M'Ithaara & another v Magambo & another (Civil Appeal 19 of 2019) [2025] KECA 404 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 404 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 19 OF 2019

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

FEBRUARY 21, 2025

BETWEEN

JOHN PHARES NJERU M'ITHAARA ..... 1ST APPELLANT

JUSTUS MURUJA MUSA ..... 2ND APPELLANT

AND

ABDUL RASHID MBAE MAGAMBO ..... 1ST RESPONDENT

JOHNSON NKONGE O. M'RUCHA ..... 2ND RESPONDENT

(An appeal from the Judgment and Decree of the Environment and Land Court at Chuka, (P. M. Njoroge, J.) dated the 18th of December 2018inELC Case No. 108 of 2017, formerly Meru ELC Case No. 12 of 2009)

JUDGMENT

Background

1. This appeal arises from the judgment of the Environment and Land Court (ELC) at Chuka, delivered on 18th December, 2018 in ELC Case No. 108 of 2017. The case had initially been filed in Meru HCCC No. 12 of 2009 before its transfer to Chuka ELC.

2. John Phares Njeru M'ithaara and Justus Muruja Musa (the appellants) filed a Memorandum of Appeal dated the 28th January, 2019 and listed the following grounds of appeal (reproduced verbatim):

    1. The learned Judge erred in law and fact in totally misapprehending the facts of the case before him and the jurisdiction of the Court together with the background of the dispute between the parties, thus arriving at a wrong and absurd decision and judgment which contravened basic fundamental tenets of the law and known legal principles.

2. The learned Judge erred in law and fact in proceeding with the consolidated suits in the Superior Court as though they were an appeal or judicial review proceedings from the decision of the Mwimbi Land Disputes Tribunal, which was adopted as a Judgment in Chuka SPMCC LDT 23 of 2007, and purporting to quash the said decisions in freshly instituted suits by way of plaints, thus contravening the basic legal principle of "res judicata", which the learned Judge totally ignored and or misapprehended.

3. The learned Judge erred in law and fact in entering Judgment on purported contracts which were not produced in evidence, having been the subject of adjudication before the Land Disputes Tribunal and the Subordinate Court, and proceeding to open up fresh proceedings in a concluded matter which was subject of a separate appeal filed by the 1st respondent against the 1st appellant in Meru High Court Civil Appeal No. 27 of 2007, which was later transferred to Chuka ELC Civil Appeal No. 32 of 2017, arising from the decision in Chuka SPMCC-LDT 23/2007, which appeal was not prosecuted by the 1st respondent and was eventually dismissed for want of prosecution on 06/04/17.

4. The learned Judge erred in law and fact in entering judgment and giving orders on top of subsisting orders given by Chuka SPMCC-LDT 23 OF 2007 on 18/02/09 in respect of the same suit property, which orders have never been set aside on appeal or quashed in judicial review proceedings, leading to an absurd position where there are two subsisting orders by courts of competent jurisdiction over the same property.

5. The learned Judge erred in law and fact in entering Judgment in favour of the 2nd respondent and awarding him the suit property in the absence of any evidence, document, or contract/ Agreement for Sale between the 1st respondent and the 2nd respondent in respect of the Suit Property in satisfaction and compliance with Section 3(3) of the *Law of Contract Act*, save for a Transfer which had already been cancelled by the Subordinate Court in Chuka SPMCC-LDT 23/2007, and the said Order had never been appealed against or set aside by an appellate court.

6. The learned Judge erred in law and fact in awarding general damages for breach of contract to the 1st respondent against the 1st appellant without any factual, legal or jurisprudential basis whatsoever, thus conferring a double benefit to the 1st respondent, who had blatantly violated the subsisting orders against him in the Subordinate Court in Chuka SPMCC-LDT 23 of 2007, which was under execution for costs, as acknowledged and admitted by the 1st respondent during the hearing of the suit as captured in the proceedings and Judgment.

7. The finding of the learned Judge that the 2nd respondent was a bona fide purchaser of the suit property for value without notice of factors affecting the property was wrong, erroneous, and of no basis in law, as the green card of the suit property, which was produced in Court by all the parties, clearly showed that the property was subject to Court proceedings and Orders in Chuka SPMCC LDT 23/07, in which there still exists a subsisting inhibition from the Subordinate Court, which has not been lifted, vacated, discharged, or set aside, whereas the learned Judge has made further Orders in respect to cancellation of the title in the name of the 2nd appellant and registration of the name of the 2nd respondent without making any finding on the Order of inhibition and the Orders of 18/02/09 registered against the title.

8. The entire decision and Judgment of the Superior Court given on 18/12/18 is not only absurd, unfortunate, contrary to law and facts, lopsided, full of extraneous consideration, and totally unmaintainable and should be set aside in its entirety.

9. Whereas all parties herein confirmed before the Superior Court that at the time the dispute herein arose in 2009 and an inhibition was registered on the Suit Property by the Subordinate Court in Chuka SPMCC LDT 23 of 2007, when the parties moved to the Meru High Court, the Area Chief and police instructed all parties to keep off the suit property, whereas the Judge erroneously purports in his Judgment that the 2nd respondent has been in occupation of the property for Ten (10) years without any factual basis of that finding whatsoever, whereas there was an interlocutory application by the 2nd respondent seeking a mandatory injunction to allow him to enter the suit property, which was heard and dismissed by the Superior Court.

10. The learned Judge erred in law and fact in totally ignoring the provisions of Section 80(1) of the *Land Act* and Section 26(1) of the *Land Registration Act*, thus arriving at a wrong decision without any evidence or pleading of fraud which was tendered and proved before the Judge.

11. The learned Judge erred in law and fact in failing to consider the evidence, submissions, and authorities by the appellants and totally misapprehended and misapplied the authorities and submissions on the issue of the right to be heard, quoting cases which were only applicable in an appeal, judicial review, or a constitutional petition, which was not before the learned Judge, and consequently exercising his jurisdiction in a wrong and erroneous manner. [SIC].

Johnson Nkonge O. M'Rucha and Abdul Rashid Mbae Magambo are the respondents herein.

3. The appellants pray that this Court allows the appeal and sets aside the judgment and decree of the ELC at Chuka. The appellants further pray that the consolidated suits instituted by the respondents in Chuka ELC Case No. 108 of 2017, being Meru HCCC 12 of 2009 and Meru CMCC 8 of 2010, be dismissed with costs awarded to the appellants. Additionally, the appellants pray that they be awarded costs of the instant appeal.

4. A brief background of the appeal is that the dispute involves ownership and transfer of land parcel No. Mwimbi/S. Mugumango/1419 (the suit property), contractual obligations arising from sale agreements for the land, and the applicability of res judicata. The appellants challenge the Court's decision, contending that the matter was improperly re-litigated and that the ELC exceeded its jurisdiction. The respondents maintain that the High Court properly adjudicated the matter, contending that the 2nd respondent was a bona fide purchaser for value and that the ELC had jurisdiction to hear the case.

5. The origins of this dispute can be traced to an agreement dated the 2nd of September 2002, where the 1st respondent (the Vendor) agreed to sell the suit property to the 1st appellant (the Purchaser) for Kshs.1,000,000.00. The 1st appellant paid part of the consideration but defaulted on the balance, prompting the 1st respondent to seek redress before the Mwimbi Land Disputes Tribunal in 2007. The Mwimbi Land Disputes Tribunal ruled in favour of the 1st respondent, directing that the 1st appellant either complete the purchase price or return the land. This decision was adopted as a judgment by the Chuka Senior Principal Magistrates Court (SPMCC LDT 23 of 2007).

6. The 1st appellant challenged the decision at the Provincial Appeals Committee, which upheld the Tribunal's ruling. The High Court dismissed an appeal against this decision for want of prosecution. In 2009, the 1st respondent instituted Meru HCCC No. 12 of 2009 seeking damages for breach of contract. Meanwhile, the 2nd respondent acquired the suit property and sought injunctive orders against the 1st appellant in Meru CMCC No. 8 of 2010. The two suits were later consolidated and transferred to Chuka ELC under Case No. 108 of 2017, culminating in the judgment now under appeal.

7. In the impugned judgment, the trial court undertook a review of the dispute concerning the suit property. It commenced by outlining the background of the matter, noting that two suits had initially been filed: Meru CMCC No. 8 of 2010, involving Abdul Rashid Mbae Magambo as the plaintiff against John Phares Njeru and Justus Muruja Musa, and Meru HCC No. 12 of 2009, involving Johnson Nkonge M'Rucha as the plaintiff against John Phares Njeru. The two matters were subsequently consolidated into Meru HCC No. 12 of 2009 and transferred to Chuka as ELC No. 108 of 2017.

8. The court analyzed the claims and determined that the primary issue was ownership of the disputed parcel of land and the legality of transactions that led to its transfer. The court observed that Johnson Nkonge had initially sued John Phares Njeru for breach of contract, alleging that the latter had failed to complete payment for the purchase of the suit property as per their agreement executed on 7th August 2003. The court took note that the land had been transferred to John Phares Njeru in good faith after the payment of a deposit, but later reverted to Johnson Nkonge following the determination in LDT Case No. 23 of 2007.

9. In considering the competing claims, the trial court examined the validity of the transfer and whether there was fraud or irregularity. The court noted that Abdul Rashid Mbae Magambo had separately sued in Meru CMCC No. 8 of 2010 seeking a declaration that the registration of John Phares Njeru as proprietor of the land on 24th April 2009, pursuant to orders issued on 18th February, 2009, was fraudulent and irregular. The court observed that Abdul Rashid Mbae Magambo sought rectification of the register to reinstate him as the lawful proprietor.

10. The ELC found that the registration of the 1st defendant, John Phares Njeru, as the owner of the land was tainted with irregularities. It relied on the doctrine of bona fide purchaser, citing *Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others* (2015) eKLR. The ELC concluded that if no valid title passed from Johnson Nkonge to John Phares Njeru due to fraud, then no valid title could have passed from John Phares Njeru to Justus Muruja Musa.

11. It was the ELC's considered opinion that Abdul Rashid Mbae Magambo had established his claim to the property and that the alleged fraudulent transactions leading to the 1st and 2nd defendants' ownership were void. The court further held that the doctrine of indefeasibility of title could not be used as a shield for fraudulent acquisition of property, citing *Onyango v. Attorney General* (1986-1989) EA 456. In the final analysis, the court concluded that the registration of Justus Muruja Musa as the proprietor of the land was unlawful and should be cancelled, with the property reverting to Abdul Rashid Mbae Magambo. The ELC further found that John Phares Njeru had breached his contract with Johnson Nkonge and was liable for damages.

12. The trial court issued the following orders:

    1. The suit by the 1st Plaintiff, Johnson Nkonge, against the 1st Defendant, John Phares Njeru, for damages for breach of contract succeeds. The 1st Defendant was ordered to pay the sum of Kshs. 400,000, less the amount already paid to the 1st Plaintiff, meaning he would pay a net amount of Kshs. 93,000.

    2. The suit by Abdul Rashid Mbae Magambo, initially filed in Meru CMCC No. 8 of 2010, succeeded in terms of prayers (a), (b), and (c). The Land Registrar, Chuka, is directed to cancel the name of Justus Muruja Musa as the proprietor of Land Parcel No. Mwimbi/S.Mugumango/1419 and instead register the name of Abdul Rashid Mbae Magambo as the rightful proprietor.

3. The 1st Defendant, John Phares Njeru, is ordered to refund the sum of Kshs. 310,000 to the 2nd Defendant, Justus Muruja Musa, being the amount paid in consideration for the fraudulent transfer.

4. Costs were awarded to the Plaintiffs and the 2nd Defendant, to be paid by the 1st Defendant, John Phares Njeru.

Submissions by Counsel

13. Counsel for the parties filed written submissions supporting their respective positions. At the hearing of the appeal, the appellant was represented by learned counsel Mr. K'Opere whilc the respondent was represented by learned counsel Mr. Mwendwa. Mr. K'Opere submitted that this appeal arises from the judgment and decree of the ELC at Chuka (ELC No. 108 of 2017, formerly Meru ELC No. 12 of 2009), delivered by (P.M. Njoroge, J.) on 18th December, 2018. Counsel submitted that the dispute between the parties involves the suit property which was originally the subject of Meru HCCC No. 12 of 2009 before being consolidated with Meru CMCC No. 8 of 2010. The consolidation was necessitated by the fact that both suits pertained to the same parcel of land and involved the same parties, thereby requiring a common adjudication.

14. Counsel's primary contention in this appeal is that the ELC at Chuka lacked jurisdiction to overturn the orders issued by the subordinate court on the 18th February 2009, which had not been set aside or successfully appealed against. Counsel further asserted that the learned trial Judge erroneously entertained matters that had already been adjudicated upon in Chuka SPMCC LDT Case No. 23 of 2007, thereby violating the doctrine of res judicata. Counsel submitted that the ELC proceeded as though the consolidated suits were an appeal or judicial review application challenging the previous decisions of the Land Disputes Tribunal and the subordinate court. Consequently, the first order in the decree was, in effect, a reinstatement of an abandoned appeal, rendering the judgment legally untenable.

15. Counsel further submitted that the 2nd respondent failed to produce a written agreement establishing the purported sale transaction between himself and the 1st respondent, contrary to Section 3(3) of the *Law of Contract Act*, which requires that contracts for the disposition of land must be in writing and signed by all parties. Additionally, the ELC awarded damages amounting to Kshs.400,000/= without a legal or factual basis, while simultaneously deducting Kshs.307,302/= from the payable sum, an amount which represented the original purchase price. Counsel further submitted that, if the 1st respondent had already received the full purchase price, then the subsequent award of damages lacked any legal or equitable justification.

16. Counsel further submitted that the 2nd respondent could not have been deemed a bona fide purchaser for value without notice, given that he was a party to the prior proceedings and was fully aware of the litigation affecting the suit property. Counsel submitted that the 2nd respondent's lack of possession of the suit property further diminishes any claim of good faith, given that his alleged title was cancelled by the subordinate court within two months of its issuance.

17. Counsel further submitted that the ELC disregarded express statutory provisions governing land transactions, including Sections 38 to 42 of the *Land Act* and Sections 26(1) and 80 of the *Land Registration Act*, which safeguard the sanctity of title and prescribe the proper procedure for the rescission of contracts for the sale of land. Counsel further submitted that fraud was not established, as required by Section 107 of the *Evidence Act*, and that the ELC erred in issuing equitable reliefs that effectively nullified the subordinate court's decree without lawful justification.

18. In support of the appellants' case counsel cited various authorities on the doctrine of res judicata *Peter Mbogo Njogu v. Joyce Wambui Njogu & Another* [2005] eKLR, the principle of bona fide purchaser for value without notice Lawrence P. Mukiri Mungai v. Attorney General & 4 Others [2017] eKLR, and the limits of judicial intervention in matters that have already been conclusively determined Pop-In (Kenya) Ltd v. Habib Bank AG Zurich [1990] eKLR.

19. In conclusion, counsel urged this Court to allow the appeal and reinstate the orders of the subordinate court, emphasizing that litigation must come to an end and that the judgment of the ELC constitutes an impermissible abuse of court process. Counsel further submitted that the ELC erred in law and fact in multiple respects, including assuming jurisdiction over a matter that was res judicata, failing to interrogate the validity of the 2nd respondent's title, disregarding statutory provisions under the Land Registration Act and *Land Act*, and awarding damages without legal or evidential basis. Counsel prays that this Court allows the appeal, sets aside the judgment and decree of the ELC, dismisses the consolidated suits filed by the respondents in the courts below, and awards costs to the appellants.

20. Mr. Mwendwa submitted that the ELC had the requisite jurisdiction to determine the matter, as established under Article 162(2) of *the Constitution* and the *Environment and Land Court Act*. Counsel submitted that the court's powers extend to disputes relating to land administration, management, and title, and that it exercises both original and appellate jurisdiction over such matters. Counsel further submitted that the appellants' claim that the ELC lacked jurisdiction is unmerited, as the matter before it was within its purview. Counsel further submitted that the appeal filed before the High Court as HCCA 27 of 2009, later transferred to Chuka as ELC Appeal No. 32 of 2017, was dismissed for want of prosecution on 6th April 2017. As a result, counsel asserted that there was no determination on merit of that case, reinforcing their position that the ELC had jurisdiction.

21. Counsel further submitted that the matter is not res judicata. They rely on the decision in Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR, which outlines the elements that must be satisfied for res judicata to apply. Counsel submitted that while the parties in the previous suits may have been similar, the issues before the different courts were distinct. Counsel asserted that Meru HCCC 12 of 2009 involved the same title and parties as previous tribunals and lower court cases but was not before courts of similar jurisdiction. Counsel further emphasized that the appeal case in Meru (HCCA 27 of 2009) was dismissed without a substantive decision, rendering it incapable of barring the instant appeal on the basis of res judicata.

22. Counsel further submitted that the suit by the 2nd respondent was not founded on a contractual dispute concerning the sale of land but was instead a claim for the protection of an already issued title. Counsel maintained that the 2nd respondent had acquired legal ownership of the suit property following a valid transaction with the 1st respondent and that the subsequent actions of the 1st appellant in cancelling that title and transferring it to himself amounted to unlawful interference. Counsel relied on Black's Law Dictionary, 9th Edition, Page 213 for the defintion of a breach of contract in the following terms:

> "a violation of a contractual obligation be failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non- performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages."

23. Counsel asserted that the 1st appellant's failure to honour the sale agreement constituted a violation entitling the 2nd respondent to seek legal redress. Counsel further submitted that the 2nd respondent already had a title deed, and his claim was not to enforce a sale agreement but to protect that title from unlawful interference by the 1st appellant.

24. Counsel further submitted that the 2nd respondent was a bona fide purchaser for value without notice of any encumbrance or dispute regarding the suit property. Counsel referred to the Ugandan case of Katende v Haridar & Company Limited [2008] 2 EA 173, where it was held that a bona fide purchaser must demonstrate that they acquired title in good faith, had no knowledge of fraud, and paid valuable consideration. Counsel asserted that the 2nd respondent met all these conditions, as he lawfully acquired the property from the 1st respondent, had it registered in his name, and was not aware of any dispute regarding the suit property.

25. Counsel further asserted that the 1st appellant's title was obtained fraudulently and in contravention of Section 26(1) of the *Land Registration Act*. Counsel relied on the decision of Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another [2013] eKLR, where the court held that a title acquired illegally or through a corrupt scheme can be challenged. Counsel asserted that the 1st appellant's failure to complete payment for the suit property before purporting to register it in his name amounts to fraud. As such, counsel submitted that no valid title passed from the 1st respondent to the 1st appellant, and subsequently, no valid title could have been transferred from the 1st appellant to the 2nd appellant.

26. Counsel further submited that rectification of the land register is warranted under Section 80(1) of the *Land Registration Act*, which empowers the court to cancel any registration obtained through fraud or mistake. Counsel relied on the decision of Mary Ruguru Njoroge v Hon. The Attorney General [2014] eKLR, where the court affirmed its power to rectify a register in instances of fraud or mistake. Counsel asserted that since the 1st appellant fraudulently registered the property in his name, the court should order the cancellation of his title and the restoration of the 2nd respondent's ownership.

27. Counsel refuted the appellants' claims that the 2nd respondent was a mere proxy for the 1st respondent to circumvent court orders. Counsel submitted that the 2nd respondent took immediate possession of the suit property after purchasing it, fenced it, and built structures, actions that would not have been undertaken by someone acting as a mere placeholder. Further, that there is no evidence to support the appellants' allegations of collusion between the 1st and 2nd respondents.

28. Counsel further submitted that the allegations that the 2nd respondent violated a status quo order are without merit, as he was not a party to the Land Disputes Tribunal proceedings and was therefore unaware of any such order. Counsel submitted that the 2nd respondent took possession of the suit propety lawfully and that there was no evidence presented to show that he defied any court directive.

29. Counsel further submitted that this Court should uphold the principle that title to land is protected unless acquired fraudulently, as enshrined in Section 26 of the *Land Registration Act*. Counsel asserted that since the 2nd respondent was a bona fide purchaser, his title should be upheld. Counsel urged that the 1st appellant, having acted fraudulently, should not be allowed to benefit from his wrongdoing, in line with legal principles discouraging unjust enrichment.

30. Counsel further submitted that contractual obligations must be upheld and that courts cannot rewrite agreements between parties. Counsel relied on the decision of Rufale v Umon Manufacturing Co. (Ramsbolton) (1918) LR 1 KB 592, where it was held that courts cannot imply terms into a contract merely because they seem reasonable. Counsel submitted that since the sale agreement contained a

clause requiring double the purchase price in the event of breach, the 1st appellant should be held liable for that amount.

31. Counsel concluded that the appellants have failed to demonstrate any valid basis for interfering with the ELC's judgment. Counsel asserted that the instant appeal is an attempt by the appellants to circumvent the consequences of their fraudulent conduct and to unjustly dispossess the 2nd respondent of his property. Counsel urged this Court to dismiss the instant appeal with costs and affirm the ELC's decision, urging that the interests of justice favour upholding the 2nd respondent's title.

32. As the first appellate court we have a duly to re-evaluate, re-assess the evidence adduced before the trial court in light of the grounds of appeal and submissions made before us. This court however, in reaching its decision is required to take into consideration that it did not see nor hear the witnesses as they testified and therefore cannot make any comments regarding the demeanour of witnesses (see Selle& Another v Associated Motor Boat Co. Ltd [1968] EA 123).

Determination

33. We have carefully examined the record, the facts, pleadings, the submissions, the authorities cited and the law. This Court has distilled the key issues that require determination in this appeal. These issues arise from the intricate factual matrix and the legal contentions advanced by both sides. They are inextricably linked to the history of the dispute, the decisions of previous tribunals and courts, and the reliefs sought by the parties. In identifying these issues, the Court has also taken into account the applicable statutory provisions and judicial precedents relied upon.

34. We discern the following issues for determination:

    1. Whether the Environment and Land Court (ELC) had jurisdiction to determine the dispute in light of prior proceedings before the Mwimbi Land Disputes Tribunal and Chuka Magistrate's Court.

    2. Whether the doctrine of res judicata applies to bar the suit before the ELC, given the existence of prior determinations and a dismissed appeal.

    3. Whether the 2nd respondent was a bona fide purchaser for value without notice, considering the history of the suit property and alleged encumbrances.

    4. Whether the cancellation of the appellants' title and rectification of the land register was legally justified under the *Land Registration Act*.

    5. Whether the award of damages to the 1st respondent for breach of contract was legally and factually justified.

    6. Whether the trial court's orders created conflicting judicial decisions over the same property, leading to legal absurdities.

    7. Whether the appellants' appeal is merited and, if so, the appropriate reliefs to be granted.

35. We will now proceed to analyze and determine each of these issues in turn but may collapse related issues and determine them en bloc. We have carefully considered the first issue regarding whether the ELC had jurisdiction to determine the dispute, given the prior proceedings before the Mwimbi Land Disputes Tribunal and the Chuka Magistrate's Court. Jurisdiction is the foundation of any court's authority, and where a court acts without it, its decision is a nullity. This is a settled principle that requires no further comment. This Court will deal with it as the first issue since a determination of this question will determine the trajectory of the other issues.

36. Counsel for the appellants contend that the matter was already decided by the Mwimbi Land Disputes Tribunal, whose decision was adopted by the Chuka Magistrate's Court in SPMCC LDT 23 of 2007. However, this Tribunal had no jurisdiction over ownership disputes, its mandate being limited to boundary issues, customary land use, and trespass, as per the now-repealed Land Disputes Tribunals Act.

37. Counsel for the respondents contend that the ELC was properly seized of the matter, as it involves title and ownership, which fall squarely within the constitutional mandate of the ELC under Article 162(2)(b) of *the Constitution* and Sections 13(1) & (2) of the *Environment and Land Court Act*. Further, the mere fact that the Tribunal's decision was adopted by the Magistrate's Court does not oust the ELC's jurisdiction. The High Court and ELC have powers to review, quash, or determine the validity of titles where fraud, mistake, or illegality is alleged, as provided under Section 80(1) of the *Land Registration Act*. We also note that the matrix extended beyond the parties that participated in the dispute before the Tribunals. The 2nd respondent was not a party to those proceedings and cannot be faulted for mounting a defence of his title in the ELC. We also note that the orders that were granted by the Tribunal and adopted by the court did not provide for cancellation of the 2nd respondent's title and this was done by judicial and administrate craft and a judicial challenge at the ELC was permissible and we approve of it.

38. Having found that the ELC was properly seized of jurisdiction, it follows that we must now determine whether the doctrine of res judicata bars the respondents from pursuing the matter afresh. The principle is well established under Section 7 of the *Civil Procedure Act*, which prohibits the re-litigation of matters that have been conclusively determined by a competent court. This Court in Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR set out the elements of res judicata as follows:

    i. the matter must be directly and substantially in issue in the former suit;

    ii. the parties must be the same or litigating under the same title;

    iii. the issue must have been heard and finally determined; and

    iv. the former suit must have been decided by a competent court.

39. Counsel for the appellants submittedd that the dispute was finally adjudicated in Chuka SPMCC LDT 23 of 2007, and as such, the respondents were barred from instituting fresh proceedings before the ELC. However, res judicata cannot apply where the initial tribunal lacked jurisdiction. In John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR, this Court ruled that a decision rendered without jurisdiction cannot be the basis for res judicata. The English House of Lords in Carl Zeiss Stiftung v Rayner & Keeler Ltd [1967] 1 AC 853 emphasized that res judicata is only valid where a case has been heard and finally determined by a competent court. Lord Reid stated that:

> "Issue estoppel may be a comparatively new phrase, but I think that the law of England, unlike the law of some other countries, has always recognized that estoppel per rem judicatam includes more than merely cause of action estoppel."

40. A dismissal for want of prosecution is a procedural termination that does not resolve the substantive legal or factual issues in dispute. As was held in William Koross v Hezekiah Kiptoo Komen & 4 others [2015] eKLR, for res judicata to apply, there must be a final adjudication on the merits. Since no such adjudication occurred in the Meru appeal, the respondents were not precluded from pursuing their

claim before the ELC especially for a cause of action that was unrelated to the orders that flowed from the Land Disputes Tribunal and involving a new party (the 2nd respondent in this appeal).

41. The principle of audi alteram partem, which dictates that no person shall be condemned unheard, is a cornerstone of procedural fairness and a fundamental tenet of natural justice. It is an indispensable safeguard in legal proceedings, ensuring that all parties to a dispute are afforded an opportunity to present their case before adverse orders are issued. The issuance of orders that have the effect of cancelling a registered title without the participation of the titleholder contravenes this principle and cannot be countenanced. The 2nd respondent, whose title was purportedly impugned, was neither a party to the proceedings before the Land Disputes Tribunal nor involved in the proceedings adopting its award. The procedural fairness of such a process is, therefore, irredeemably compromised.

42. The House of Lords, in Ridge v Baldwin [1964] AC 40, reaffirmed that decisions made in breach of the right to be heard are null and void. The deprivation of proprietary rights without due process amounts to a fundamental miscarriage of justice. In the present matter, we appreciate that the 2nd respondent's proprietary interest was extinguished through a legal process in which he had no participation. To hold that his title was successfully impugned without affording him an opportunity to be heard is an affront to both substantive and procedural justice.

43. It is trite law that a court cannot issue binding orders against a party who has not been properly enjoined in the proceedings. The legal standing of the 2nd respondent as a bona fide purchaser for value without notice could not have been lawfully impugned in his absence. The Land Disputes Tribunal's award, which was later adopted by the subordinate court, metamorphosed into an order that effectively cancelled the 2nd respondent's title despite him having had no opportunity to challenge the claims against him. Such an outcome is legally untenable and offends the principles of due process, fairness, and legitimate expectation. The suggestion that the matter was litigated on its merits, notwithstanding the 2nd respondent's non-participation, cannot withstand scrutiny.

44. In light of the foregoing, it is clear that the appellants' contention and position suffer from a grave procedural defect that cannot be cured by an assertion that the Tribunal's decision and its adoption and subsequent metamorphosis from an order for specific performance to one cancelling title was final. The unilateral extinguishment of the 2nd respondent's property rights without affording him an opportunity to be heard constitutes a nullity. Consequently, the contention that the matter was conclusively litigated is without merit and must be rejected. The sanctity of title and the principles of procedural fairness demand that a party whose rights are at stake must be afforded an opportunity to be heard. Any contrary position would set a dangerous precedent that undermines the rule of law and due process.

45. Having carefully reviewed the evidence and submissions by the parties, we are not persuaded that the 2nd respondent, Abdul Rashid Mbae Magambo, participated in any fraud or irregularity that would warrant the cancellation of his title. The burden of proving fraud or illegality rests with the party alleging it, and mere assertions without cogent proof cannot suffice to defeat an otherwise valid title. The appellants have not demonstrated that the 2nd respondent was complicit in any fraudulent scheme or that he was involved in any unlawful alteration of the land register.

46. We take note that when he testified as PW3 in the ELC, the 2nd respondent was unclear in his responses regarding whether he had notice of any encumbrances or existing litigation on the Green Card. However, negligence in failing to conduct exhaustive due diligence does not equate to fraud, nor does it amount to irregularity in a manner that would render his title void. The law is settled that fraud must not only be pleaded and proved to the required standard, but also that the person whose title is impugned must have actively participated in it or otherwise been aware of it. In the absence of such

proof, the 2nd respondent's actions, do not rise to the legal and factual threshold that would justify setting aside his title.

47. This Court also frowns upon the appellants' conduct, which has occasioned this protracted and convoluted litigation spanning several fora over an extended period. The 1st appellant failed to fulfill his contractual obligations, yet proceeded to deal with the title as though he had unfettered ownership, ultimately transferring the land to the 2nd appellant whose claim was rightly rejected. This kind of conduct, which misrepresents the powers and impact of court orders and creates conflicting land interests, is precisely what the legal framework governing land transactions seeks to prevent. The record also shows that the 1st respondent failed to ensure absolute clarity in his dealings with both purchasers, further contributing to the legal entanglement that has necessitated this appeal. Accordingly, we agree with the ELC and find that the 2nd respondent's title ought to be upheld, and his interest in the suit property remains valid.

48. After a careful reconsideration of the damages awarded to the 1st respondent, this Court is persuaded that while damages for breach of contract are justifiable in principle, the quantum awarded by the ELC requires adjustment to ensure that it aligns with the principles of compensatory damages, unjust enrichment, and proportionality to the actual loss suffered. The fundamental principle in contract law, as established in Hadley v Baxendale (1854) 9 Exch 341, is that damages should compensate the claimant for the actual loss sustained due to the breach and should not place them in a better position than they would have been had the contract been performed. Similarly, this Court in Kenya

    Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR emphasized that general damages are not awardable for breach of contract and that any damages must be proven and strictly limited to what was foreseeable and quantifiable at the time of contracting. They must be fair.

49. In the instant appeal, the ELC awarded Kshs.400,000, which was to be offset against the amounts already paid, leaving the net sum of Kshs.93,000 payable. However, this Court finds that this assessment was not entirely supported by an adequate evidentiary or equitable foundation.

    The sale agreement, which formed the basis of the contractual relationship, did not contain a clause specifying liquidated damages or penalties in case of breach. In the absence of a predetermined sum, the court must assess actual financial loss based on the market value of the land, the sums paid, and any further detriment suffered.

50. From the evidence, it is clear that the 1st appellant had already paid a portion of the purchase price, and the 1st respondent sought compensation for the breach of contract rather than specific performance. In assessing damages, we are guided by the need to prevent a party from recovering more than their actual loss, thereby benefiting from a breach in a manner inconsistent with equity and fairness. The principle of unjust enrichment prohibits courts from making awards that amount to double recovery.

51. This Court also notes that the 1st respondent later disposed of the land to a third party, meaning that he ultimately recovered ownership of the suit property. It is trite law that where a party has not suffered an actual financial loss, damages must be nominal. In Weld-Blundell v Stephens [1920] AC 956, the House of Lords reaffirmed that where a breach does not result in measurable financial loss, nominal damages should be awarded. Lord Viscount Finlay stated as follows:

    > " Generally speaking, in English law, though a man has a cause of action he is not entitled to damages if he has not suffered damage. But if a man has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment

of it. If actual damage is not shown, the law, rather than that he should go without a remedy, gives him a nominal sum by way of damages."

52. Accordingly, this Court varies the trial court's award and finds that an award of Kshs.200,000 in general damages is appropriate. This sum reflects the loss of contractual expectation, the inconvenience suffered, and the financial detriment incurred while ensuring that the 1st respondent does not recover more than their actual loss while ensuring that the damages do not exceed the actual loss suffered. This sum shall be subject to offsetting any amounts already paid, ensuring a fair resolution that aligns with established legal principles and the facts of this case.

53. The appeal is therefore partially allowed, with the revised damages reflecting fair compensation without unjust enrichment. The balance of justice demands that the award be reduced to reflect the actual loss sustained, while maintaining the integrity of contractual obligations and commercial fairness.

54. Given the protracted and convoluted nature of this dispute, the partial success of the appeal, and the fact that all parties contributed in varying degrees to the legal uncertainty surrounding the title, we find it appropriate that each party bears their own costs both in the ELC and in this Court. This serves as a proper reflection of the responsibility each party must take for the legal quagmire that has now been disentangled.

55. We therefore make final orders as follows:

    i. The appeal partially succeeds only to the extent that the quantum of damages awarded to the 1st respondent is varied downwards to Kshs.200,000, subject to any payments already made.

    ii. The appellants' claim against the 2nd respondent is dismissed.

    iii. We substitute the order awarding costs to the plaintiffs in the High Court with an order that each party shall bear their own costs.

    iv. Each party shall also bear their own costs of this appeal.

55. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF FEBRUARY, 2025.

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR