Mburu v Kariuki & another (Civil Appeal 15 of 2020)
[2026] KECA 529 (KLR) (13 March 2026) (Judgment)

Neutral citation: [2026] KECA 529 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 15 OF 2020

DK MUSINGA, JM NGUGI & GV ODUNGA, JJA

MARCH 13, 2026

BETWEEN

GEORGE MWAI MBURU ..... APPELLANT

AND

JOSEPH GATUBI KARIUKI ..... 1ST RESPONDENT

KIKUYU SUB-COUNTY (FORMERLY TOWN COUNCIL OF KIKUYU) ..... 2ND RESPONDENT

(Being an Appeal against the Judgment and Decree of the Environment and Land Court of Kenya at Thika (L. Gacheru, J.) delivered on the 25th March 2019 in ELC No. 312 0f 2017)

JUDGMENT

1. The 1st respondent, as plaintiff, by a plaint dated 14th March 2014, sued the appellant together with the 2nd respondent, Kikuyu Sub County, formerly Town Council of Kikuyu ("the Council"), as defendants, jointly and severally for orders of:

    a. Permanent injunction restraining the defendants, their agents, servants, employees or persons acting under their direction from interfering with the quiet occupation and utilisation of the 1st respondent's Plot No.29 Nai Civil Appeal No 15 of 2020 formerly known as 25A, Kikuyu Kidfarmaco and any structures or development built on it or its tenants as well as occupants of that plot.

    b. General damages for trespass.

    c. Costs of the suit.

    d. Any other reliefs the Court may deem fit and just.

2. According to the 1st respondent, he purchased plot no. 29, formerly known as plot no.25A Kidfarmaco, Kikuyu (the suit property) in 1998, and was issued with a duly executed transfer by the Council, after which he started paying rates in respect thereof. He then constructed semi-permanent residential structures thereon which he rented out. Before the appellant came into the picture, his possession, acquisition and occupation was never disputed by anyone. However, around 22nd May 2013, the appellant's agents, acting under his instructions, destroyed the 1st respondent's wooden fence and gate and erected iron sheets barring the 1st respondent and his tenants from accessing the suit property. The appellant then put up a notice to the effect that he was the owner of the property. Upon conducting a search at the Council's offices, the 1st respondent, to his shock, confirmed the appellant's claim.

3. The 1st respondent contended that the Council irregularly, illegally and fraudulently caused the transfer of the suit property into the appellant's name, particulars of which he set out. He further averred that the Council was under a duty to notify the allottees of the plots of its intention to reallocate the suit property and thereafter cease the taking of further rent payments from them. According to the 1st respondent, the appellant defeated his right to property and trespassed on his land without lawful cause. He demolished the 1st respondent's fence and gate and denied his tenants peaceful occupation.

4. In response, the Council, in its statement of defence dated 9th April 2015, denied the allegations made in the plaint, contending that its records indicated the appellant as the legitimate owner of the suit property. It asserted that its dealings were within the confines of the law.

5. The appellant filed a defence together with a counter-claim dated 20th January 2016, in which he averred that he bought the suit property from one John Muchiri Mbiriri via a sale agreement dated 6th June 2011. According to him, the Council was notified of the transaction both prior to and after the purchase of the suit property and that the Council, at its meeting held on 10th May 2012, approved the transaction. His position was that he legally acquired the suit property and that the 1st respondent had no rights over it.

6. In his counter-claim, the appellant averred that the 1st respondent was the one who had unlawfully encroached onto his land and interfered with his quiet possession thereof and had purported to rename it.

7. Consequently, the appellant sought the following orders:

    a. The striking out and/or dismissal of the 1st respondent's suit.

    b. An order of a permanent injunction restraining the 1st respondent by himself, his servants or agents from interfering with the appellant's quiet possession of plot no. 29-Kidfarmaco in Kikuyu sub county and an order for the eviction of the 1st respondent and removal of any structures erected by him on the appellant's said plot by a bailiff at the 1st respondent's costs.

    c. Costs of the suit and the Counter-claim.

    d. Such other or further relief as this Court may deem fit.

