

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELCL APPEAL NO. E032 OF 2024**

**MOLYN CREDIT  
LIMITED.....APPELLANT**

**-VERSUS-**

**SABRINA WANJIRU MAINA AND**

**DOUGLAS GAKINYA MAINA (Suing as the Administrators**

**of the estate of JANE WARUIRU MAINA) .....1<sup>ST</sup>**

**RESPONDENT**

**MOSES NDEGWA GITONGA.....2<sup>ND</sup>**

**RESPONDENT**

**JUDGMENT**

**Background.**

1. The appeal herein is against the judgment delivered by Hon. R.A. Oganyo (Mrs.) Chief Magistrate, Kajiado Law Courts, on 22<sup>nd</sup> August 2024 in CMELC 66 of 2019. The appeal was

commenced by way of the memorandum of appeal dated 29<sup>th</sup> August 2024 wherein the Appellant has listed 26 grounds of appeal. The Appellant prays that the judgment of the trial court be set aside and in its place there be judgment in favour of the Appellant dismissing the 1<sup>st</sup> Respondent's suit with costs.

2. In his submissions in support of the appeal, the Appellant condensed the 26 grounds of appeal classifying them into six (6) key areas and argued them as such as follows:-

- (a) The existence, ownership and sale of Plot No. 11448;
- (b) The ownership of L.R. No. Ngong/Ngong/16054 and the relationship between John Keen and Moses Gitonga, the 2<sup>nd</sup> Respondent;
- (c) Misapprehension of the Appellant's evidence;
- (d) Cancellation of the Appellant's titles to the suit properties;
- (e) Possession of the suit properties; and
- (f) The alternative remedies proposed by the trial court.

3. While at it, I must state that numerous and repetitive grounds of appeal do not enhance the chances of success of an appeal rather they tend to cloud and obfuscate the real issues in dispute. A

memorandum of appeal ought to be precise, concise and brief as stated by the **Court of Appeal** in **KPA -vs- Threeways Shipping Services (K) Limited (2019) eKLR**. The court stated that,

***“We abhor repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination by the court. In William Koross -vs- Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this court stated;***

***“The memorandum of appeal contains some thirty - two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully crafted by counsel. In this regard, precise, concise and brief is wiser and better”.***

4. In the case of **Robinson Kiplangat Tuwei -vs- Felix Kipchoge Limo Langat (2020) eKLR**, the **Court of Appeal** (differently constituted) had this to say in regard to **rule 86 of**

***the Court of Appeal Rules*** which is *pari materia* with **Order 42 rule 1 of the Civil Procedure Rules**;

***“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of Rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal and end up arguing only two or three issues on the myth that he has condensed the grounds of appeal. This court has repeatedly stated that counsel must take time to draw the memorandum of appeal in strict compliance with the rules of court. (see *Abdi Ali Dere vs Firoze Hussein Tundal & 2 others (2013) eKLR*) and *Nasri Ibrahim -vs- IEBC & 2 others (2018) eKLR*. In the latter case, this court lamented:-***

***“We must reiterate that counsel must strive to make drafting of grounds an art, not an exercise in verbosity, repetition, or empty rhetoric ...A surfeit of prolixious grounds of appeal do not in any way enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs”.***

**History of Litigation before the trial court.**

5. The 1<sup>st</sup> Respondent was the Plaintiff in the case before the trial court on behalf of the estate of Jane Waruiru Maina. Her case was premised on the further amended plaint dated 11<sup>th</sup> September 2019 whereby she had sought a variety of orders against the Appellant and the 2<sup>nd</sup> Respondent herein. The 1<sup>st</sup> Respondent’s case was that she was the registered owner of Plot No. L.R. Ngong/Ngong/35057 and Ngong/Ngong/35058. The said plots according to the 1<sup>st</sup> Respondent had been purchased by her late husband Stephen Maina who had initially entered into a sale

agreement with the late John Keen and his sales agent by the name of Simon Mugo Nyutu t/a Rainbow Properties for purchase of a plot known as Plot No. 11448, Ongata Rongai which he had paid for fully and additionally paid survey fees of Kshs. 6,000/- and Land Control Board fees of Kshs. 4,000/-.

