M'eliungu v M'tuota (Legal Representative of the Estate of Twata Etaya) & 3 others (Environment and Land Appeal E011 of 2023) [2024] KEELC 1536 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1536 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E011 OF 2023

CK NZILI, J

MARCH 20, 2024

BETWEEN

GEORGE MEME M'ELIUNGU ..... APPELLANT

AND

M'ITHIKANYI M'TUOTA (LEGAL REPRESENTATIVE OF THE ESTATE OF TWATA ETAYA) ..... 1ST RESPONDENT

DISTRICT SURVEYOR MERU NORTH ..... 2ND RESPONDENT

REGISTRAR OF LANDS MAUA ..... 3RD RESPONDENT

HON. ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being an appeal from the Judgment of Hon. D.W Nyambu – CM in Meru E.L.C. No. 73 of 2018 delivered on 16.1.2023)

JUDGMENT

1. The appellant, who was the plaintiff at the lower court, had sued the respondent, claiming that his L.R No. Kiegoi/Kinyanka/1809, measuring 0.077 ha as initially registered, had been illegally, fraudulently, and without lawful justification changed and reduced by 0.0341 ha and added to L.R No. Kiegoi Kinyanka/1095, belonging to the 1st respondent, whose initial registration was 0.5 ha in 2000. He prayed for a declaration to invalidate the reduction in size and an order directing the 2nd & 3rd respondents, to rectify the register and boundaries of the two parcels to reflect their original status both on the grounds and the land record.

2. The 1st respondent opposed the claim through an amended defense and counterclaim dated 8.11.2018. As the legal department of the estate of Twala Etaya alias M'Mutuota Maraju, he averred that his late father had gathered 1.72 acres of land later on registered as L.R No. Kiegoi Kinyanka/1095 in 1968,

which he has been exclusively occupying with clear boundaries, though the 2nd and 3rd respondents erroneously registered it as measuring 0.5 ha instead of 0.7 ha.

3. It was averred that in 2008, the appellant, with an intention to deceive and defraud him, began constructing onto the land while he knew it was not his land or purported to excise off the portion. Therefore, the 1st respondent counterclaimed for the rectification of his title and the register to read 0.70 ha of the appellant instead of 0.50 ha, demolition, and eviction from the encroached portion.

4. Through a reply to the amended defense and defense to the counterclaim, the appellant denied the alleged gathering, demarcation and erroneous registration of 0.5 ha instead of 0.7 ha. He termed the alleged discovery as an afterthought to confuse the presence of illegalities. The appellant denied the alleged deceit or fraud on his part. To the contrary, the appellant averred that he has been in occupation of all his parcels measuring 0.077 ha despite a reduction of 0.034 ha in favor of the 1st respondent. He termed the counterclaim as a ploy to complicate the primary claim which was well founded on facts and the history of this suit.

5. At the trial, George Meme M'Eliungu testified as PW 1 and adopted his witness statement dated 17.4.2013 as his evidence in chief. Briefly, PW1 said that the 1st respondent, a neighbour, and owner of L.R No. Kiegoi/Kinyanka/809, in collusion with the 2nd & 3rd respondents, reduced his land by 0.034 ha and added the same to that of the 1st respondent. He termed the acts as unjustified, illegal, fraudulent, and unconstitutional. Further, PW 1 said that the initial size of the 1st respondent's land was 0.05 ha but was increased by that margin both in the register and on the ground. He sought a resurvey, resetting and reversal of clear boundaries as per his initial land size both on the register and on the ground.

6. The appellant relied on a certificate of official search dated 15.7.2008 for the 1st respondent's land, a copy of his title deed, certificate of official search, district land surveyors report dated 2.10.2008, proceedings and an award by Land Dispute Tribunal memorandum of appeal at the provincial L.D.T, findings thereof, limited grand a demand letter to the 4th respondent and a reply as P. Exh No. 1 – (9) respectively.

7. In cross-examination, PW 1 told the court that a boundary dispute was heard by the district land surveyor and the land registrar, and a ruling was made on 9.12.2008, establishing that his land had encroached out of the 1st respondent's land by two meters. PW1 said that he had no problem with the implementation of the report as long as it did not interfere with his title deed. He denied erecting any house on the two-meter portion belonging to the 1st respondent. PW1 said that he bought the land from the first allottee.