8. In his reply, the 1st respondent reiterated the contents of his plaint and also filed a defence to the counter-claim, denying the averments in the statements in the counterclaim. He specifically denied that he encroached onto the suit property and maintained that his utilization or development of the suit property was based on his ownership. He therefore urged that the statement of defence and counter-claim be dismissed.

9. In support of his case, the 1st respondent, testifying as PW1, stated: that he, on 9th June 1998, purchased plot No.25A, Kidfarmaco Kikuyu from the allocated owner, John Njoroge, who surrendered the original allotment letter to him; that the original allotment letter was surrendered to the County so as to effect the change of ownership to him; that the said change of ownership was eventually effected on 27th September 2012, upon payment of the requisite fee and approval by the Council; that before then he had, in July 1998, developed the suit property by putting up semi-permanent structures that were occupied by tenants; that with a view to further developing the suit property, he submitted to the Council architectural drawings which were approved by the Council's Public Health Officer; that since the appellant had by then trespassed onto the suit property, he was unable to proceed with his construction; and that as a result, he reported the matter to the police.

10. The 1st respondent further averred that in the year 1999, three unsuspecting buyers had gone to inspect the suit land, on the information that the plot was on sale. He also became to learn of the change of the plot from no. 25A to no. 29A from the appellant, although he was not aware of any double allocation. It was his evidence that his rate-payments in respect of plot no. 25A had never been declined by the Council and he was never informed of any intended or actual revocation of his allotment and the reason therefor. He disclosed that although he had filed a previous suit in respect of the suit property, the same was struck out on the ground that it was filed by an unqualified advocate. He asserted that his plot was no. 25A and not plot no. 29, and that it had never been annulled. He denied knowledge of any minutes of a meeting held by the Council that revoked plot numbers at Kidfarmaco, including his plot no. 25A. He reiterated that he was unable to construct his permanent home and insisted that he had never transacted with the appellant and urged the court to allow his claim.

11. The 1st respondent explained, in cross examination, that he purchased the plot in June 1998, and although he did not sign a sale agreement, he had witnesses to the transaction. Although he made the application for change of ownership dated 9th June 1998, through John Njoroge, it was not until 2012 that he had the land transferred to his name. In his evidence, at the time of the alleged revocation, the transfer to him had not been effected. He insisted that his name appeared in the Council's Green book and that he paid all the dues, although the receipts were issued in the name of the seller, John Njoroge. Although he did not file a case to challenge the revocation, he insisted that the Council approved the transfer to him.

12. PW2, Agnes Mugure, the 1st respondent's tenant, testified that she was unaware of the appellant's claim to the suit property till 2012 when the appellant told them verbally to move out and then removed the fence and erected a new one.

13. At the close of the 1st respondent's case, the Council did not call any witness but instead adopted the contents of its statement of defence.

14. On his part, the appellant, George Mwai Mburu (DW1), also adopted his witness statement and testified that he owned plot no. 29 Kidfarmaco which was sold to him by John Muchiri Mbiriri. After the Town Clerk, Kikuyu, confirmed to him that the said seller was the owner of the land, he entered into a sale agreement and sought the Council's approval and the transfer to him was effected. In his evidence, the documents produced by the 1st respondent did not refer to plot no. 29 but were in respect of plot no. 25A, which he did not transact for. He was not aware that plot no.29 was also referred to as plot no. 25A. He further testified that he continued to pay rates for plot no. 29 and denied engaging in any irregularity, insisting that the suit property belonged to him and that the 1st respondent's plot was revoked by the Council. In his evidence, he tried to take possession of his property in 2010 but since there were temporary structures thereon, he told the owners to move out and he was given permission

to fence it in 2014. In his counterclaim, he insisted that the 1st respondent should vacate the suit property since he is in the plot illegally.