6. The 2<sup>nd</sup> Respondent however, unlawfully and illegally resold Plot No. 11448 Ongata Rongai to a third party but undertook to compensate the 1<sup>st</sup> Respondent with an alternative  $\frac{1}{4}$  acre plot. When he delayed to act as promised, the 1<sup>st</sup> Respondent sued him and the vendor in Milimani CMCC 481 of 2004 which according to her was fortunately settled by way of a consent whereby the Defendants (John Keen and the 2<sup>nd</sup> Respondent herein) undertook to and actually compensated the 1<sup>st</sup> Respondent with the suit properties herein; Ngong/Ngong/35057 and Ngong/Ngong/35058. The 1<sup>st</sup> Respondent allegedly fenced off the two (2) plots and took possession awaiting processing of titles in her name.
7. As it were, the 1<sup>st</sup> Respondent asserted that the 2<sup>nd</sup> Respondent, fraudulently transferred the titles of the suit properties to himself and subsequently to the Appellant in May 2016. The Appellant, according to the 1<sup>st</sup> Respondent, never took possession of the suit

properties since the 1<sup>st</sup> Respondent was in possession all through. It was only in 2019 that the Appellant trespassed into the suit properties and started digging the ground intending to erect a site structure and a toilet alleging ownership on the premises that it had been sold the two properties by the 2<sup>nd</sup> Respondent.

8. The 1<sup>st</sup> Respondent particularized her allegations of fraud at paragraph 18 of the further amended plaint and sought cancellation of the titles and entries in the register in favour of the 2<sup>nd</sup> Respondent and subsequently in favour of the Appellant and the titles to revert to her.
9. The Appellant by an amended statement of defence dated 30<sup>th</sup> October 2019 denied the Plaintiff's allegations putting her to strict proof. The Appellant stated that it had entered into a land purchase agreement with the 2<sup>nd</sup> Respondent dated 14<sup>th</sup> April 2016 for five parcels of land including the suit properties at a total cost of Kshs. 6,000,000/- which transaction was duly concluded in terms of the provisions of the agreement after due diligence was carried out and establishing that the titles were in the names of the 2<sup>nd</sup> Respondent herein.

10. The Appellant acknowledged that as he conducted a search he came across a restriction by the DCI in Ngong/Ngong/35057 restricting any dealings on the property pending finalization of investigations.
11. The Appellant insisted that it was a bona fide purchaser for value of the suit properties and that its title to the suit properties was lawful and indefeasible.
12. The case proceeded to hearing with each side calling one witness in support of their respective positions. The 2<sup>nd</sup> Respondent did not file any pleadings and did not participate in the trial.
13. The trial court found in favour of the 1<sup>st</sup> Respondent concluding that the 2<sup>nd</sup> Respondent did not have a clean title capable of being transferred to the Appellant.

**Court's directions.**

14. The Court's directions were that the appeal be canvassed by way of written submissions. The Appellant and the 1<sup>st</sup> Respondent duly complied.

**Submissions by the parties**

15. The Appellant begins its submissions with a narration of the 1<sup>st</sup> Respondent's case before the trial court. The Appellant asserts that the 1<sup>st</sup> Respondent's case was that their deceased parents had entered into an agreement with the Late John Keen for the purchase of the plot No. 11448 through his agent Simon Mugo T/A Rainbow properties but the plot was resold to a third party. The 1<sup>st</sup> Respondent's parents sued the Late John Keen in Nairobi CMCC 481 of 2004 and an out of court settlement was reached that they be allocated 2 plots out of L.R. No Ngong/Ngong/16054, but the 2<sup>nd</sup> Respondent allegedly a surveyor of the Late John Keen, appointed to carry out the subdivisions registered the resultant subdivisions into his name and transferred them to third parties including the Appellant herein who acquired L.R. No. Ngong/Ngong/35057 and 35058 (the suit properties).

