



Municipal Council of Kisumu v Teleposta Pension Scheme Registered Trustees & 19 others (Civil Appeal 33 of 2020) [2025] KECA 619 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KECA 619 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 33 OF 2020
MSA MAKHANDIA, LK KIMARU & WK KORIR, JJA
MARCH 28, 2025**

BETWEEN

MUNICIPAL COUNCIL OF KISUMU APPELLANT

AND

**TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES 1ST RESPONDENT
COMMISSIONER OF LANDS 2ND RESPONDENT
DISTRICT LAND REGISTRAR KISUMU 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT
JULIUS NYABUDI 5TH RESPONDENT
MABEL OKWISA OMONDI 6TH RESPONDENT
MAUREEN OLEL 7TH RESPONDENT
JARED GILO OPUL 8TH RESPONDENT
BENARD ODHIAMBO 9TH RESPONDENT
ERICK OUMA OTUOMA 10TH RESPONDENT
JOHN ANDREW OGELE NYAKUNA 11TH RESPONDENT
MONICA ANYANGO ORWA 12TH RESPONDENT
JACKTON OKITA OCHORE 13TH RESPONDENT
ASTERI ANGOLO 14TH RESPONDENT
CORNEL OPIYO OSANO 15TH RESPONDENT
PAUL MOSES OMONDI 16TH RESPONDENT**



SEVENTH DAY ADVENTIST CHURCH E.A. UNION LIMITED (VICTORIA SDA CHURCH)	17 TH RESPONDENT
JOSEPH SHADRACK ONONG'NO	18 TH RESPONDENT
MINISTER FOR FINANCE	19 TH RESPONDENT
K REP BANK LIMITED	20 TH RESPONDENT

(An appeal from the judgment of the Environment and Land Court of Kenya at Kisumu (S.M. Kibunja, J.) dated 20th November 2019 in ELC Case No. 782 of 2016 formerly HC Civil Suit No. 110 of 2007)

JUDGMENT

1. The appellant, the Municipal Council of Kisumu, had, in Kisumu High Court Civil Suit No. 110 of 2007, through a Re-Amended Further Amended Plaintiff dated 29th May 2013 initiated proceedings against 27th defendants, among them being the 1st - 19th respondents herein. The 20th respondent herein was in the course of the trial added as an interested party. The matter was later transferred to the Environment and Land Court (ELC) at Kisumu and registered as ELC Case No. 782 of 2016. The appellant claimed that it was the registered proprietor of the lease for parcel I.R. 12663/1, measuring 7.72 acres (“suit land”), having been granted the lease by the Governor of the Colony and Protectorate of Kenya, now the President of the Republic of Kenya for 99 years from 1st January 1956. Among the conditions in the lease was that the appellant could not deal in or alienate the suit land without the prior written consent of the Governor.
2. It was the appellant’s case that in 1958, it surrendered the grant upon the request of the Governor for the purpose of excision of 0.0996 acres from the suit land for road extension. So as to perfect the surrender, the appellant executed a surrender instrument dated 2nd August 1968 and handed over the original grant to the 2nd respondent, the Commissioner of Lands. In return, the 2nd respondent assured the appellant that a new lease, reflecting the reduced acreage, would be prepared in their favour.
3. According to the appellant, the 2nd respondent in breach of its promise, and without its knowledge or consent, proceeded to convert the title into a lease under the Registered *Land Act*, Cap. 300, and orchestrated the registration of another lease being L.R. No. Kisumu Municipality/Block 9/1 on 27th September 1975. The appellant averred that later, the 2nd respondent in violation of the prior commitment and in collusion with the 1st respondent, Teleposta Pension Scheme Registered Trustees, prepared a new lease and issued it in favour of the 1st respondent.
4. The appellant also claimed that prior to leasing the suit land to the 1st respondent, on or around 11th February 1980, the 2nd respondent and the 3rd respondent, the District Land Registrar Kisumu, registered a purported surrender by the appellant of the lease of L.R. No. Kisumu Municipality/Block 9/1. The appellant contends that this registration was fraudulent as it was done without the appellant’s consent or authorization.
5. The appellant further alleged that the 2nd and 3rd respondents created another fraudulent lease on 4th February 2007 registered as L.R. No. Kisumu Municipality/Block 9/329 measuring approximately 7.116 acres, derived from the appellant’s suit land in favour of the Government and that by means of an irregular surrender dated 31st December 2002, Kenya Posts and Telecommunications Corporation (KP&TC), the 1st respondent’s predecessor supposedly surrendered the suspect lease of this parcel of



land. The appellant additionally pleaded that through Legal Notice No. 154 on 5th November 1999 (“L.N. No. 154”), the 19th respondent vested L.R. No. Kisumu Municipality/Block 9/329 in the 1st respondent.