15. On cross examination, he testified that he became the owner of the plot in 2011 and that although he did not see the allocation letter issued to Mr. John Muchiri Mbiriri, from whom he purchased the plot, he saw the letter from the Council. He further stated that he did not attend the meetings of the Council and therefore did not know the reason for the revocation of plot no. 25A. According to his evidence, there was a transfer from Booker Kungu to John Muchiri Mbiriri, and that the acceptance by Muchiri was on 5th September 2011, a few days before he purchased the plot. He was, however, not aware how Muchiri acquired the plot from Mr. Booker Kungu. When he was taken to the plot by the Town Council Engineer, there were occupants. He had however gone to the plot alone in 2010 before he purchased it. He disclosed that he was paying rates in the name of Booker Kungu and insisted that the map of the area made no reference to plot no. 25A. According to him, plot no. 25A was revoked in 1999 and the Council confirmed that he was the owner of the suit property. He insisted that he did his due diligence before acquiring the plot.

16. The learned Judge, in her judgement identified the issues for determination as follows:

    a. Whether plot nos. 25A and 29 were the same.

    b. Whether the Council followed due process in revoking the letter of allotment granted to the 1st respondent.

    c. Whether the appellant's title ought to be cancelled.

    d. Whether the 1st respondent was entitled to the prayers sought.

17. In her judgment, the learned Judge noted that whereas the appellant appeared as the proprietor of the suit land, the 1st respondent was in possession thereof. She noted that the 1st respondent claimed to have bought the land from John Njoroge, who bought the land from the original allottee, Jane Muthoni. The appellant, on the other hand, claimed to have bought the suit land from John Muchiri Mbiriri. It was noted that after the transaction between him and John Njoroge, the 1st respondent returned the letter of allotment dated 11th March 1997 issued to John Njoroge to the Council, for purposes of change of ownership and cancellation but retained a copy which he exhibited. It was noted, that in the replying affidavit of one of the Council's officers, Stephen Nthenya Mwangi, which was tendered as evidence by the 1st respondent, the Council, in a meeting, resolved to revoke the titles of various plots and amongst them the suit property, and that, as a result, plot no. 25A was then renumbered as plot no. 29. The court was therefore satisfied that plot no. 29 and plot no. 25A were the same.

18. The trial court found that the said plot was allotted to John Njoroge, who in turn sold it to the 1st respondent, who continued paying rents and rates to the Council. While the Council purported to revoke the allotment of plot no. 25A, the right to allocated property was protected under section 75 of the former Constitution, while Article 40 of the current Constitution protects the right to own property. Pursuant to Article 47 of *the Constitution*, the learned Judge held that a proprietor of land is entitled to be heard before action is taken to deprive him of his interest therein. In this case, the court found that there was no evidence that the Council ever informed the 1st respondent or John Njoroge, of its intention to revoke the suit property hence, in violation of the rules of natural justice, they were not given a chance to be heard before the purported revocation. In this regard, reference was made to the case of Kuria Greens Limited v Registrar of Titles and Commissioner of Lands Nairobi [2011] eKLR, highlighting the need to follow the due process in revocation of title.

19. The learned Judge found that although the Council, in the minutes produced as evidence in Court, resolved that the occupants of the affected plots of land should be served with a 14 days' Notice to vacate, there was no evidence that this resolution was complied with. Similarly, there was no evidence that the owners of the plots were afforded a hearing before revocation of their allotments. While appreciating that the 1st respondent may not have been the registered owner of the property, it was found that he had certain interests in the suit property, which could not be taken away arbitrarily. According to the learned Judge, the decision to revoke the title, having been taken in blatant disregard of the rules of natural justice, was irregular and unprocedural, null and void. Since the decision was not communicated to the 1st respondent, the learned Judge held that there was no way that the 1st respondent could have challenged that which he knew nothing about.

20. Further, the trial court found and held that the actions of the Council were suspect since the minutes produced by both the appellant and the 1st respondent, transferring the suit property to them, appeared to have been signed by the same Clerk, one Mr. Wanyoike, who should have known about the purported revocation. The trial court found it baffling that the Council would revoke a title and continue to accept payments for it and even approve a transfer and building plans for the same. It was noted that the Council did not call any witness or produce any evidence as to how and why they revoked the title and the process that they followed in changing the name and the number of the plot. On his part, the court noted, the appellant was only contented with the production of a map indicating the Survey Plan which was, without more, of little value to the court. The court relied on the case of Mbau Saw Mills Ltd v Attorney General (2014) eKLR and held that since the revocation of the suit property was irregular and void ab initio, the interest therein still lay with the 1st respondent.