16. As stated at the beginning of this judgement, the Appellant condensed his 26 grounds of appeal into 6 main grounds as hereunder;

- a) The existence, ownership and sale of Plot No. 11448;

- b) The ownership of L.R. No. Ngong/Ngong/16054 and the relationship between John Keen and Moses Gitonga, the 2<sup>nd</sup> Respondent;
- c) Misapprehension of the Appellant's evidence;
- d) Cancellation of the Appellant's titles to the suit properties;
- e) Possession of the suit properties; and
- f) The alternative remedies proposed by the trial court.

17. In arguing his 1<sup>st</sup> ground, the Appellant referred to Section 107 of the Evidence Act submitting that the 1<sup>st</sup> Respondent was obligated to prove the existence of Plot No. 11448 and ownership thereof by the Late John Keen since the alleged agreement between the 1<sup>st</sup> Respondent's parents and the Late John Keen could not have been premised on a non-existent property. The Appellant insisted that no agreement was produced as evidence of purchase of Plot No. 11448. No witness either was called from the Estate of John Keen neither was his alleged agent, John Mugo Nyutu T/A Rainbow Properties was called as a witness to support the allegation that a purchase agreement had been entered into with respect to plot No.11448.

18. The Appellant faults the trial court's finding to the effect that there was documentary evidence pointing to the fact of the existence of an agreement between the Plaintiff's parents and one John Keen who had instructed his agents to transfer property to the Plaintiff's parents.
19. Regarding the 2<sup>nd</sup> ground, the Appellant submits that the suit properties were a subdivision of L.R. No. Ngong/Ngong/16054. The evidence produced by the 1<sup>st</sup> Respondent in the form of a mutation form (Pexh 8) showed that the 2<sup>nd</sup> Respondent was the registered proprietor of L.R. No. Ngong/Ngong/16054 and was represented by Geodata Land Surveyors and Consultants.
20. The Appellant's case is that a title issued under the Land Registration Act is prima facie evidence of ownership unless proven to have been acquired unlawfully, fraudulently or through misrepresentation. The 1<sup>st</sup> Respondent did not prove either of the above grounds to challenge its title to the suit properties.
21. The Appellant avers that the 1<sup>st</sup> Respondent did not prove that the 2<sup>nd</sup> Respondent was an agent of the late John Keen authorized to subdivide and transfer the suit properties to the parents of the 1<sup>st</sup> Respondent. The trial court therefore erred by

making a finding that the 2<sup>nd</sup> Defendant failed to transfer the land as agreed with the late John Keen.

22. The Appellant questioned the existence of the alleged consent the Milimani Case, MCCC 481 of 2004. The court proceedings in the Milimani case were not exhibited before the trial court yet the court proceeded to make a finding to the effect that the consent entered into between the Plaintiff's parents and John Keen together with his agents who were parties in the Milimani Civil suit No. 481 of 2004 falls under the preview of Section 61 of the Evidence act. The said consent according to the trial court was the basis upon which the Plaintiffs were settled on the suit property for 10 years.

23. With regard to the 4<sup>th</sup> consolidated ground, the Appellant submits that its witness detailed the process which they had followed in their lawful acquisition of the suit properties, including the sale agreements, land control board consent, transfer instruments, title deeds and possession.

24. The Appellant further faults the trial court for finding that the 1<sup>st</sup> Respondent was in possession. According to the Appellant, the

1<sup>st</sup> Respondent's witness (PW1) admitted during cross-examination that no one lived in the suit property.

25. The Appellant submits that the law in respect to fraud and misrepresentation is that they must not only be pleaded but also strictly proved to a standard that is higher than a balance of probabilities but lower than the standard of beyond reasonable doubt. The Appellant opines that no such evidence of fraud was presented by the 1<sup>st</sup> Respondent to the required standard. The uncorroborated oral evidence by the 1<sup>st</sup> Respondent contained substantial hearsay evidence which did not even meet the threshold of admissibility to establish a case of alleged fraud.

26. In conclusion, the Appellant submitted that the trial court's judgement was against the weight of the evidence presented before it. It therefore prayed that its appeal be allowed with costs.

