy to follow, then under its given mandate, in the exercise of its jurisdiction as the first appellate court, it would have been very easy for this court to consider the said evidence as adduced before the trial court in its totality, re-examine, re-analyse and re-evaluate it in its totality and reach its own informed and well considered conclusion and its final determination, decision either uphold or set aside the impugned judgement of the trial court on its merits.

90. However, as matters stand, in light of the anomalies that I have herein highlighted, this is not possible. The court is therefore not able to sufficiently and authoritatively render itself on this appeal. Any rendition that the court may purport to give will be based on no evidence and this in my view would be akin to the court plucking non-existent evidence from the air in a bid to aid it reach a determination. Clearly, this would amount to a travesty of justice.

91. For the above reasons, it is my finding that the proceedings before the trial court amounted to a mistrial and the judgement therein rendered cannot stand. In this regard, Accordingly, I now hereby set aside the judgement in its entirety as well as the entirety of proceedings before the trial court and refer the matter back to the subordinate court for a fresh trial. It is so ordered.

Read Dated and Signed at ELDORET on 12th March 2026

E. OMINDE
JUDGE