21. From the evidence adduced by the appellant, the learned Judge found that although it seemed that Booker Kungu was succeeded as proprietor by John Mbiriri before the suit property was sold to the appellant, Booker Kungu, from whom both John Mbiriri and the appellant traced their titles, had no transferable title in the land. Similarly, it was noted, there was no documentation or evidence of the process that resulted to the renumbering and further allotment of the suit property to the said Booker Kungu. The entry of Booker Kungu as proprietor, according to the learned Judge, was either fraudulent, erroneous or illegal. It was noted that neither Booker Kungu nor John Mbiriri ever took steps to take possession of the suit property, which all along was in the 1st respondent until the appellant decided to evict the 1st respondent's tenants without prior notice. The 1st respondent, the learned Judge found, produced building plans which were approved by the Council and which indicated that he was the one in possession, a fact corroborated by the evidence of PW2.

22. Section 26(1) of the *Land Registration Act* and the case of Nancy Wanjiru Kunyiha v Samuel Njoroge Kamau (2018) eKLR, were cited for the position that transfer of interest, if undertaken illegally, unprocedurally or through a corrupt scheme, is liable to be revoked. The trial court found that the title held by the appellant was not a good title, allowed the 1st respondent's claim and, while invoking section 80(1) of the *Land Registration Act*, cancelled the appellant's title. Having allowed the 1st respondent's claim, the learned Judge proceeded to dismiss the appellant's counter-claim.

23. On damages, the learned Judge found that the appellant did not deny the destruction caused to the suit property and, on the authority of the case of Philip Aluchio v Crispinus Ngayo [2014] eKLR, awarded to the 1st respondent a nominal amount of Kshs.100,000.00 as general damages for trespass together with the costs of the suit.

24. Aggrieved, the appellant moved to this Court to challenge the decision on the following grounds:

    1. The learned Judge erred in law by framing three issues for determination which did not form part of the 1st respondent's pleaded cause of action, namely: whether plot no. 25A and 29 are the same; whether the Council followed due process in revoking the letter of allotment granted to the 1st respondent; and whether the appellant's title could be cancelled.

    2. The learned Judge erred in law by ignoring the fact that by the time the Council took the decision on 2nd June 1999 to revoke the allocations of plot Numbers 25A, the 1st respondent had not transferred plot No. 25A into his name and erred in finding that the Council had obligation to notify the 1st respondent of its decision.

    3. The learned Judge erred in fact by finding that the Council did not notify John Njoroge, the allottee of plot no. 25A, of the intention to revoke the suit property while there was no evidence to that effect and while the said John Njoroge was not a party to the dispute.

    4. The learned Judge erred in law and fact by shifting the burden of proof and making findings as to the reasons for the revocation of plot no. 25A while that decision was not contested by the 1st respondent.

    5. The learned Judge erred in law by applying the provisions of The *Land Registration Act* and in particular sections 26(1) and 80(1) thereof while the said statute was inapplicable to the matter before the court.

    6. The learned judge erred in law and fact by awarding general damages when there was no basis for making the award.

    7. The learned Judge's findings were unsupported by the evidence and therefore went against the weight of the evidence.

    8. The learned Judge erred in law in dismissing the appellant's counterclaim without due regard to the overwhelming evidence in support thereof.

25. Before us, the appellant prays: that judgement given on 25th March 2019 and orders subsequent thereto be set aside and substituted with a finding that the 1st respondent failed to prove his case to the required standard and that the 1st respondent's claim be dismissed; and that this Court finds merit in the appellant's counterclaim and grants orders in terms of prayers (b) and (c) thereof.

26. We heard the appeal on the Court's virtual platform on 12th November 2025 when learned counsel, Mr King'ara, appeared for the appellant, learned counsel, Mr Mathenge Wokabi, appeared for the 1st respondent, and learned Counsel, Mr Jesse Kariuki, appeared for the 2nd respondent. While Mr King'ara and Mr Mathenge relied on their written submissions, Mr Kariuki informed us that the 2nd respondent had no position in the appeal.