**The 1<sup>st</sup> Respondents submissions.**

27. The 1<sup>st</sup> Respondent too begins with a narration of her case before the trial court. She asserts that her deceased mother is the bona fide owner of 2 parcels of land known as Title No. Ngong/Ngong/35057 & Ngong/Ngong/35058 at Ongata Rongai

which she had purchased from the original owner, the Late Hon. John Keen on 27<sup>th</sup> March 1990, vide a sale agreement with the Late John Keen and his agent Simon Mugo T/A Rainbow Properties initially in respect of the plot known as plot No.11448,Ongata Rongai.

28. It is the 1<sup>st</sup> Respondent's case that the Late John Keen and his agent unlawfully and illegally sold the original plot No.11448 Ongata Rongai to a third party but they undertook to compensate the 1<sup>st</sup> Respondent's deceased mother with another  $\frac{1}{4}$  acre in the same locality. However, they delayed and the 1<sup>st</sup> Respondent's mother filed a suit in Milimani CMCC 481 of 2004 which was allegedly settled out of court whereby the Late John Keen and his agent Simon Nyotu compensated the 1<sup>st</sup> Respondent's deceased mother with 2 plots equal to  $\frac{1}{4}$  acre. The case (Milimani CMCC 481 of 2004) was therefore withdrawn and closed amicably.

29. The 1<sup>st</sup> Respondent alleged that her deceased mother took possession of the two plots and fenced them off awaiting processing of titles having paid all requisite charges. She had

allegedly been in possession of the suit properties for 14 years prior to filing the suit giving rise to this appeal.

30. The 1<sup>st</sup> Respondent asserted that the 2<sup>nd</sup> Respondent instead of transferring the two plots to her as instructed by the late John Keen, transferred the 2 plots to himself and subsequently transferred to the Appellant on 12<sup>th</sup> May 2016, albeit, fraudulently at a throw away price of Kshs. 3 Million while they were valued at Kshs. 5 Million.

31. The 1<sup>st</sup> Respondent further submitted that the Appellant did not bother to look for the 2<sup>nd</sup> Respondent to testify as its witness as a seller and to explain how the Appellant acquired the 2 title deeds in the first place.

32. The 1<sup>st</sup> Respondent in its submissions extensively cites the Supreme Court of Kenya decision in **Dina Management Limited vs County Government of Mombasa & 5 others** to the effect that the title or lease is an end product of a process.

33. On 15<sup>th</sup> December 2025, this court, appreciating its responsibility as a first appellate court, to re-evaluate, re-access and re-analyze the evidence presented before the trial

court with a view to drawing its own independent conclusions and satisfy itself that the conclusions reached by the trial court were consistent with the evidence adduced before the court noted that the trial court in the impugned judgement had placed heavy reliance on an alleged consent entered into by the parties in a case referred to as Milimani CMCC 481 of 2004. Interestingly neither the alleged consent nor the proceedings were placed before the trial court; but the trial court went ahead to invoke the provisions of Section 61 of the Evidence Act stating that,

***“The consent is an important factor in the determination of root of title to the Plaintiff’s case. The said consent is actually the basis upon which the Plaintiffs were settled on suit property for ten years.”***

34. This court exercising its power under Section 78(1)(d) of the Civil Procedure Act considered it appropriate and indeed called for the file Milimani Civil suit 481 of 2004 to satisfy itself if indeed there was a consent recorded therein and the terms of the said consent, if at all, before delivering its final judgement in this appeal.

35. On 17<sup>th</sup> February 2026, the court informed the advocates for the parties in this appeal that the file Milimani CMCC 481 of 2004 had been availed and was indeed before the court. No consent had been recorded in the file. The last recorded proceedings therein were on 1<sup>st</sup> August 2005 where the court was informed that negotiations had failed. The advocate for the 1<sup>st</sup> Respondent, Mr. Gitau Mwara expressed surprise at the turn of events. The matter then was stood over generally. That is the last proceeding in the matter.

36. The court allowed the advocates the opportunity to peruse the file and file supplementary submissions if they so wished.