8. In re-examination, PW 1 said the effect of the decision dated 9.12.2008 by the District Land Registrar and Surveyor was to reduce his land both on the map and on the ground. PW1, in essence, said the actions of the reports amounted to canceling his title, reducing the size and awarding part of his land to the 1st respondent, which would be unfair. PW 1 said no one had complained or objected when he was putting up a house on the disputed portion and it would be unfair or unjust to demolish it. He sought assistance from the court to stop the implementation of the said decision. His view was that the land registrar had no power to make or listen to the dispute. PW 1 said the 1st respondent was yet to file for succession over the land initially owned by the 1st respondent's late father.

9. Nancy Nyambura Jenga, a District Land Registrar in Meru North, testified as DW 1 and produced her report dated 9.12.2008 as P. Exh No. (4). She told the court that after a boundary dispute over the two parcels of land arose, a land registrar visited the locus in quo on 9.12.2008 and established that the appellant's parcel of land, a subdivision of L.R No. 1594, had encroached into the 1st respondents land

by approximately two meters DW1 said that they fixed the boundary to its correct position, and asked the parties to obey them. Similarly, DW 1 said that the parties were explained their right of appeal since the registry index map was to be amended to accord with the decision. DW 1 was unable to confirm if the decision had been implemented without a court order.

10. In cross-examination, DW 1 said that as per the title deed held by the 1st respondent, his land was approximately 0.5 ha while that of the appellant was 0.077 ha, meaning that the appellant's land was reduced to 0.0429 to remove the encroached size of 0.034 ha. DW1 said that general boundaries do not go by the map for each case is treated differently following observation on the ground. DW 1 was unaware if the appellant had appealed against the decision to the provincial appeals committee. Similarly, DW1 said the report was complete and due for implementation.

11. Kimotho Peter Kaberia, a survey assistant, testified as DW 2 and confirmed that the scene visit took place, establishing that the common boundary between the two parcels had kept on being shifted, culminating in the current boundary dispute. DW 2 said he visited the parcels of land on 18.7.2009 with the land registrar. He said that he established that the Registry Index Map compared well with the boundary shared between the two parcels. The land surveyor said that they checked distances and the marked boundary of Parcel No. 1809, and established that there was a problem to which they fixed the boundary in the presence of the parties. From the diagram accompanying the report, D.W. 2 said that it showed that the original line/boundary area of Parcel No. 1809 was encroached by approximately 0.0341 ha. He produced his report as D. Exh No. (2). He said that once the court directs him to rectify the registry index map, he shall abide by the order. DW 2 said that the problem arose after the sale of a subdivision of one of the portions.

12. In cross-examination, DW 2 said that the appellant's title was issued on 9.2.2001 erroneously bearing 0.077 ha but was yet to be canceled. DW 2 said that the appellant's parcel was a subdivision of land Parcel L.R No. 770, initially 0.8 ha that was subdivided into L.R No's. 1456 and 1457, plus a road of 0.087 ha, that was excised to serve the two parcels of land. He said that eventually, L.R No. 1457 was subdivided into L.R No. 1594 and 1595, as per a mutation approved by his predecessor on 9.4.1997. Later on, DW2 said Parcel No. 594 was further subdivided to yield the appellant's land measuring 0.077 ha.

13. D.W.2 said that he was uncertain if the 1st respondent had consented to all these subdivisions since his land remained in its original boundaries. DW 2 said that he was uncertain if the appellant objected to P. Exh No. 4 and its implementation and the need to reduce his land to add the same to the 1st respondent's title by 0.034 ha. DW 2 said that he was not aware that the appellant's land was fully developed and that the 1st appellant was seeking eviction orders. Further, DW 2 said the land registrar had the power to recommend the map to change but for the boundary to shift.

14. DW 2 said if the reduction of the land was to be done, the affected party was entitled to compensation; otherwise, the appellant's land as per the map was excess, which error was created during the subdivisions that were approved by the land registrar out of a mutation also approved by the land surveyor on 9.4.1997. He said that the report had captured the details of how the appellant acquired his land now subject to a reduction by 0.034 ha.

15. Julius Murugi Thikanyi testified as DW 3 and adopted as his evidence in chief as per witness and further statements dated 20.12.1996 and 1.11.2019. He told the court that his father, who passed on in 2002, had gathered the suit land, which was registered under his name, measuring 1.72 acres as per the demarcation record. DW3 said that in 2005, the appellant and his son encroached onto his land by putting up a canteen on it and that upon visiting the lands office, it was discovered the parcel was

0.5 ha instead of 0.7 ha contrary to the adjudication record, following which he referred the dispute to the relevant authorities.

16. Further, DW 3 said that the 2nd and 3rd respondents visited the land, fixed the correct boundaries and made a report. He said that other than a canteen, the appellant put up a semi-permanent house on the disputed portion, which he was now occupying. DW 3 relied on a limited grant, copy of the green card, certificate of the official search, district land registrar's report dated 9.12.2008, and a district land surveyor's report dated 2.10.2008 as D. Exh No. 3-6, respectively.

17. In cross-examination, DW 3 said that his land on the ground was 1.72 acres as opposed to 0.5 ha in the title deed; DW3 said the correct acreage was in line with what was captured in the demarcation book. DW3 denied that the problem arose in the first mutation form. He blamed the appellant for encroaching onto his land and building a house despite warnings to desist from interfering with the land. DW 3 said he collected the title deed on 10.3.1980, hence the need for the rectification. He went on to say that the problem began in 2005 after the appellant forcefully and unjustifiably entered, occupied, and hived off the portion. D.W. 3 said that the district land registrar and the land surveyor confirmed that the appellant's acts were illegal and unjustified.

18. The appellant faults the judgment entered on 16.1.2023 on the basis that the trial court ignored, or disregarded his claim, or misinterpreted his evidence regarding fraud and illegalities in the reduction of his land size by 0.0341 ha. acted contrary to *the Constitution*, and based on an unfounded excuse to rectify the boundary. Secondly, he faults the trial court for rejecting his evidence and facts that there was a good basis to rectify the register to indicate his correct acreage of land as 0.077 ha. Thirdly, the appellant faults the trial court for failing to find that the respondent acted unjustifiably and unconstitutionally in interfering with his land size. Lastly, the appellant says the trial court acted against the facts, evidence, and the law and hence arrived at a wrong decision.

19. With leave of court, parties were directed to canvass the appeal by written submissions due by 25.2.2024. The appellant relied on written submissions dated 6.2.2024.

20. It is submitted that the trial court should not have dismissed the appellant's claim and allowed the 1st respondent's defense and counterclaim. In this case, the appellant relies on Selle vs Associated Motor Boat Co. & others (1968) E. A 123 and Mbogo & Another vs Shah (1968) E. A 63, invites the mandate of this court to rehearse, retry, re-evaluate the record, and come up with independent conclusions as to facts and the law. The appellant submitted that the main issue for determination was whether the alterations and or amendments affecting the suit parcels of land were perpetuated by fraud on the part of the respondents. It is submitted that fraud as held in Mutsonga vs. Nyati (1989) KLR 428 has to be specifically pleaded particularized and proved through the evidence I.C.E.A. vs A.G.G. & another H.C.C. No. 135 of 1998.

21. The appellant submitted that the alteration was tailor-made to reduce his land and was fraudulently done in the absence of compensation, contrary to the law. The appellant submitted numerous subdivisions were done on L.R No. Kiegoi/Kinyanka/770, yielding his parcel of land and affecting its shape, acreage and position due to numerous resultant subdivisions in the area, especially on the 2nd mutation form that translated into amendments of the survey map and land register under Section 22 of the repealed Registered *Land Act* (Cap 300).

22. The appellant submitted that the changes and or alterations of the register, map and boundaries were effected by the 2nd and 3rd respondent without notifying him so as to register his objection or without being accorded an opportunity to interrogate the changes likely to affect his land. The appellant submitted that the original map was unilaterally and unlawfully altered without his knowledge or consent, resulting in the purported subsequent survey map for the same area, mapping out new

boundaries and adjusting the position and acreage for the two parcels of land contrary to the procedure set under Cap 300. On that score, the appellant submitted that the actions by the respondents were irregular, unlawful, null, and void.

23. Regarding the rectification ordered by the trial court, the appellant submitted that the trial court wrongly invoked Section 148 (II) & (2) of the repealed (Cap 300) by okaying the reduction of his parcel of land, yet the claim was beyond the error in acreage and covered wrongful and unlawful alteration of survey maps and boundaries against Section 22 and 143 of Cap 300 (repealed), going also by the documentary evidence and the decision contained in the list of documents and in particular the L.D.T decision dated 11.11.2008.

24. The appellant submitted that the 2nd & 3rd respondents did not notify the appellant of the boundary alterations, yet he holds a title to land showing 0.077 ha that on the ground has been altered to 0.0043 ha, which powers the 2nd & 3rd respondents did not have to increase and or reduce sizes of registered parcels of land contrary to Article 40 (3) of *the Constitution*.

25. The court has carefully gone through the record of appeal as compared with the lower court file, all the pleadings and documents tendered as evidence, the ground of appeal and the written submissions.

26. The mandate of an appellant court of the first instance is to relook at the lower court, re-evaluate the same, and come up with independent findings as to facts and law but give credit to the trial court who had to observe the demeanor of the witnesses. See Selle vs. Associated Motor Co. Ltd & another (supra) Gitobu Imanyara & others vs Attorney General & others.

27. In this appeal, the primary pleadings capturing the cause of action were the plaint dated 17.4.2014, which was accompanied by a list of nine documents later on produced as exhibits. The 1st respondent filed an amended defense and counterclaim dated 8.11.2018 against the appellant as the 1st defendant and the 2nd, 3rd, and 4th respondents as the 2nd – 4th defendants. The appellant, as the 1st respondent to the counterclaim, opposed it through a reply to and defense to the counterclaim dated 19.12.2018. The 2nd – 4th respondents herein did not enter an appearance or file any defense to both the plaint and the counterclaim. That notwithstanding, it appears on pages 143 & 144 of the record of appeal that there was a legal representative for the 2nd, 3rd, and 4th respondents in court. After that, there is no evidence for the appearance of the 2nd – 4th respondents or directions on default in filing their statement of defense. Evidence is also lacking on the record of service of hearing notices upon the 2nd – 4th respondents.

28. A cause of action refers to a set of facts showing an act on the part of the defendant, which gives the plaintiff the cause of the complaint. See D.T Dobie & Co. Ltd v Muchina [1982] K.L.R. 1 AG Nyaga v H.J Nyamu & another [1076] eKLR and Carton Manufacturers Ltd v Prudential Printers Ltd [2013] eKLR.

29. In this appeal, the appellant's cause of action was captured in paragraph 7 of the plaint. He had complained that the 1st respondent had unlawfully and without justification or notice to him and in collusion, changed his acreage, earlier on registered as measuring 0.077 ha, by manipulating the register, reducing his acreage by 0.0341 ha and adding it to the 1st respondent L.R No. 1095, initially 0.5 ha to 0.634 ha whose effect on the ground was to unlawfully deny him an accrued legal right to land ownership under *the Constitution* and statutes. The appellant had sought a declaration that the acts of the respondents were unlawful, unjustified, oppressive, and against *the Constitution*. He further sought the rectification of the register to reflect 0.077 ha and alignment of the boundaries on the ground.

30. The specific dates when the alleged acts by the respondents took place were not pleaded. Be that as it may, the appellant attached to his plaint a copy of a district land surveyor report dated 2.10.2008, later

on, produced as P. Exh No. (4) that gave the history of his parcel of land. In particular, it confirmed that mutation forms were approved by the 2nd & 3rd respondents at various stages of the subdivisions and the registration of his title. Similarly, the appellant relied on P. Exh No. (5), which were proceedings on 3.9.2008.

31. In the proceedings before the Land Disputes Tribunal, the appellant had admitted that he had bought his land from Miriti M'Itimituu in 1998, who transferred it to him in 2000, measuring 0.19 acres. He had admitted that there was an objection in the subdivisions regarding the interchange of the boundary, which was eventually rectified. The record shows that the seller had been accused of encroachment, but eventually, the mutation form was rectified and the correct boundary was shown to him.

32. Further in the proceedings, the appellant had confirmed that the district land surveyor had visited the land in June 2008 and allegedly interfered with the boundary and allocated it to the 1st respondent. The Land Dispute Tribunal looked at the survey report dated 2.10.2008 and made a finding that the encroachment was real. P. Exh No. (6) the provincial appeals rightly found that it lacked jurisdiction to hear and determine the dispute that fell under titled land.

33. In a demand letter dated 1.2.2011, the appellant had made general claims without stating the specific date of the alleged cause of action. Why do I say that the date of the cause of action was important? There is evidence that the appellant acquired his title deed in 2006, while the 1st respondent acquired his in 1980.

34. The first port of call on general boundaries dispute relating to registered land under Sections 14-21 of the *Land Registration Act* is the office of the Land Registrar as held in Azzuri Ltd vs Pink Properties Ltd (2018) eKLR. The defunct Land Dispute Tribunals had no jurisdiction on titled land, whether on a dispute relating to boundaries, the rectification of titles, or to wrongful or illegal alteration of boundaries or titles. Once there was a dispute over land size, acreage, or boundary over title land it is the land registrar who handles the dispute by summoning the parties and any other person affected by the boundary. The evidence tendered by the appellant and the 1st respondent indicated that before the suit was filed, a report dated 2.10.2008 and 9.12.2008 had been made by the 2nd and 3rd respondents and was only awaiting implementation. These facts are captured in paragraph 12 of the amended defense and counterclaim.

35. The 1st respondent and the plaintiff to the counterclaim was seeking a court order for the 2nd and 3rd respondents herein and the 3rd defendant to his counterclaim to implement the two reports both on the register and on the ground and afterward, evict the appellant from the encroached land.

36. It is trite law that parties are bound by their pleadings, and issues arise from the pleadings. See Mutinda Mule and another v IEBC & others [2013] eKLR, Raila Odinga & others v IEBC & others [2017] eKLR.

37. The appellant has faulted the trial court that it ignored, misinterpreted, disregarded, rejected, and or overlooked his pleaded facts, evidence, and law and eventually failed to find his claim meritorious, unlike the 1st respondent's claim on the basis that the respondent had no justification under the statute or *the Constitution* to reduce and add a portion of his land to that of the 1st respondent.

38. The evidence appearing on pages 159 – 60 of the record of appeal by the appellant shows that he had admitted that on 9.12.2008, the district land registrar and surveyor visited the locus in quo and established an encroachment. He said he had no problem with the implementation of the report so long as his title deed was not affected. The appellant admitted that he bought the land from an initial owner. He accused the 2nd – 3rd respondents of illegalities in reducing his land both in the title and on the ground. On pages 163 – 167 of the record of appeal, DW1 had confirmed the scene visit on

9.12.2008 and a report produced as P. Exh No. (4) was made. She said that she could not confirm if the Registry Index Map had been amended after the fixing of the boundary on the ground. DW 2 confirmed the same.

39. The law is that once a boundary is fixed under Sections 17 and 18 of the *Land Registration Act*, any party aggrieved by the decision of the land registrar may question it before a court of law. It can be by way of judicial review in line with Article 47 of *the Constitution* and Section 4 (3) (1) of the Fair Administration Action Act or Order 53 of the Civil Procedure Rules as read together with Sections 8 and 9 of the *Law Reform Act*.

40. In this appeal, the cause of action, as framed, was silent on whether it was questing the decisions made on 10.3.1980, issuing the 1st respondent title on 9.4.1997, the subdivisions made on 9.2.2001, the issuance of the title deed to the appellant; site visit and fixing of boundary on 18.7.2008; the reports by the 2nd respondent made on 2.10.2008 and 9.12.2008.

41. The appellant, in his pleadings, raised the questions of fraud, illegalities and collusion against the respondents. The law is that particulars of the three issues must be specifically pleaded and proved to the required standards. See Virjay Morjaria vs Nansingh Darbar & another [2000] eKLR, Arthi Highway Developers Ltd v West End Butchery Ltd & 6 others [2015] eKLR.

42. The appellant did not challenge or appeal anything except in general terms regarding the above-cited decisions as soon as they were made by the 2nd – 4th respondents, in favor of the 1st respondent. Fraud has time limits within which a party has to sue. The appellant came into ownership of his land on 9.2.2001. Already, the subdivisions as per DW 2 to create his land had occurred on 9.4.1997. The appellant made admissions before the land disputes tribunal that the predecessor in title had a dispute over a boundary and encroachment. The appellant led no evidence to show that before he bought and got registered to his land, he had ascertained the correct boundary with his potential neighbors, especially the 1st respondent. There was no evidence that he had conducted due diligence to establish the correct acreage of his land both on the title, the register, and on the ground vis a vis that of the 1st respondent.

43. In Joshua Nyamache Omasire vs Charles Kinanga Maena [2019] eKLR, the court said that under Sections 107 and 109 of the *Evidence Act*, it was upon the party desiring a fact to be believed of its existence to prove it. It is the appellant who had the burden to prove when, where, how, and the manner in which the alleged fraud, illegality, and collusion arose or occurred, especially on the error in the measurements of his land as a result of which he was entitled to and by which the disputed land constituted part of his land.

44. The appellant did not produce the sale agreement, land control board consent and transfer forms by which he became the registered owner in 2001. The appellant did not call the seller to his land one Miriti to ascertain the status of his boundary before 2001. The appellant did not provide supporting evidence before the land registrar and land surveyor when they visited the suit land in 2008 to ascertain and fix the boundary. The decisions made on the fixing and the ascertainment of the boundary, as well as the need to rectify the register and title deeds was not challenged.

45. Those decisions were not under challenge before the trial court. In my considered view the dispute on those decisions, some statute-barred were not pleaded by the appellant in the primary suit or questioned as unconstitutional, fraudulent, illegal, unjustified, and or unenforceable.

46. Paragraphs 6,7 & 8 of the defense to the counterclaim was full of denials in general terms. Further, there was no set off to the counterclaim, which sought reliefs against the 2nd – 4th respondents as defendants to implement the decisions by the 2nd & 3rd respondents made under Sections 14 – 21 of the *Land Registration Act* and the repealed Cap 300.

47. In my view, the appellant ought to have pleaded to the counterclaim and raised the issues now being raised by way of written submissions to attack DW1 & D.W. 2, yet their reports as under Sections 19 and 22 of the repealed Cap 300 were not challenged between 2008 and 2014 in reply to defense and defense to the counterclaim.

48. The 2nd and 3rd respondents were carrying out a statutory duty in visiting the locus in quo in 2008 after a dispute had arose over the boundary and acreage. There was no evidence tendered that the 2nd and 3rd respondents were on a frolic of their own, carried out an illegal activity based on forged documents, and sought to perpetuate any fraud or illegality. It was not enough for the appellant to allege fraud without calling for and tendering tangible and credible evidence of its manifestation. See Mutsonga v Nyati (supra).

49. The appellant seeks solace or assistance in Section 22 of the repealed Cap 300. In Joshua Nyamache Omasire vs. Charles Kinaga Maena (supra), the court said there could be no correction to the registry index map without instructions or authorization from the land registrar. There is evidence that the appellant was present during the visit by the 2nd and 3rd respondents when they went to fix the boundary. He cannot, therefore, through written submissions on appeal, deny the obvious facts, as admitted in his evidence and allege that he was condemned unheard and was not notified of the visit or accorded a report made after the visits.

50. As stated above, the appellant did not challenge the recommendations by the 2nd & 3rd respondents before 2014 and after 2018 when the 1st respondent sought through a counterclaim for substantive relief to implement the decisions, unlike in Stephen Onyango Oloo vs Nelson Makhoha Kaburu & others C.A No. 83 of 2014.

51. In this appeal, the appellant, on pages 158 – 160 of the record of appeal had admitted knowledge and participation during the visit by the 2nd & 3rd respondents represented by DW 2 pursuant to statutory requirements under Sections 18 and 22 of the Registered *Land Act* Cap 300 (repealed). There is also evidence that the appellant, after obtaining his title deed in 2001, did not notify the 2nd & 3rd respondents of any anomaly and was the one who, in 2005, provoked the 1st respondents, leading to a complaint with the 2nd & 3rd respondents who visited the land, fixed the boundary and made a report.

52. There is no evidence that the appellant sought to challenge the refixing of the boundary and the recommendations by the 2nd – 3rd respondents until he filed the suit based on fraud six years later, which, in my view, offended Sections 4 & 7 of the *Limitation of Actions Act*.

53. In the absence of the challenge to the statutory decisions by the 2nd and 3rd respondents on time or at all and by evidence contrary to the statutory reports by DW 1 and DW 2 the report reminained unchallenged, I find that the appellant had failed to prove his claim on a balance of probabilities and to be entitled to the reliefs sought in the plaint dated 17.4.2014.

54. Regarding the counterclaim by the 1st respondent, the 1st respondent had pleaded on how the suit land was gathered in 1968 measuring 1.72 acres, his family's exclusive possession until 2005, the error in capturing the title deed as 0.05 ha instead of 0.7 ha, going by the demarcation book and the attempt in 2005 by the appellant to unjustly deceive, occupy and develop a portion of the land. The 1st respondent called DW 1 and DW 2 to produce the reports that they had made in support of his counterclaim and which had not been challenged under the law since 2008 by the appellant. The appellant did not challenge and demonstrate that the two reports were illegal, irregular, null and void, erroneous, misleading, and unconstitutional.

55. The reports were made in line with the law and with the knowledge and presence of the appellant under Sections 19 and 22 of the (repealed) Registered *Land Act*. The appellant did not appeal against the decisions. He could cry foul when the 1st respondent sought for its implementation. Before the trial court, he did not seek to impeach the said reports on account of procedural fairness, legality, and irregularity. See Republic & others v Principal Land Registrar Kajiado & others [2018] eKLR, Nkuruma Ole Tirian v Lemayian Ole Keno & another [2013] eKLR. It was upon the appellant to impeach the title held by the 1st respondent under Section 26 of the *Land Registration Act*.

56. The reports by DW 1 and DW 2 were from experts and which the trial court, in my view, was proper to accept under Section 48 of the *Evidence Act*. Such opinions were and are admissible in law as held in Mutongi v Republic [1982] KLR 203. It was incumbent upon the appellant to demonstrate how those reports were forged, illegal and fraudulent. He merely made vague and very general allegations of fraud against the respondents. The burden of proof is much heavier and higher in fraud and conspiracy claims, as held in R.G Patel v Valji Makanji [1957] E.A 314.

57. At the very least, the appellant, as a recent acquirer of the title to the land in 2001, unlike the 1st respondent who had been on the land since 1968 and had obtained the title in 1980, which was not affected by any subdivisions should have called the seller of the land to ventilate his claim on the status of the boundary as of 2001.

58. The appellant has relied on the findings by the land dispute tribunal and faulted the trial court for invoking Sections 148 (1) and (2) of the Registered *Land Act* (Cap 300) (repealed) yet his claim was over wrongful and unlawful alterations of the boundaries and maps. As indicated elsewhere in this judgment the land dispute tribunal had no jurisdiction on titled land. Its award herein was a nullity and was not binding on the trial court. Further, if the appellant faulted and believed that the acts of the 2nd and 3rd respondents made him suffer and were contrary to Article 40 (3) of *the Constitution* he should have pleaded and proved.

59. The law is that a title obtained by mistake, fraudulently or irregularly and through corrupt means has no protection of the law under Article 40 (6) of *the Constitution*. See Dima Management Limited vs County Government of Mombasa & 5 others (petition 8) [E010] of 2021; [2023] KESC 30 KLR and Torino Enterprises Limited v Attorney General (Pet 5 [E006] of 2022 (2023) KESC 79 (KLR) (22 September 2023) Judgment. The 1st respondent had pleaded deceit, mistake and fraud against the appellant, and the appellant was the 1st defendant in the counterclaim. Evidence of mistake and irregularity was tendered through DW 1 and DW 2. The appellant did not plead and seek indemnity against the 2nd, 3rd, and 4th respondents as codefendants in the counterclaim. If the appellant felt that he was a victim of mistakes by the 2nd – 4th respondents who gave him an erroneous title deed in 2001 and showed him the wrong boundaries, nothing was stopping him from pleading bonafide purchaser or from seeking compensation from the 2nd – 4th respondents.

60. In Wambui v Mwangi & 3 others (20210 KECA (144) (KLR) (19th November 2021) judgment, the court said it could not under Sections 80 of *Land Registration Act* provide succor to illegally or irregularly obtained title and that title to land was not a stand-alone issue and must be interrogated to its root and that its anchor or basis if rooted on deceit was critical to finding it's nullity ab initio. The court said the title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The court said the issue of unjust enrichment was not pleaded in the primary suit, and therefore, the trial court and the appellate court were tied by the pleadings and evidence on record and could not pronounce themselves on unpleaded issues or grant reliefs not correctly laid before them.

61. In this appeal, the appellant did not raise a claim against the statutory decisions by the 2nd & 3rd respondents made in 2008. There was no set-off or third-party proceedings against the 2nd – 4th respondents and or codefendant in the counterclaim. No indemnity was sought against the codefendants for issuing a title deed by mistake. Therefore, the appellant is barred from raising new issues on appeal which were not pleaded or ventilated at the primary court. The upshot is that I find the appeal lacking merits. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 20th DAY OF MARCH, 2024

In presence of

C.A Kananu

Miss Kerubo for Mwanzia for 1st respondent

HON. C K NZILI

JUDGE