27. On behalf of the appellant, it was submitted that there was no prayer in the plaint for the determination or declaration that plot No. 25A and 29 were the same, or for a declaration that the revocation of plot No. 25A was undertaken without due process. Similarly, there was no order seeking to cancel the title held by the appellant. Accordingly, the aforesaid matters did not form part of the matters that fell for determination by the trial Court, and since no evidence was led in respect thereof, they ought

not to have formed part of the determination by the learned Judge. According to the appellant, it was not in dispute that the Council was vested with and had the powers to revoke the allotment of plot allocations under its jurisdiction, including plot no. 25A to which the respondent laid claim. Further, it was submitted, it was also not disputed that at a full council meeting, the decision to revoke the allotment of plot no. 25A was made in the Town Planning Markets Committee meeting held on the 2nd June 1999 and adopted at the full council meeting of 3rd August 1999. In addition, it was admitted by the 1st respondent that plot no. 25A was not transferred to him until September 2012, some 14 years after the decision to revoke that allotment had been taken and adopted. The appellant's view was that the Council had no reason and no obligation to notify the 1st respondent of the revocation of the allotment as he did not appear in their records as the allottee.

28. The appellant asserted that whether or not the decision to revoke the allotment of plot no. 25A was communicated to John Njoroge, its then registered allotee, was not relevant and did not fall for determination by the trial Judge for the reason that John Njoroge was not party to the suit. In any case, it was contended, the issue whether it was necessary to notify the holders of the allotment letters of the intention to revoke their allocations did not fall for determination by the learned Judge as the issue was not before the court. The appellant submitted that since the 1st respondent did not challenge the decision to revoke the allocation of plot no. 25A, that decision remained unchallenged. In the premises, the findings by the Judge that the revocation was irregular, null and void were incorrect. In addition, the findings were erroneously made because the case that faced the appellant at the trial was not one as to the correctness or legality of the decision to revoke the allotment.

29. It was further submitted that the invocation of the provisions of section 26(1) of the *Land Registration Act* was erroneous because the provision applies to a certificate of title issued by the Registrar upon registration or to a certificate of title issued to a purchaser of land upon transfer or transmission. On the evidence before the trial court, there was no certificate of title issued in respect of plot no. 29 which was the plot that was registered in the records of the Council in the name of the appellant. It was therefore wrong for the trial Judge to have purported to cancel the title held by the appellant on the basis of sections 26(1) and 80(1) of the *Land Registration Act* as neither of the two provisions was applicable to the appellant's plot no. 29.

30. Regarding the damages awarded, the appellant submitted that there was no basis in law or fact for the award of the Kshs. 100,000.00 as general damages, hence the same was plucked from the air by the trial Judge without any evidence to support it. According to the appellant, the 1st respondent ought to have furnished the trial court with evidence of loss to justify any award for damages. In the appellant's submission, there could not have been trespass on plot no. 25A as the allotment thereof was lawfully revoked in 1999 and the appellant paid for the transfer by change of ownership and clearance vide a receipt issued on the 25th February 2011, which change was confirmed by a letter dated 22nd May 2013. Further, upon payment of land rates to the Council the appellant was issued with a Clearance Certificate.

31. According to the appellant, the trial Judge did not consider any of the evidence adduced by the appellant on the counterclaim.

32. In support of the submissions, the appellant cited the case of Kenya Commercial Bank Limited v Lazarus Kitili Vetu & Another [1998] eKLR on undesirability of deciding cases on unpleaded issues. According to the appellant, the judgment of the trial court was entirely erroneous and should be set aside. The appellant urged this Court to allow his appeal as prayed.

33. The 1st respondent, as we have stated, relied on his written submissions. We must however observe that the said submissions seem not to have been proof-read by counsel who drafted them. There were

obvious grammatical and syntactical errors that rendered some of the sentences difficult to decipher. Nevertheless, we have endeavoured to make sense of what has been placed before us.