37. The advocate for the Appellant upon perusing the file did in fact file supplementary submissions dated 2<sup>nd</sup> March 2026. The advocate for the 1<sup>st</sup> Respondent, Mr. Gitau Mwara, informed the court that he did not wish to file any further submissions.

**Appellant's Supplementary Submissions.**

38. The Appellant submits that having perused the Milimani CMCC 481 of 2004 it is clear that no consent was reached or recorded by the parties in respect to the suit properties. The Appellant averred that the pleadings filed by the 1<sup>st</sup>

Respondent in the case before the trial court giving rise to this appeal were a clear misrepresentation of the proceedings in Milimani CMCC 481 of 2004.

39. The Appellant concludes that the alleged consent was a deliberate misrepresentation by the counsel for the 1<sup>st</sup> Respondent which resulted into an erroneous judgement by the trial court

**Issues for determination.**

40. Having carefully considered the Memorandum of Appeal, the record of appeal, submissions by the parties, the proceedings in Milimani CMCC 481 of 2004 and the supplementary submissions by the Appellant, the issues that arise for determination in this appeal in the court's considered opinion are;

***A. Whether the 1<sup>st</sup> Respondent had established the factual and legal basis for her claim of the suit properties.***

***B. Whether the 1<sup>st</sup> Respondent proved her allegations of fraudulent acquisition of titles to the suit property against the Appellant.***

**C. Whether the 1<sup>st</sup> Respondent established the grounds for cancellation of the titles held by the Appellant over the suit properties.**

**D. Whether the trial court's judgement was consistent with the evidence adduced before it.**

**E. What orders should issue in respect to the costs of the appeal and the suit before the trial court.**

**Determination.**

41. Before delving into the identified issues, I wish to state that, this court appreciates its obligations as the first Appellant court to reconsider and re-evaluate the trial court record in its entirety as succinctly pronounced by Mativo J (as he then was) in the case of **Mursal & another vs Manese (2022) KEHC 282 (KLR)**, where he stated that;

***“A first Appellant court is mandated to re-evaluate the evidence before the trial court as well as the judgement and arrive at its own independent judgement on whether or not to allow the appeal. A first appellate court is empowered to subject the***

***whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand.”***

42. Secondly I note that in the Memorandum of Appeal, the lower court case appealed against is indicated as, Ngong ELCC 66 of 2019 instead of Kajiado ELCC 66 of 2019. The record of appeal presented before the court including the impugned judgement is clear that the case appealed against is Kajiado ELCC 66 of 2019 and the impugned judgement is the judgement of the Kajiado Chief Magistrate, Hon. R.A. Oganyo delivered on 22<sup>nd</sup> August 2024 in Kajiado CMELC 66 of 2019. The parties in their submissions too make reference to Kajiado CMELC 66 of 2019. This is to me a non-issue. It is clearly a typographical error.

43. That said, I proceed to the identified issues.

A. **Whether the 1<sup>st</sup> Respondent had established the factual and legal basis for her claim of the suit properties.**

44. The first Respondent's claim as pleaded in the amended  
plaint dated 22<sup>nd</sup> May 2023, specifically at paragraphs 7 and 8  
was that;

**“7. The Plaintiffs aver that the 2nd Defendant, the  
Late Hon. John Keen and his sales agent, Simon Nyutu  
T/A Rainbow Properties delayed to show deceased the  
alternative plot, hence on 1<sup>st</sup> April 2004, the deceased  
filed a suit in Milimani CMCC No 481 of 2004 which  
was settled out of court whereby the Defendants  
herein compensated the deceased Plaintiff with 2  
plots equal to 1/4 acre hence the court file was closed  
amicably.**

**8. The Plaintiffs aver that on 5th July 2005, the Late  
John Keen and his sales agent Simon Nyutu T/A  
Rainbow Properties exchanged plot No. 11448 Ongata  
Rongai which they sold without the consent of the  
deceased Plaintiff with two plots No  
Ngong/Ngong/35057 and 35058 each measuring 50 ft  
x 100 ft which were equivalent to 1/4 acre.”**

45. The 1st Respondent's case in a nutshell was that their deceased mother had entered into an agreement with the late John Keen and his agent to purchase a plot known as 11448, Ongata Rongai. However, the sellers instead sold the subject plot to other persons but undertook to compensate the 1<sup>st</sup> Respondent's deceased mother with 2 alternative plots. They however delayed in compensating the 1<sup>st</sup> Respondent's deceased mother forcing her to initiate court proceedings at the Milimani Law Court's being Milimani CMCC for 481 of 2004.

46. A perusal of the file Milimani CMCC for 481 of 2004 tells a different story. Despite the fact that the plot known as 11448, Ongata Rongai was already sold to a third party, as stated in the 1<sup>st</sup> Respondent's case, the two main prayers in the Milimani CMCC 481 of 2004 in accordance with the amended plaint amended on 26th February 2004, were;

A. An order that the Plaintiff be shown the physical location of her plot No 11448 Ongata Rongai by the Defendants and in default the Plaintiff be compensated by a similar plot or the current market value of the original plot; and

B. An order that the Plaintiff be given her title deed for the plot number 11448 Ongata Rongai by the 1st Defendant.

47. It is noteworthy that the 1<sup>st</sup> Defendant in the Milimani case was the Late John Keen; whereas the 2<sup>nd</sup> Defendant was Simon Mugo Nyutu.

48. According to the 1st Respondent and as pleaded at paragraphs 7 & 8 of the amended plaint, cited above, the Milimani case was amicably settled out of court whereby the Defendants compensated her deceased mother with the suit properties, Ngong/Ngong 35057 & Ngong/Ngong 35058. That according to the 1st Respondent is her factual and legal basis for her claim of the suit properties.

49. The trial court relying on the representations by the 1st Respondent about the amicable settlement of the Milimani case which she wrongly termed as a consent, went ahead to find in favour of the 1st Respondent against the Appellant. The trial court stated that;

***"The Plaintiffs alleged that their parents purchased property from one deceased John Keen who instructed his agent the 2<sup>nd</sup> Defendant to cause the***

**same to be transferred to the Plaintiff. When the agent failed to transfer the said property, the Plaintiff's father filed suit number Milimani Civil Suit number 481 of 2004 which was compromised by consent. The second Defendant then pointed out the instant suit properties to the Plaintiff who fenced it off and took possession in the year 2005 till January, 2019 when the cause of action herein arose."**

50. The trial court emphasizing on the supposed consent entered into as the basis of the 1<sup>st</sup> Respondent's claim for the suit property, further at paragraph 30 of its judgment noted that;

**"The consent entered into between the Plaintiff's parents and John Keen together with his agents who were parties in Milimani Civil suit number 481 of 2004 falls under the purview of this section of the law. The said consent is an important factor in the determination of root of title to the Plaintiff's case. The same consent actually is the basis upon**

***which the Plaintiffs were settled on the suit property for 10 years."***

51. The alleged consent as clearly established from the Milimani case file was non-existent. No such consent was ever recorded. The trial court therefore took judicial notice of a consent that never thereby arriving at a factually wrong conclusion.
52. The 1<sup>st</sup> Respondent created a false narrative which the court unfortunately believed without verifying if indeed a consent was recorded as alleged with the late John Keen and his alleged agent. It was the basis upon which the 1<sup>st</sup> Respondent claim of the suit properties was premised.
53. This court finds and holds that the 1<sup>st</sup> Respondent did not establish a proper factual and legal basis for her claim against the suit properties. The trial court's finding that the 1<sup>st</sup> Respondent had made out and proved the case against both Defendants was erroneous, factually and legally.
54. Whereas the above finding is sufficient to allow the appeal and set aside the judgment of the trial court, I will out of abundance of caution proceed to determine the other identified issues.

**B. Whether the 1<sup>st</sup> Respondent proved her allegations of fraudulent acquisition of titles against the Appellant.**

55. In her submissions, the 1<sup>st</sup> Respondent insinuates that since the 2nd Respondent did not enter appearance and interlocutory judgment was entered against him, her claim against him was established. At page 9 of the submissions the 1st Respondent submits that;

**"The 1st Respondent's advocates filed the request for interlocutory judgment dated 25th February 2020 which was supported by the affidavit of service of the process server Duncan Mugo Kimani sworn on 25th February 2020 which was filed in court on 28th February 2020. On 16th January 2024, the trial court entered the interlocutory judgment against the 2nd Respondent. Hence in law, the 1st Respondent's case against the 2nd Respondent..."**

56. The 1<sup>st</sup> Respondent submits that the non-appearance of the 2<sup>nd</sup> Respondent is evidence of obvious land fraud and fraudulent money transaction because the 2<sup>nd</sup> Respondent like

in all land fraud cases was avoiding any court appearance to defend the fraudulent sale of the 1<sup>st</sup> Respondent's 2 plots to the Appellant. He further accuses the Appellant of failing to look for the 2<sup>nd</sup> Respondent to testify as its witness as a seller and to explain how the Appellant acquired the 2 title deeds in the first place.

57. For starters, the 1<sup>st</sup> Respondent's case was a non-liquidated claim. There is no provision in law for entry of judgment in a non-liquidated claim. The provision of Order 10 Rule 9 of the Civil Procedure Rules is that where any party served in all suits not otherwise specifically provided for by the order, does not enter appearance and or file a statement of defence, the Plaintiff shall set down the suit for hearing. The entry of interlocutory judgment against the 2<sup>nd</sup> Respondent was therefore irregular and of no consequence.

58. The 1<sup>st</sup> Respondent being the Plaintiff was under legal obligation to discharge the burden of proof whether the 2<sup>nd</sup> Respondent entered appearance or not.

59. In the case of **Gichinga Kibutha vs Caroline Nduku into (2018) ECLR**, the court stated that;

***"It is not automatic that instances where the evidence is not controverted the claimant shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest."***

60. The Court of Appeal in the case of **Summer Singh Bachn vs Nicholas Wainaina Kago (1976) KLR**, too emphasized that 'the fact that the proceedings were described as formal proof did not lessen the Plaintiff's burden of proof required in a civil case'.

61. In the case **Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR**, the court cited with approval the Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: which describes the burden of proof thus:

***"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate***

***standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”***

62. The 1<sup>st</sup> Respondent’s case was premised of allegations of fraud which, is well settled must not only be pleaded but must be specifically proved and on a standard above that of balance of probabilities but lesser than the standard of beyond reasonable doubt.

63. I am not the least persuaded that the 1<sup>st</sup> Respondent discharged the legal burden of proof. There was a suggestion in the 1<sup>st</sup> Respondent’s amended plaint and in her oral testimony that the 2<sup>nd</sup> Respondent was an agent of the Late John Keen and was instructed to transfer the suit properties to the 1<sup>st</sup> Respondent’s mother but the so called agent instead

transferred the titles of the suit properties to himself and subsequently to the Appellant. Other than the oral allegations of the 1<sup>st</sup> Respondent there was no evidence whatsoever in the form of any documentation to prove the allegation that the 2<sup>nd</sup> Respondent was an agent of the Late John Keen instructed to transfer the suit properties to the 1<sup>st</sup> Respondent's mother.

64. Surprisingly, though the 1<sup>st</sup> Respondent's claim was that her parents had entered into an agreement with the Late John Keen, and her claim was essentially against the Late John Keen, they did not sue his estate. They merely sued the Appellant and the 2<sup>nd</sup> Respondent, the alleged agent of John Keen. They were therefore obligated to prove the agency and the instructions to transfer property to themselves.

65. As stated earlier, the trial court believed the existence of the consent supposedly entered into between the parents of the 1<sup>st</sup> Respondent and the Late John Keen and his agents in Milimani CMCC 481 of 2004. Its judgement was heavily premised on that supposed consent. That is why the court did not bother to interrogate the allegation of agency between the Late John Keen and the 2<sup>nd</sup> Respondent. The trial court at paragraph 29 of

its impugned judgement embraced the provisions of section 61 of the Evidence Act on facts that need not be proved and stated that the consent falls under the purview of that Section, meaning that the fact of the 1<sup>st</sup> Respondent's acquisition of the suit properties and the fact that the 2<sup>nd</sup> Respondent was an agent of the Late John Keen needed no proof; in view of the consent.

66. The Appellant on his part demonstrated that it purchased the suit properties from the 2<sup>nd</sup> Respondent for value and without notice of any defect in title. At the time of acquiring the suit properties it is undisputed that the 2<sup>nd</sup> Respondent was the registered owner of the properties. PW1 in cross-examination admitted that the properties were vacant and there was nothing therein to show they were owned by any other person other than the registered owner.

67. The Appellant discharged the evidential burden of proof to show and demonstrate how it had acquired the suit properties.

68. The burden of proof was upon the 1<sup>st</sup> Respondent to demonstrate by way of credible evidence beyond the mere allegations, that the 2<sup>nd</sup> Respondent did not have the legal

capacity to transfer title to the Appellant. That burden was not discharged.

69. This brings me to the 3<sup>rd</sup> issue whether the 1<sup>st</sup> Respondent established the grounds to justify cancellation of the titles.

70. Section 80 as read together with Section 26 of the Land Registration Act, provides for cancellation of titles and rectification of the register where the court is satisfied that any registration was obtained, made or omitted by fraud or mistake, and that the proprietor had knowledge of, caused or substantially contributed to the omission, fraud or mistake in consequence of which the rectification is sought.

71. The evidence before the trial court does not prove the allegations of fraud as against either the Appellant or the 2<sup>nd</sup> Respondent. There was no basis whatsoever for the trial court to nullify the titles to the suit properties. A decision of the court must be based on evidence alone and nothing else. The 1<sup>st</sup> Respondent did not establish her case against either the Appellant or the 2<sup>nd</sup> Respondent to the required standard.

72. This court's conclusion is that the judgement of the trial court was inconsistent with the evidence adduced before it.

Consequently, this appeal succeeds and the judgment delivered by Hon. R.A. Oganyo (Mrs.) Chief Magistrate, Kajiado Law Courts, on 22<sup>nd</sup> August 2024 in CMELC 66 of 2019 is hereby set aside in its entirety.

73. On the issue of costs, the guiding principle in awarding costs of the suit is stipulated in Section 27 Civil Procedure Act (Cap. 21) as follows:

***“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or***

***issue shall follow the event unless the court or judge shall for good reason otherwise order.”***

74. The above provision was elaborated upon by the Supreme Court in its decision in **Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR)** as follows;

***“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and***

***conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”***

75. While dealing with the issue of costs, the Court of Appeal in **Farah Awad Gullet v CMC Motors Group Limited**

**[2018] KECA 158 (KLR)** held as follows

***“ . ....the position in law is that costs are at the discretion of the court seized of the matter with the usual caveat being that such a discretion should be exercised judiciously, meaning, without caprice or whim and on sound reasoning (see Githiaka versus Nduriri [2004] 2KLR). Secondly that a Court can only withhold costs either partially or wholly from a successful party for good cause to be shown.”***

76. Guided by the provisions of section 27 of the Civil Procedure Act and the above decisions, I award the costs of the appeal and of the suit before the trial court to the Appellant against the 1<sup>st</sup> Respondent.

77. The final disposition therefore is that the appeal succeeds costs of the appeal and of the suit before. the trial court to the Appellant against the 1<sup>st</sup> Respondent.

Ordered accordingly.

**Dated Signed and Delivered at Kajiado Virtually this 24<sup>th</sup>  
Day of March 2026.**

**M.D. MWANGI  
JUDGE**

**In the virtual presence of:**

Mr. Karuiru h/b for Mr. Githinji for the Appellant

Mr. Gitau Mwara for the 1<sup>st</sup> Respondent

N/A by the 2<sup>nd</sup> Respondent

Court Assistant: Mercy

**M.D. MWANGI  
JUDGE**