6. It was further the appellant’s case that the actions of the 2nd and 3rd respondents were fraudulent because they misled the appellant into surrendering its original title by falsely promising that the same would be returned after excision of the portion for the road construction. Also said to be fraudulent was the alleged illicit conversion of the title from L.R. No. Kisumu Municipality/Block 9/1 to L.R. No. Kisumu Municipality/Block 9/329 without the appellant’s consent and the transfer of the property to the defunct KP&TC and then to the 1st respondent.
7. Consequently, the appellant sought, among other reliefs: a declaration that the conversion of Title No. I.R. 12663 to L.R. No. Kisumu Municipality/Block 9/1, together with the registration of the 1st respondent as the proprietor of L.R. No. Kisumu Municipality/Block 9/1 or L.R. No. Kisumu Municipality/Block 9/329, was fraudulent, illegal, irregular, and therefore null and void; the annulment of Legal Notice No. 154 dated 5th November 1999; and, an order directing the 2nd and 3rd respondents, jointly and severally, to cancel the registration of the 1st respondent as the proprietor of L.R. No. Kisumu Municipality/Block 9/1 or L.R. No. Kisumu Municipality/Block 9/329, as well as all titles arising from its subdivision.
8. The appellant’s plaint was amended multiple times. The 1st respondent’s final response to the claim was an amended statement of defence dated 18th May 2012. It was its case that the surrender of L.R. No. Kisumu Municipality/Block 9/329 by its predecessor, KP&TC, was properly documented and executed, as evidenced by the lease surrender dated 31st December 2002. The 1st respondent asserted that the transmission of L.R. No. Kisumu Municipality/Block 9/1 to it, was legitimate and facilitated by the 19th respondent through L.N. No. 154. The 1st respondent also refuted the alleged fraudulent activities or illegalities attributed to it and its predecessor, firmly asserting that all dealings related to the suit land were conducted lawfully and transparently. The 1st respondent acknowledged that it had subdivided the suit land into distinct parcels, as identified in the appellant’s pleadings, and confirmed that it had sold certain parcels to its co-defendants.
9. In addition, the 1st respondent disputed the appellant’s claim to ownership of L.R. No. Kisumu Municipality/Block 9/1, and outrightly dismissed the allegations of fraud that were linked to transactions, including the subsequent issuance of resultant titles, in relation to L.R. No. Kisumu Municipality/Block 9/329.
10. The 1st respondent finally asserted that the appellant’s suit was barred by statute, specifically referencing sections 7 and 9 (1) of the *Limitation of Actions Act*, and urged the court to dismiss the case with costs, while reinforcing their stance on the legality and legitimacy of their actions concerning the suit property.
11. In their response, the 2nd and 3rd respondents filed a joint statement of defence on 18th September 2012 with the 4th respondent (the Attorney General) and the 19th respondent (Minister for Finance) opposing the claim. They denied the appellant’s registration as the proprietor of the suit land, asserting that the appellant voluntarily surrendered the land to the Government without condition. According to these respondents, the surrender vested the property in the Government absolutely, thereby extinguishing the appellant’s interests. They further claimed that the suit land was allocated to the now defunct KP&TC with the appellant’s consent and notice and that the subsequent transfer of the land to the 1st respondent by the 19th respondent was conducted legally and procedurally. Additionally, they asserted that the subdivision and alienation of the suit land had the appellant’s blessings. It was finally



- their defence that the suit contravened section 13A of the *Government Proceedings Act*, section 3 of the *Public Authorities Limitation Act*, and section 136(1) and (2) of the Government *Land Act*. They consequently urged for the dismissal of the suit with costs.
12. Jared Gilo Opul, Benard Odhiambo, Erick Ouma Otuoma, John Andrew Ogele Nyakuna, Monica Anyango Orwa, and Joseph Shadrack Onong'no, the respective 8th, 9th, 10th, 11th, 12th and 18th respondents, filed individual responses of various dates opposing the claim. Cumulatively, their defence was that the transmission of the original title from the appellant to the 1st respondent was legitimate and that in any event, they were innocent purchasers for value without notice of any defect in title. Further, that they had acquired their respective suit parcels regularly and legally and had paid the appellant annual land rates ever since.
 13. Mabel Okwisa Omondi, Julius Nyabudi, Maureen Olel, Asteri Angolo, and Cornel Opiyo Osano who are the respective 5th, 6th, 7th, 14th, and 15th respondents in this appeal also filed their separate statements of defence and joined forces with the 8th, 9th, 10th, 11th, 12th and 18th respondents in advancing the defence of innocent purchasers for value.
 14. The 13th respondent, Jackton Okita Ochore, through his statement of defence averred that he had acquired his parcel of land from the 1st respondent on a willing buyer-willing seller basis and had been paying all the land rates.
 15. The 17th respondent, Seventh Day Adventist Church E.A. Union Limited (Victoria SDA Church), similarly filed its statement of defence, averring that it acquired its parcel from the legal allottee, and the title was valid and indefeasible in law. It was its defence that it obtained the appellant's consent and clearance for the transaction having paid the rates and received a rates clearance certificate.
 16. The 20th respondent, KREP Bank Limited, also filed a statement of defence denying any fraud and illegality in the acquisition of Kisumu Municipality/Block 9/380 by the 11th defendant (Edwin Omunyaku) who had charged the title for a loan facility but defaulted in servicing the facility.
 17. This being a first appeal, we have a duty to re-assess the evidence adduced at the trial in order to arrive at our independent decision. In that regard, we are called upon to briefly highlight the evidence adduced by the parties at the trial. It is not lost upon us that the main protagonists were the appellant on the one hand and the 1st, 2nd, 3rd, 4th, and 19th respondents on the other hand. The other respondents' respective defences are appendage to that of the protagonist respondents: their case will succeed or fail depending on the finding made on this appeal with regard to the dispute between the main disputants above.
 18. In support of its case, the appellant called Stephen Sule (PW1) who was a planning assistant for the County Government of Kisumu and had previously served in other positions since 1994 where his responsibilities encompassed a wide array of duties, including the processing of development applications and the preparation of development plans and controls. He adopted his written statement dated 15th March 2018 in which he recounted the history of the suit land, stating that in 1956, a parcel of land measuring 7.72 acres was leased to the appellant to establish an African Social Centre. He testified that the appellant later acceded to the request by the Government for excision of 0.0996 acres from the land for the expansion of Jomo Kenyatta Highway. This was done through the execution of a surrender of grant dated and registered on 2nd August 1968.
 19. It was PW1's testimony that following the 1968 surrender, it was expected that the 2nd respondent would prepare a new title reflecting the remaining portion of the land for the appellant. However, this expectation went unfulfilled. On 30th September 2004, the appellant sought clarification from the 3rd respondent regarding the status of the suit land, and through a letter dated 11th October 2004,



- the appellant was informed that multiple plots had been carved out of the suit land. This revelation compelled the appellant to conduct a search which disclosed that L.R. No. Kisumu Municipality/Block 9/1 measuring 3.0838 acres was registered on 27th September 1975. They were also surprised to discover a purported surrender made by the appellant on 11th February 1980 in respect to this parcel of land.
20. PW1 testified that although the document used for the surrender parcel of land was signed by John Mwangi, who served as the Secretary of the Commission that had been appointed by the Minister to take charge of the operations of the appellant, he doubted the validity of this surrender because the document lacked the official seal and the signature of the Chairman of the Commission. PW1 disputed the 1st respondent's assertion that L.R. No. Kisumu Municipality/Block 9/329 was a subdivision of L.R. No. Kisumu Municipality/Block 9/1 or that it had been legally vested in it through L.N. No. 154. The witness emphasized that no such subdivision could have taken place since there was no approved Part Development Plan (PDP). It was also his testimony that investigations by the appellant revealed L.R. No. Kisumu Municipality/Block 9/329 was registered with the Government on 4th July 2002.
 21. PW1 conceded that the KP&TC had, with the appellant's approval, developed several residential flats on L.R. No. Kisumu Municipality/Block 9/1. However, he expressed his inability to locate any documentation regarding the approvals for these developments. The witness clarified that even though L.R. No. Kisumu Municipality/Block 9/329 had been subdivided into 103 distinct plots, the appellant's role in that subdivision process was not evident. According to PW1, this lack of clarity led to the issuance of a directive halting the appellant's revenue department from accepting rate payments for the 103 plots. Additionally, that the 1st respondent's suit filed in the High Court at Nairobi, being Misc. Application No. 9 of 2008, seeking to compel the appellant to receive rates for the plots had been dismissed. Further, that despite the dismissal of the application, the appellant had continued to receive the rates although the County Government of Kisumu was ready to refund any rate payments it had collected.
 22. PW1 stated that he could not trace any minutes of the appellant's decisions concerning the suit land after 1968, despite the legal requirement that all council decisions be documented in minutes. He told the court that, although the exact acreage of the land occupied by the block of flats constructed by the KP&TC with the appellant's purported approval was unknown, the appellant was desirous of reclaiming the entire parcel of land.
 23. Lastly, PW1 accepted that the appellant lacked direct evidence of fraud concerning those who had purchased parcels of land from the 1st respondent. He, however, insisted that the purchasers could not benefit from what he termed as unlawfully obtained land.
 24. The 1st respondent's defence was advanced by its administrator and secretary, Peter Kipyegon Rotich (DW1) who adopted his written statement dated 2nd May 2011. His testimony was that among the assets allocated to the 1st respondent by L.N. No. 154 was L.R. No. Kisumu Municipality/Block 9/1 on which stood nine blocks of flats. His evidence was that out of the nine blocks, the 1st respondent had a title for eight flats while the 9th block was not titled as it had encroached on a road reserve. He produced a letter of allotment of L.R. No. Kisumu Municipality/Block 9/1 (Part) in respect to the portion upon which the eight blocks stand. He stated that apart from getting titles for each of the flats, they had also surveyed and subdivided the suit land into 49 parcels and had sold 26 of them. The witness vehemently denied any fraud by the 1st respondent or its predecessor in the acquisition of the suit land.
 25. The 3rd respondent, called George Nyangweso (DW9), the Land Registration Officer, Kisumu Land Registry to the stand. His evidence was that the suit land was first registered to the appellant under



- the Registration of Titles Act as I. R. 12663/1 and on 2nd August 1968, the appellant surrendered a portion of 0.0996 acres of the suit land to the Government. DW1 testified that there was a subsequent surrender of 11th February 1980 executed by the appellant surrendering the lease for L.R. No. Kisumu Municipality/Block 9/1 measuring 3.0838 hectares to the Government, and upon registration, the appellant relinquished its rights over the suit land.
26. Mr. Nyangweso also stated that through the letter of 11th October 2004, the appellant wrote to the 3rd respondent enquiring about the status of L.R. No. Kisumu Municipality/Block 9/1 that was initially the suit land measuring 7.72 acres, and upon checking the records, it was discovered that the land had been registered in favour of the 1st respondent. He maintained that the suit land was procedurally surrendered to the Government and was therefore available for allocation by the 2nd respondent.
 27. DW9 testified that the second surrender of L.R. No. Kisumu Municipality/Block 9/1 was signed by John Mwangi, the Secretary to the Commission that was in charge of the operations of the appellant at the material time. He stated that according to their records, KP&TC was allocated by the 2nd respondent L.R. No. Kisumu Municipality/Block 9/1 (Part) measuring 2.93 hectares as shown in Plan No. 53589/127/1. Further, that the lease was registered in the Chief Registrar's Office, Nairobi, where the subsequent subdivisions were also processed without involving the Kisumu Land Registry.
 28. Some of the other respondents also testified at the trial. In essence, their testimony was that they were legitimate and innocent purchasers of their respective properties from the 1st respondent and they had done so with the appellant's consent.
 29. In his judgment, S. M. Kibunja, J, held that there was a relationship between L. R. No. 1148/9/XII [I.R. 12663] and L.R. No. Kisumu Municipality/Block 9/1, and there was no fraud in the registration of the suit land under the Registered *Land Act*. The learned Judge also found that the appellant had been aware of the transactions involving the suit land and that the defence of bona fide purchaser for value without notice of defect in title was established by some of the respondents who bought plots from the 1st respondent. Ultimately, the appellant's claim was dismissed with costs.
 30. In its memorandum of appeal, the appellant raises sixteen grounds of appeal, which in summary faults the learned Judge for shifting the burden of proof, misapprehending the evidence on record, and making conclusions contrary to the evidence on record.
 31. When this appeal came up for hearing on 11th November 2024, learned counsel Mr. David Otieno appeared for the appellant whereas learned counsel Mr. S. K. Bundotich was present for the 1st respondent. Also, in attendance were learned counsel Mr. Moses Orenge for the 8th, 9th, 10th, 11th, 12th, 16th, and 18th respondents; learned counsel Mr. Odongo Awino for the 5th, 6th, 7th, 15th, and 17th respondents; and learned counsel Ms. Obware for the 20th respondent. There was no appearance by the Attorney General for the 2nd, 3rd, 4th and 19th respondents though served with the hearing notice for the day by Court.
 32. In urging the appeal, Mr. Otieno relied on submissions dated 7th November 2024 and also the submissions filed by the appellant before the trial court. According to counsel, the learned Judge erred in validating the second surrender of the lease. Counsel submitted that once the appellant denied knowledge of that surrender, the burden of proof shifted to the 2nd, 3rd, 4th, and 19th respondents to establish that the subsequent registration of the suit land pursuant to the second surrender of the lease was lawful. Counsel urged that once the legality of the process was challenged, it was incumbent upon the respondents to prove that the surrender was done within the confines of the law. Still urging this line of argument, counsel submitted that had the learned Judge considered the provisions of the repealed Local Government Act on the process of transfer of land by a local authority, he would not have arrived



- at the conclusion in the impugned judgement. He stressed that the appellant's failure to take any action against the purported signatory of the second surrender did not validate the surrender document.
33. Turning to another line of argument, counsel submitted that despite the appellant querying the origin of L.R. No. Kisumu Municipality/Block 9/1, the respondents had failed to satisfactorily explain how that registration came to be. Counsel relied on *Jama Musa Hussein vs. Registrar of Government Lands & 2 Others* [2019] eKLR and *Dina Management Ltd vs. County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR) for the submission that because the appellant had challenged the legality of the title for the suit property, it was incumbent upon the respondents to prove the legality of the process leading to the acquisition of the title.
 34. Mr. Otieno further submitted that owing to the questionable origins of L.R. No. Kisumu Municipality/Block 9/1 and L.R. No. Kisumu Municipality/Block 9/329, they could not have existed. Relying on *In the Matter of the National Land Commission* [2015] eKLR and *Wreck Motors Enterprises vs. The Commissioner of Lands & 3 Others* [1997] eKLR, counsel argued that the power of the 2nd respondent to allot public land was restricted by the law and urged the Court not to sanction the illegal actions of the 2nd, 3rd, 4th and 19th respondents. Additionally, counsel referred to *Joram Nyaga & Another vs. Attorney General* [2019] eKLR to urge that once land is allotted for public utility, the 2nd respondent cannot allocate the same piece of land for any other purpose, and therefore, it was immaterial that the appellant's officers could have been involved in the transfer of suit land or even receipt of rates.
 35. Counsel for the appellant finally, and in reliance on *Alice Chemutai Too vs. Nickson Kipkirui Korir & 2 Others* [2015] eKLR and *Arthi Highway Developers Ltd vs. West End Butchery Ltd & 6 Others* [2015] eKLR, contended that the titles issued for the subdivisions of the suit land were impeachable as long as they were obtained through an illegal and unprocedural process. Counsel consequently urged us to allow the appeal and award damages to the appellant for trespass as prayed in the plaint.
 36. In opposition to the appeal, Mr. Bundotich for the 1st respondent relied on submissions dated 2nd October 2024. Firstly, counsel maintained that the appellant lawfully surrendered the suit land and the same was free for allocation. Further, that the appellant was aware and approved the developments erected on the suit land. Counsel referred to section 107 of the [Evidence Act](#) to submit that the appellant having alleged that the surrender was unlawful, the onus was upon it to prove that fact.
 37. Secondly, counsel asserted that the acquisition of the suit land by the 1st respondent was lawful and procedural. Counsel adverted to the evidence on record, and additionally relied on *Weston Gitonga & 10 Others vs. Peter Rugu Gikanga & Another* [2017] eKLR and *Katende vs. Haridar & Co. Advocates* [2008] 2 E.A. 173, to submit that the 1st respondent was otherwise an innocent proprietor and purchaser for value without notice. Counsel also urged that the appellant, if anything, brought the claim late in the day; 32 years after the impugned allocation. According to counsel, the 1st respondent could not be blamed as neither its predecessor nor itself existed at the time of the alleged fraud. Counsel relied on *Joshua Ngatu vs. Jane Mpinda & 3 others* [2019] eKLR to buttress this submission and to reiterate that equity aids the vigilant and that in the circumstances of this matter, equity could not come to the aid of the appellant.
 38. Thirdly, it was Mr. Bundotich's submission that the appellant was aware of the subsequent subdivisions of the suit land and acknowledged the new owners by collecting the land rates from them. Further, that the new owners and the 1st respondent, had discharged their obligations by paying rates as owners of rateable plots.



39. Finally, counsel urged us to affirm that title numbers I.R. 12663/1, Kisumu Municipality/Block 9/1 and Kisumu Municipality/Block 9/329 referred to the same piece of land. Mr. Bundotich eventually urged us to dismiss the appeal with costs.
40. Mr. Odongo Awino for the 5th, 6th, 7th, 15th and 17th respondents opposed the appeal through submissions dated 8th November 2024. Firstly, counsel referred to the definition of a bona fide purchaser in Black’s Law Dictionary and the case of *Katende vs. Haridar Co. Ltd.* [2008] 2 E.A. 173 to submit that his clients had established that they were bona fide innocent purchasers for value and without notice.
41. Secondly, counsel referred to section 80 of the *Land Registration Act* and the definition of fraud in Black’s Law Dictionary to submit that the appellant did not prove the element of fraud against his clients. Still, on this issue, counsel argued that section 39 of the repealed Registered *Land Act* and section 26(1)(a) of the *Land Registration Act* protected his clients because they purchased the plots in good faith.
42. Finally, Mr. Odongo submitted that the appellant had not established a case of trespass against his clients. Counsel consequently asked the Court to dismiss the appeal with costs.
43. Learned counsel Mr. Orengo relied on submissions dated 29th October 2024 to propel the case of the 8th, 9th, 10th, 11th, 12th, 16th and 18th respondents. Counsel urged us to affirm the trial court’s finding of a relationship between I.R. 12663/1, Kisumu Municipality/Block 9/1 & Kisumu Municipality/Block 9/329. Dismissing the allegation of fraud, counsel submitted that the appellant had failed to tender any evidence to show that the second surrender was impugnable, urging that in the circumstances the surrender could not have been irregular. It was also the counsel’s submission that the subsequent dealings in and subdivisions of the suit land were undertaken in the full glare and with the knowledge of the appellant, and everything was therefore procedural. Finally, counsel urged that his clients were bona fide purchasers and their respective titles should therefore remain undisturbed. In the end, counsel urged us to dismiss the appeal with costs.
44. Finally, Ms. Obware for the 20th respondent commenced her oral highlights by associating herself with the submissions of the 5th to 18th respondents. Turning to her written submissions dated 7th November 2024, counsel submitted that her client’s customer who had charged one of the sub-divisions of the suit land for a loan facility had lawfully acquired the title from the 1st respondent. It was counsel’s case that before advancing the loan to the customer, the 20th respondent had conducted due diligence and found the title to be in order. It was also her argument that the appellant had failed to prove a case of fraud or irregularity in the transactions involving the suit land. She therefore prayed for the dismissal of the appeal with costs.
45. We restate that this being a first appeal, our duty is to conduct a retrial in order to arrive at our own independent decision. As elaborated in *Selle vs. Associated Motor Boat Co.* [1968] EA 123, we must reconsider the evidence, evaluate it, and draw independent conclusions. In doing so, we will be alive to the fact that, unlike the trial court, we had no opportunity to hear and see the witnesses testify in order to gauge their demeanour. Additionally, we take guidance from the holding of the Court in *Makube vs. Nyamuro* [1983] eKLR that:

“However, a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did....”



46. We have given due consideration to the record of appeal, the grounds of appeal, and the submissions by counsel. In our view, this appeal will be settled by determining the question as to whether the appellant surrendered the lease for L.R. No. Kisumu Municipality/Block 9/1 on 11th February 1980. Any other issue will be resolved one way or the other once this overarching issue is addressed.
47. There is no dispute that the appellant was the registered proprietor of a lease for the suit land granted by the Governor of the Colony and Protectorate of Kenya for a term of 99 years commencing 1st January 1956. It is also not contested that at the time of the initial allotment, the land was referenced as parcel L.R. 12663 measuring 7.72 acres. It is also a point of consensus that the appellant executed a surrender instrument dated the 2nd August 1968 in accession to the Government's request for the excision of 0.0996 acres from the suit property for a road extension. Indeed, the excision was done as confirmed by Survey Plan No. 85174 annexed to the surrender document. What happened thereafter is the point of departure between the appellant on one side and the respondents on the other side.
48. The appellant's case is that the 2nd respondent did not, as was expected and promised, prepare and issue another title for the remaining portion. The respondents on their part contend that there was a second surrender on 11th February 1980. The appellant vehemently denied this second surrender. According to PW1, the appellant's star witness, the second surrender was suspect because the surrender document lacked the official seal of the Commission and the signature of its then Chairman.
49. Despite the appellant distancing itself from the surrender of L.R. No. Kisumu Municipality/Block 9/1 on 11th February 1980, it remained uncontested that John Mwangi was the Secretary to the Commission that had been appointed by the concerned Minister to run the affairs of the appellant at the material time. However, from the pleadings and the evidence of PW1, the appellant's case is that John Mwangi was not authorized to sign the surrender document and that the onus was on the respondents to prove that the surrender was legal. Counsel for the appellant pursued this point by submitting that once the appellant denied knowledge of that surrender, the burden of proof shifted to the 2nd, 3rd, 4th, and 19th respondents to demonstrate that the subsequent registration of the suit land pursuant to the alleged surrender was lawful. According to counsel, once the legality of the process was challenged, the onus shifted to the said respondents to prove that the surrender was done within the confines of the law. Counsel additionally submitted that the learned Judge erred by not considering the provisions of the repealed Local Government Act applicable to transfer of land by local authorities. Finally, counsel asserted that the appellant's failure to act against John Mwangi for signing the invalid surrender could not validate the impugned surrender.
50. We therefore need to address the legality of the surrender of 11th February 1980 and in so doing, we start by recalling the provisions of sections 107, 108, and 109 of the *Evidence Act* as follows:

“ 107. Burden of proof.

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.



108. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

51. A summary of the cited provisions is that a party laying a claim to a right must table evidence against a defendant or respondent in support the case. Such evidence must meet the required standard of proof being on a balance of probabilities in civil cases, failure to which the claim cannot succeed. In this case, there is no doubt that there was a surrender document dated 11th February 1980 signed by John Mwangi, who worked with the appellant at that time. The appellant has sought to impeach John Mwangi’s authority to sign the surrender document. In our view, the onus was, therefore, with the appellant to table evidence to establish that the surrender document was not valid on account of the lack of authority on the part of John Mwangi. Looking at the evidence on record, no such evidence was adduced. PW1, who testified on behalf of the appellant, informed the trial court that the resolutions by the appellant were always recorded in minutes. However, no minutes were produced to either approve the surrender of 1968 or to invalidate the surrender of 1980. All the appellant pleaded was that they were not aware of the surrender of 1980 until 2004.
52. Aside from the foregoing evidence, there was the evidence of DW9, which testimony was not rebutted, that there was a letter dated 15th June 1979 by the Secretary of the Commission asking the 3rd respondent to prepare a surrender document for their execution. There was therefore preparatory work done in respect to the surrender. From the evidence that was placed before the trial court, it was more likely than not that, there was a valid surrender of the suit land by the appellant.
53. Counsel for the appellant also blamed the trial Judge for failure to apply the provisions of then applicable law; the Local Government Act. This was a generalized argument. No particular provision of the Act that was not considered by the learned Judge was pointed out. It is not in doubt that the Minister responsible for local authorities had at the material time removed all the members of the appellant municipality and appointed a Commission to run the affairs of the appellant in the place of the removed members. By dint of section 252 (2) of the Act, the Commission could, among other things, exercise all the powers of the appellant.
54. Our finding that the surrender of 11th February 1980 was within the confines of the law, answers the appellant’s complaint that its title document was never returned to it after the first surrender. In answer to this, we are of the view that the second surrender could not have happened if the appellant was not the registered owner of L.R. No. Kisumu Municipality/Block 9/1 and had in its custody the ownership document. There is evidence on record that L.R. No. Kisumu Municipality/Block 9/1 was registered on 27th September 1975. Although PW1 insisted in his testimony that a search conducted on the title showed that it measured 3.0838 acres thereby being much lesser in size than what ought to have remained after the surrender of 1958 as perfected in 1968, DW9 testified that as per their records the parcel of land measured 3.0838 hectares and that is over 7 acres. According to him, that is what remained of the appellant’s land after the first surrender. The 3rd respondent is the keeper of land records and there is no reason to doubt its evidence that L.R. No. Kisumu Municipality/Block 9/1 was made up of what remained after the first surrender.
55. In this appeal, counsel for the appellant attempted to shift the blame to the 2nd and 3rd respondents, urging that the burden of proof lay with them. The appellant having besmirched the second surrender, it was upon it to adduce evidence in support of its position. In our view, the appellant fell short of



impeaching the second surrender and we find no basis for faulting the learned Judge for upholding this surrender.

56. For the completeness of our determination, we will briefly address the issue as to whether L.R. No. Kisumu Municipality/Block 9/1 was available for allotment to KP&TC. We have already held that the surrender document dated 11th February 1980 was valid. The allotment letter particularized the land allocated as the portion edged in red in Plan No. 53589/127/1. The appellant questioned how the land described in the letter of allotment as L.R. No. Kisumu Municipality/Block 9/1 was registered after the surveying process. The appellant also faults the learned Judge's finding that title numbers I.R. 12663, Kisumu Municipality/Block 9/1, and Kisumu Municipality/Block 9/329 referred to the same parcel of land.

57. The learned Judge addressed the appellant's complaint as hereunder:

“That though the parties did not provide the court with documents to confirm how the Land described in the letter of allotment as Kisumu Municipality/Block 9/1 (Part) was registered after surveying process, the 1st Defendant's list of documents contains a copy of a lease for Kisumu Municipality/Block 9/329 measuring

2. 835 hectares in favour of Kenya Posts and Telecommunication Corporation and Certificate of Lease dated 5th July, 2002. The court takes the parcel described thereon to be the reference of the land allocated to Kenya Posts and Telecommunications Corporation under the letter of allotment dated 30th October 1985, after surveying and registration.

(e) ...

f. ...

g. That the certified true copy of the white card [register] for Kisumu Municipality/Block 9/1 produced as exhibit 4 shows that it was opened on the 27th September 1975 and registered under entry number 1 in the name of the Plaintiff. That the land measures 3.0838 hectares on the document produced by DW9. That from the evidence of PW9, that was the acreage of the land that had remained after excising 0.0996 hectares after the surrender of 2nd August 1968 from the original acreage of 7.72 acres. That the foregoing findings therefore confirms the relationship between L. R. No. 1148/9/XII [I.R. 12665] and Kisumu Municipality/Block 9/1.”

58. We have reviewed the record and the evidence adduced, and we do not find error in the analysis and conclusion by the learned Judge. Consequently, we also find and hold that there was a relationship between L. R. No. 1148/9/XII [I.R. 12663] and Kisumu Municipality/Block 9/1. We affirm that upon the 1980 surrender, the parcel was available for allotment by the Government of Kenya. We additionally find that the lease for L.R. No. Kisumu Municipality/Block 9/329 under a Certificate of Lease dated 5th July 2002 in favour of KP&TC resulted from the surrender of L.R. No. Kisumu Municipality/Block 9/1 by the appellant to the Government of Kenya. Thereafter, plot numbers Kisumu Municipality/Block 9/335 to 439 were carved out of the property.

59. Turning to the appellant's claim that the dealings in respect to the suit land were fraudulent, we observe that the alleged fraud on the part of the 1st, 2nd, and 3rd respondents was the cornerstone of



the appellant's suit. The appellant contends that these respondents acted fraudulently in dealing with the suit land. However, as the Court pointed out in *Pamba Ong'weno Amila vs. John Juma Kutolo* [2015] KECA 867 (KLR), the facts alleged to be fraudulent must be set out and evidence led thereon to prove fraudulent intent. It has also been held in *Kagina vs. Kagina & 2 Others* [2021] KECA 242 (KLR) that fraud must be proved as a fact by evidence whose standard of proof is beyond a balance of probabilities applicable to ordinary civil cases but not as high as beyond reasonable doubt which is the standard of proof in criminal proceedings.

60. The particulars of fraud alleged against the 1st, 2nd, and 3rd respondents by the appellant were that the 2nd and 3rd respondents misled the appellant into surrendering its original title and also acted fraudulently by secretly preparing a new lease in favour of the 1st respondent. Further, that the 1st respondent acted fraudulently in securing a lease on a property they ought to have known was fraudulently acquired from the appellant.

61. Our review of the record shows that the 1st respondent was allocated L.R. No. Kisumu Municipality/Block 9/1 by the Government and the land was transferred to it through L.N. No. 154.

The transfer was facilitated within the powers conferred to the Minister by paragraph 5(6) of the Third Schedule to the Kenya Communications Act, 1998. Through a surrender document registered on 15th January 2003, KP&TC surrendered the lease over L.R. No. Kisumu Municipality/Block 9/329 back to the Government. The property was later vested in the 1st respondent by the 19th respondent. After being allotted the property, the 1st respondent subdivided it into parcels 334 to 436. The evidence on record shows that prior to the subdivision of L.R. No. Kisumu Municipality/Block 9/329, the appellant's town engineer granted his approval on 2nd March 2003. There is also a letter dated 7th July 2006 by the District Physical Planning Officer, addressed to the Director of Physical Planning. The Director of Surveys wrote a letter dated 2nd October 2002 to the Commissioner of Lands concerning the subdivision of the suit land. The Director of Physical Planning also issued Certificate of Compliance No. 02825 for the subdivision. We also observe that the Part Development Plan was advertised through Gazette Notice No. 10157 of 16th December 2005, calling for objections. The appellant did not indicate whether it filed any objection pursuant to the notice. The District Physical Planning Officer, in the letter dated 7th July 2006, confirmed that no objection was received by that office.

62. We have already given the green light to the process of transmission of the suit land from L.R. No. 1148/9/XII [I.R. 12663] to L.R. No. Kisumu Municipality/Block 9/1 and finally to L.R. No. Kisumu Municipality/Block 9/329. We have also demonstrated that the dealings in respect to L.R. No. Kisumu Municipality/Block 9/329 by the 1st respondent, were not done in secrecy but in the open and with the consent, knowledge, and engagement of the appellant's officers. Furthermore, the 1st respondent and its predecessor were not privy to the transactions that took place before the second surrender by the appellant. Any allegation of fraud cannot surely hold against the 1st respondent. As the 1st respondent asserted, it was not even in existence at the time the alleged fraud is said to have been committed. In view and on the evidence on record, we find that the appellant has not established any fraud against the 1st, 2nd, 3rd, and 19th respondents in respect of the transactions on the suit land.

63. Having found that the transmission of the suit land from the appellant to the 2nd respondent, and from the 2nd respondent to the 1st respondent and thereafter to the 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th and 20th respondents was above board, we find no reason to venture into the plea by those who purchased plots from the 1st respondent that they were bona fide purchasers for value.



- 64. From the foregoing analysis, it follows that the appellant’s appeal is without merit. Consequently, having failed to establish its claim over the suit land, the appellant’s claim for damages for trespass fall by the wayside. The appeal is for dismissal, and we hereby dismiss it.
- 65. The final issue relates to the costs of the appeal. Ordinarily, costs follow the event unless the court for good reason orders otherwise. The appropriate order on costs is that the appellant shall bear the costs of this appeal for the 1st, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th and 20th respondents. We make no order on costs in respect to the 2nd, 3rd, 4th, 13th, 14th and 19th respondents who failed to file submissions or attend the hearing of the appeal.
- 66. The final order is that this appeal is dismissed with costs to the 1st, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th and 20th respondents.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF MARCH 2025.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