34. It was submitted: that as on 6th June 2011, when the appellant claims to have purchased the plot, the 1st respondent was in occupation as he had built rental houses thereon in the year 1998, having bought the suit property the same year from John Njoroge Karuga, to whom the property had been allotted by the Council; that on 6th June 2011, when the appellant alleged to have acquired the plot, he did not engage the 1st respondent to inquire as to why there were structures on the suit property, particularly as the sale agreement produced by the appellant purported that the property was sold "with vacant possession"; that the trial judge did not introduce any prayers outside from the plaint dated 14th March 2014 but only made deductions from the issues before the court; that from the maps produced, it was clear that plot no. 25A Kidfarmaco Market and plot no. 29 Kidfarmaco was one and the same; that the plot numbers changed after the revocation of some plots without change in their locations; that the issues as framed by the learned Judge were necessary for the purposes of determination of the matter, since as held in R. v Director General of East African Railways corporation, Ex-parte (1977) 654 KLR cited with approval in James Njoka v Zecharia Ciathathi [2015] eKLR, Mary Wanjiku Ngunju v James Gichimo Kimoni [2016] eKLR and Eric V.J. Makokha & 4 Others v Lawrence Sagini & 2 Others, Civil Application No.20 of 1994, courts do not issue orders in vain; that the learned Judge was right in finding that both the respondent and the person from whom he bought the plot were not notified of the intention to revoke the allocation; and that the 1st respondent's title, having acquired first in time, prevailed over the appellant's title.

35. We have considered the record as put to us, the grounds on which the appeal is anchored, the rival submissions and the applicable law. Our mandate on a first appeal is set out in rule 31(1) (a) of the Rules of this Court, under which we are obliged to reappraise the evidence and draw our own conclusions thereon.

36. Expounding on that mandate, the predecessor of this Court in case of Peters v Sunday Post Limited [1958] EA 424, stated that:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

37. Having carefully considered the record placed before us, the impugned judgment, the written and oral submissions of learned counsel for the appellant and for the respondents, the cited authorities and the law, we settle the following as the main issues that commend themselves to us for determination, namely:

i. whether the three issues framed by the learned Judge for determination, being whether plot nos. 25A and 29 were the same; whether the Council followed due process in revoking the letter of allotment granted to the 1st respondent; and whether the appellant's title could be cancelled, were supported by pleadings and evidence.

ii. Whether the learned Judge erred in finding that the Council ought to have notified the 1st respondent of the intention to revoke his allocation of plot no. 25A when by 2nd June 1999 when the decision was taken, the 1st respondent had not transferred the plot into his name.

iii. Whether the learned Judge erred in fact by finding, without evidence, that the Council did not notify John Njoroge, the allottee of plot no. 25A, of the intention to revoke the suit property and when the said John Njoroge was not a party to the dispute.

iv. Whether the learned Judge, by making findings on the reasons for revocation of plot no. 25A without the 1st respondent challenging the decision, shifted the burden of proof.

v. Whether sections 26(1) and 80(1) of The *Land Registration Act* were applicable to the dispute before the court.

vi. Whether there was any basis for the award of general damages.

vii. Whether the appellant's counterclaim was merited.

38. As regards the issue whether the three issues framed by the learned Judge for determination were supported by pleadings and evidence, one needs to re-examine the pleadings in order to determine whether this ground is merited. The appellant has taken issue with the findings on identity of the two plots in question, the process by which the revocation was undertaken and the cancellation of the appellant's title. In determining this ground, the pleadings as filed by the parties must be given a holistic consideration, taking into account that the dispute before the trial court, to the extent that it encompassed a claim and a counterclaim, called for determination of two suits in one proceeding. This is because, a counterclaim is deemed to be a separate suit usually determined in the suit for the purposes of legal convenience. That position was restated by this Court in County Government of Kwale & 2 others v Rahimkhan & 5 others [2023] KECA 308, where it was held that:

> " The rationale for this provision is that a counterclaim is separate claim and is only brought within the main claim for the purposes of convenience. A counterclaim is a case in its own right, completely different from the plaintiff's case and it will fall or succeed on its own merits; it is a form of cross suit in which the parties transpose roles, whereby the defendant becomes the plaintiff and the plaintiff the defendant hence a counterclaim is a suit distinct from the plaintiff's suit."

39. The 1st respondent's case was that that he purchased plot no. 25A Kidfarmaco on 9th June 1998 from John Njoroge, who had been allocated the same by the Council. In order to complete the transfer in his name, he handed over the original letter of allotment to the Council and retained its copy. He was not aware how the same property came to be known as plot no. 29 Kidfarmaco and how the appellant acquired interest in the same land, albeit named differently, when the letter of allotment, on the basis of which he got his interest had not been revoked. The appellant's case, on the other hand, was that he bought the suit property from one John Muchiri Mbiriri via a sale agreement dated 6th June 2011, although he never saw the allotment letter. According to his pleadings, his plot was not the same as the 1st respondent's plot.

40. During the hearing, both the appellant and the 1st respondent adduced evidence in support of their respective cases. However, the 2nd respondent, the Council, which was responsible for the allocation of the plots to both the John Njoroge and John Muchiri Mbitiri, did not adduce any evidence. In his evidence, however, the appellant disclosed that he was aware that the allocation through which the 1st respondent claimed interest was revoked by the Council. That position was based on the Minutes of Works, Town Planning, Markets Committee held on 2nd June 1999, according to which it was resolved that since the plan for Kidfarmaco Council area had been tampered with, thus denying some people their plots and other common services, plot nos. 40A, 25A, 3A, 4A 83A, 2 and 36A be revoked. It was further resolved that plan no. 2 of the area be adopted and that 14 days' notice be served on the

occupants of the said plots to vacate. The 1st respondent's case was that the plot that was being claimed by the appellant was the same plot which he acquired from John Njoroge and where he had constructed rental structures. It was also the plot whose development plans had been approved by the Council.

41. The appellant's complaint is that the three issues: whether plot Nos. 25A and 29 were the same; whether the Council followed due process in revoking the letter of allotment granted to the 1st respondent; and whether the appellant's title could be cancelled, were not supported by pleadings and evidence. In our view, although the said issues may not have ben expressly pleaded, it is clear from the evidence adduced that the determination of the dispute between the appellant and the 1st respondent called for a resolution of the said issues. Both parties made claims before the trial court whose resolution could only be arrived at by the determination of the issues complained of. This Court, in Ann Wairimu Wanjohi v James Wambiru Mukabi [2021] eKLR, observed that:

> " (27) In Odd Jobs vs Mubia (supra), the Eastern Africa Court of Appeal held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for determination. In Vyas Industries vs Diocese of Meru [1976] eKLR, the Eastern Africa Court of Appeal applied and approved Odd Jobs vs. Mubia (supra), holding that, as the advocate for the appellant had led evidence during the trial and addressed the court on the unpleaded issue, the trial court could base its decision on the unpleaded issue, as the issue had been left for the court's decision during the trial ....
>
> (33) We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties...Although it is desirable that where necessary the pleadings should be amended to bring in all the issues, Odd Jobs vs Mubia (supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court."

42. Similarly, in the case of Herman P. Steyn v Charles Thys (1997) KACA 395 (KLR), agreeing with the case of Odd Jobs v Mubia (supra), this Court stated that:

> " We respectfully agree. The unpleaded issue was properly left to the determination of the court by the conduct of the course of the trial and the learned trial judge was justified on the evidence in arriving at the decision that he did. This is a case on which we are satisfied that there has been no miscarriage of justice and that, on the contrary, it will be unjust now to allow the appellant to succeed on this issue."

43. In the case before us, we find that the three issues were crucial to the matters in issue, hence justifying a determination based on unpleaded issues. That ground of appeal fails.

44. The second issue for our determination is whether the learned Judge erred in finding that the Council ought to have notified the 1st respondent of the intention to revoke his allocation of plot no. 25A when by 2nd June 1999 when the decision was taken, the 1st respondent had not transferred the plot into his name. From the minutes of Minutes of Works, Town Planning, Markets Committee held on 2nd June

1999, one of the resolutions by the Council was that 14 days' notice be served on the occupants of the affected plots. One of the plots was no. 25A which the 1st respondent was claiming. PW2 testified that no notice was served on the tenants. The 2nd respondent who could have given evidence refuting this contention did not adduce evidence. The fact that the Council resolved that the occupants be notified was an appreciation that the plots were occupied by some people whose interests risked being adversely affected. It did not matter that the 1st respondent had not transferred the plot in his name. Had the tenants been notified as intended by the Council, the 1st respondent would have had an opportunity to challenge the Council's action. We agree with the learned Judge that the 1st respondent, either directly or through his tenants, ought to have been notified of the intended action before it was effected.

45. The above issue is linked with the issue whether the learned Judge erred in fact by finding, without evidence, that the Council did not notify John Njoroge, the allottee of plot no. 25A, of the intention to revoke the suit property, yet the said John Njoroge was not a party to the dispute. It is true that John Njoroge was not a party to the suit and that the issue whether or not he was informed of the revocation of the allotment was not in issue before the trial court. Accordingly, none of the parties adduced evidence whether or not he was notified. The Council which ought to have adduced that evidence opted not to do so. While we agree that the learned Judge ought not to have made a definite finding that John Njoroge was not notified of the revocation of the allotment, nothing turns on that error since there was no evidence that he was in fact served. The position of the 1st respondent, to whom John Njoroge had passed his interest, that he was not notified remains undisturbed.

46. Next is the issue whether the learned Judge, by making findings on the reasons for revocation of plot no. 25A without the 1st respondent challenging the decision, shifted the burden of proof. The 1st respondent's evidence was that he only became aware of the alleged revocation after filing the suit and this was from the appellant's response. That contention was not challenged. Accordingly, we find no reason to fault the learned Judge's decision notwithstanding the fact that the 1st respondent did not challenge the revocation of his plot allocation.

47. Next is the issue whether sections 26(1) and 80(1) of the *Land Registration Act* were applicable to the dispute before the court. In his judgement, the learned Judge expressed herself as hereunder:

> "The Court therefore finds that the title held by the 2nd Defendant is not a good title and therefore has no option but to cancel it and allows the Plaintiff's claim, Section 80(1) of the *Land Registration Act* grants the court power to cancel a title acquired unprocedurally." (sic)

48. Section 26(1) of the *Land Registration Act* provides that:

> The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and 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, unprocedurally or through a corrupt scheme.

49. We agree that in the circumstances of this case, where no certificate of title had been issued, the learned Judge erred in invoking section 26(1) of the *Land Registration Act*, in support of her decision to annul the interest of the appellant. However, what the 1st respondent and the appellant held were two equities and it is a known equitable doctrine that where there are equal equities, the first in time prevails. See Lukwago v Kizza & Another [1999] 2 EA 142. In this case, it is clear that the allocation to John Njoroge, from whom the 1st respondent traced his interest, was earlier in time to that of John Muchiri Mbiriri, from whom the appellant traced his claim. We stress that the appellant never saw that allotment letter. It is clear that the manner in which the 1st respondent's interest was cancelled, in order to give rise to Kungu's interest and thereafter to Mbiriri's interest, was not only unprocedural but violated the rules of natural justice and was hence null and void. See Onyango Oloo v Attorney General [1986-1989] EA

456. The learned Judge ultimately arrived at the correct decision notwithstanding the fact that she relied on the incorrect legal provision.

50. Was there basis for the award of general damages?

Circumstances that warrant interference with an award of damages by this Court are now trite. This Court, in Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> "It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

51. The appellant contended that there was no basis in law or fact for the award of the Kshs. 100,000.00 as general damages, hence the same was plucked from the air by the trial Judge without any evidence to support it. However, there was unchallenged evidence that the 1st respondent had constructed structures on the suit property which were occupied by tenants. There was also evidence that he had fenced the plot and put up a gate. Both the fence and the gate were destroyed by the appellant. While we may not necessarily have awarded the same amount as the learned Judge's, differences in opinions between judges is not, without more, a ground for interfering with an award of damages, which is an exercise of discretion. In the premises, we find no compelling reason to interfere with the award.

52. Having determined the foregoing issues in the manner stated above, it follows that the counterclaim had no merit and was correctly dismissed.

53. Ultimately, we find no merit in this appeal, which we hereby dismiss with costs to the 1st respondent.

54. Those shall be our orders.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH, 2026.

D. K. MUSINGA (PRESIDENT)

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR