



**Cross Current Indigenous Network v Commissioner for Lands & another (Civil Appeal 370 of 2018) [2024] KECA 1141 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1141 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 370 OF 2018  
SG KAIRU, F TUIYOTT & JW LESSIT, JJA  
SEPTEMBER 20, 2024**

**BETWEEN**

**CROSS CURRENT INDIGENOUS NETWORK ..... APPELLANT**

**AND**

**COMMISSIONER FOR LANDS ..... 1<sup>ST</sup> RESPONDENT**

**AFRICA INLAND CHURCH (KENYA) ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of the Environment and Land Court at Nairobi (Mutungi, J.) dated 14th April 2018 and delivered on 19th April 2010 by Okong'o, J. in ELC NO. 535 OF 2000)*

**JUDGMENT**

1. Cross Current Indigenous Network hereinafter the appellant, filed this appeal challenging the judgment of the Environment and Land Court ('ELC') dated 14<sup>th</sup> April 2018 (Mutungi, J.) delivered by Okong'o, J. on 19<sup>th</sup> April 2010 in ELC Case No. 535 of 2000.
2. Brief background of the subject matter of this appeal is that the appellant, a Non-Governmental Organization (NGO) registered in Kenya under section 10 of the Non-Governmental Organization Co-ordination Act, since repealed under section 70 of the Public Benefits Organization Act that commenced on 14<sup>th</sup> May 2024. Vide a plaint dated 4<sup>th</sup> April 2000 and amended on 28<sup>th</sup> April 2000 the appellant brought a claim against Commissioner For Lands and Africa Inland Church (Kenya) (AIC), the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively, claiming ownership of parcel of land known as LR. No. 209/116635, formerly Plot No. C Hill Area (hereinafter the suit property). It claimed that the 1<sup>st</sup> respondent vide a letter dated 15<sup>th</sup> May 1992 allotted to it the suit property. The appellant claimed that the 1<sup>st</sup> respondent unlawfully and fraudulently processed and issued a certificate of title over the suit property to the 2<sup>nd</sup> respondent, on or about 15<sup>th</sup> February 1998. The appellant sought judgment against the respondents jointly and severally for:



- a. “A declaration that the appellant is and continues to be the lawful allottee of Plot LR. No. 209/11635 initially Plot No. C Hill Area and that the subsequent registration of the registered owner is null and void.
- b. A permanent injunction restraining the 2<sup>nd</sup> respondent either by itself, its servants, agents or any one of them howsoever from interfering with, selling, disposing of, transferring, and/or in any way dealing with that piece of land known as L.R No. 209/11635.
- c. A permanent injunction restraining the 2<sup>nd</sup> respondent either by itself, its servants, agents or anyone of them howsoever from interfering with the appellant’s quiet possession of the said plot.
- d. An order compelling the 1<sup>st</sup> respondent to register the appellant as the owner as lessee of the property LR. No. 209/11635.”
  1. Particulars of fraud pleaded against the respondents included:
    - a. “registering the suit property in the name of the 2<sup>nd</sup> respondent when the appellant was clearly the original allottee of the said plot;
    - b. issuing title of the suit property to the 2<sup>nd</sup> respondent in spite of the appellant’s status in relation to the plot;
    - c. issuing title to the suit property to the 2<sup>nd</sup> respondent who had neither applied for it nor paid any premium;
    - d. issuing title to the 2<sup>nd</sup> respondent only after the appellant had developed the suit property and commenced operations thereon a fact that was at all material times within the knowledge of both respondents;
    - e. failing to revoke the appellant’s allotment before allotting the land to the 2<sup>nd</sup> respondent;
    - f. failing to notify the appellant of any intended revocation of the allotment; and,
    - g. Awarding illegal title to the 2<sup>nd</sup> respondent.”
3. The 1<sup>st</sup> respondent entered appearance and filed a defence dated 19<sup>th</sup> May 2005 in which it denied every averment by the appellant. It denied that it fraudulently and illegally issued title to the suit property to the 2<sup>nd</sup> respondent and averred that the issuance of the title to the 2<sup>nd</sup> respondent was done in good faith pursuant to the advice by the 2<sup>nd</sup> respondent that the appellant was a department of the 2<sup>nd</sup> respondent’s church, therefore, proprietary interest should vest with the 2<sup>nd</sup> respondent.
4. The 2<sup>nd</sup> respondent entered appearance and filed its defence and counterclaim dated 20<sup>th</sup> April 2000 and subsequently amended on 17<sup>th</sup> May 2000.
5. In its amended defence and counterclaim, the 2<sup>nd</sup> respondent averred that it was the registered proprietor of the leasehold interest in the suit property and denied the allegation that the appellant carried out any development thereon and argued that if it did so, then it was at its own peril and without the consent or knowledge of the 2<sup>nd</sup> respondent.
6. The 2<sup>nd</sup> respondent stated that any developments carried out in the suit property were funded with the consent of the 2<sup>nd</sup> respondent and by Cross Currents International Ministries USA in conjunction with Cross Current International Ministries in Canada and UK. And further, that



the said developments were funded for the sole purpose of the propagation of the Gospel and the instruction of the believers in the Word of God.

7. The 2<sup>nd</sup> respondent averred that it had duly issued a quit notice to the appellant as a trespasser on its piece of land and denied the appellant's claim that the title thereto was issued unlawfully or fraudulently.
8. Lastly, the 2<sup>nd</sup> respondent challenged the suit and averred that it was defective and did not disclose any cause of action against it. That there was no resolution to authorize the use of the appellant's name before commencement of the suit thus, it was defective in law.
9. In its counterclaim the 2<sup>nd</sup> respondent reiterated that it was the leasehold owner and entitled to possession of the suit property and that the appellant had without its consent entered upon the said property and taken possession of it which amounted to trespass. It further averred that the trespass was continuing thus depriving it of the use and enjoyment of the suit property and had thereby suffered loss and damages.
10. The 2<sup>nd</sup> respondent thus prayed that the appellant's suit be dismissed with costs and judgment be entered on the counter claim in its favour against the appellant for:
  - a. "Possession;
  - b. Damages for trespass;
  - c. Costs;
  - d. Interest on (b) and (c) at commercial rates."
11. The appellant filed its defence to counterclaim dated 27<sup>th</sup> April 2020 and reiterated that the 2<sup>nd</sup> respondent had never been allotted the suit land and never applied for the same; that at all material times the 2<sup>nd</sup> respondent was aware of the appellant's right to obtain title to and to occupy and develop the suit property; and that the 2<sup>nd</sup> respondent's title was acquired by fraudulent means and for those reasons the 2<sup>nd</sup> respondent's counterclaim was unfounded.
12. The appellant simultaneously with the suit filed an application for interlocutory injunction and sought for orders to restrain the 2<sup>nd</sup> respondent from dealing with suit property pending the hearing and determination of its suit. In his ruling dated and delivered on 11<sup>th</sup> December 2000, Visram, J. (as he was then) found that the appellant had not demonstrated a prima facie case with probability of success and dismissed it with costs.
13. Dissatisfied with the said ruling the appellant filed another application seeking stay of further proceedings in respect of the suit pending the hearing and final determination of its proposed appeal. By a ruling of Githinji, J. [as he then was] issued on 12<sup>th</sup> November 2002, the learned Judge dismissed the appellant's application and held that the intended appeal being an appeal from an interlocutory order would only delay the conclusion of the suit on merits.
14. The 2<sup>nd</sup> respondent also filed an application seeking orders that the Court unconditionally restrains the appellant and restores full possession of the suit property to it, and that in default of compliance with Court's order, an eviction order do issue. By the ruling of Ojwang, J. (as he then was) dated 4<sup>th</sup> February 2005 the learned Judge declined to grant the said order and instead ordered the appellant to move with speed to have a date fixed for hearing of the suit, failure to which the 2<sup>nd</sup> respondent would be at liberty to make a suitable application, or to secure a date for the hearing of the appellant's suit.



15. The case was heard through oral evidence. The appellant called its key witness, Pastor Boaz Okul Omondi who gave background information of the relationship between himself and Dr. Bennet, an evangelist and missionary based overseas, detailing how Cross Current Indigenous Network Limited was registered on 3<sup>rd</sup> December, 1991 by Dr. Bennet and his wife. He said he became nominated as a Director of the Company in 1992. He explained how the company applied for and got an allotment of the suit property, then unsurveyed, vide a letter dated 15<sup>th</sup> May 1992. He testified that the suit land was fraudulently registered in the name of the 2<sup>nd</sup> respondent, thus the cause of action.
16. The appellant called three other witnesses, Henry Nteere Mbutura, an Architectural Assistant who said he was engaged as an Architectural Assistant for purposes of preparing the initial working drawings for the development of the plot, and obtaining approval for building plans, which he said he did. He stated that the project was being financed by missionaries from abroad. The other witness was Timothy Mpaayei who said that he was an Architect and was engaged in 1994/1995 by the appellant through Pastor Boaz, Dr. Bennet and one Mr. Waithaka, to perform architectural works. He said he found incomplete structures which he was tasked to see to completion. He said that the appellant had approved plans and a letter of allotment but no title to the land. He testified that he was a director of the Cross Current Indigenous Network Ltd in 1997, two years after completing the construction. He said of the registration of the title to suit property in the name of the 2<sup>nd</sup> respondent was fraudulent. He also said that he was one of the founding officials of the appellant NGO registered on 25<sup>th</sup> September 1997.
17. The last witness, Sammy Aoko Amolo, employed in May 1997 to oversee the day to day running of the operations of the Centre. He stated that the 2<sup>nd</sup> respondent was a regular user of the Centre's facilities and that he issued payments receipts for the said use to it.
18. The 1<sup>st</sup> respondent called as a witness a Principal Land Administration Officer with the Ministry of Lands. He said that the 2<sup>nd</sup> respondent was allocated the suit property, pursuant to its letter dated 16<sup>th</sup> September 1997, requesting change of name of allottee from Cross Current Indigenous Network to itself (Africa Inland Church Kenya Trustee Board). He testified that the letter described Cross Current Indigenous Network as a department of the 2<sup>nd</sup> respondent and that for that reason they requested that the name of allottee be changed from the Network to the 2<sup>nd</sup> respondent. He stated that the action taken by the 1<sup>st</sup> respondent was not fraudulent, and that the change was effected by cancelling the allotment letter to the Network and a new one issued in the 2<sup>nd</sup> respondent's name dated 28<sup>th</sup> October 1997. Thereafter the title was issued to the 2<sup>nd</sup> respondent. He acknowledged that Cross Current Indigenous Network existed as a Limited Company and also as an NGO.
19. The 2<sup>nd</sup> respondent called one witness, Bishop Silas Yego, the Presiding Bishop of the AIC Church, the 2<sup>nd</sup> respondent in the case. He said that he met Dr. Bennet in 1991/1992 through former Presiding Bishop of the 2<sup>nd</sup> respondent, Bishop Birech. That Bishop Birech informed him that Dr. Bennet wished to be assisted to start a Bible Printing and was looking for land in a suitable location. He testified that the Bishop Birech facilitated Dr. Bennet obtain allocation of the suit property under the name of Cross Current Indigenous Company Limited, a company that Dr. Bennet and one Mr. William Bommet incorporated in 1991. The Memorandum and Articles of Association of the company shows Dr. Bennet and William Bommet as the initial subscribers to the memorandum. Bishop Yego testified that the idea was to have the suit property used for printing of Bibles, but that the project never took off, instead with support from abroad, some buildings were constructed on it. That as the intended project failed, the 2<sup>nd</sup> respondent wrote to the 1<sup>st</sup> respondent to change name of allottee from the Company to the 2<sup>nd</sup> respondent, on the basis the Company was a department of the 2<sup>nd</sup> respondent, and thus the decision to have change of name of allottee.



20. Regarding the appellant, Bishop Yego testified that the intention of Pastor Boaz Omondi, Daniel Waithaka and Mr. Timothy Mpaayei to register in 1997 the appellant NGO, in their names, going by the same name as the Ltd Company, in exclusion of Dr. Bennet who was the main benefactor of the Bible Centre, was to appropriate to themselves the Bible Centre and the suit property for their own selfish ends.
21. After reviewing the pleadings, the evidence and the submissions by the parties Mutungi, J., framed five issues for determination; whether the appellant NGO had locus standi to file the suit; whether the letter of allotment for the suit property to Cross Current Indigenous Network dated 15<sup>th</sup> May 1992 was cancelled by the letter dated 28<sup>th</sup> October 1997 by the 1<sup>st</sup> respondent allotting the same property to the 2<sup>nd</sup> respondent; whether an allotment letter can override and/or supersede a certificate of title where one has been issued in respect to the same property; whether the registration of the 2<sup>nd</sup> respondent as the owner of the suit property was fraudulent and hence null and void; and, who should bear the costs of the suits.
22. In his judgment dated 4<sup>th</sup> April 2018 the learned Judge found and concluded that Cross Currents Indigenous Network Limited had a distinct legal capacity apart from Cross Current Indigenous Network (NGO) and that no nexus between the two entities had been established. He found that by the time the appellant was registered on 25<sup>th</sup> September 1997 developments on the suit property had been completed and the buildings were in use and therefore, the entity that had the capacity to institute any suit relating to the suit property was Cross Currents Indigenous Network Limited and not the appellant NGO, and that therefore the appellant NGO lacked any locus standi to bring the suit where the subject matter was the ownership of the suit property allocated to Cross Currents Indigenous Network Limited vide the letter of allotment dated 15<sup>th</sup> May 1992 now registered as LR. No. 209/11635 in favor of the 2<sup>nd</sup> respondent.
23. Regarding the issue whether the allotment letter dated 15<sup>th</sup> May 1992 was cancelled by the 1<sup>st</sup> respondent vide a letter dated 28<sup>th</sup> October 1997 allotting the same to the 2<sup>nd</sup> respondent, the learned Judge noted that following the request made by the 2<sup>nd</sup> respondent vide its letter of 16<sup>th</sup> September 1997 for change of name of the plot allottee from Cross Current Indigenous Network to the 2<sup>nd</sup> respondent, which request the Ministry of Land had accepted, the effect of issuing a fresh letter of allotment in the name of the 2<sup>nd</sup> respondent was to cancel the earlier letter of allotment to Cross Currents Indigenous Network and hence was satisfied that the letter of allotment made to Cross Currents Indigenous Network was withdrawn and/or cancelled by the 1<sup>st</sup> respondent before the new allocation. He further held that the letter of allotment not having been made to the appellant NGO, it could not properly raise issue in the manner the allotment may have been withdrawn and/or cancelled as it lacked the locus standi to do so.
24. In addition, the Judge held that the 2<sup>nd</sup> respondent following the allotment had a title processed in its favor and was now a registered proprietor, and that upon registration of the same, the 2<sup>nd</sup> respondent's title became absolute and indefeasible and could only be challenged on grounds of fraud or misrepresentation. He further held that the appellant having failed to demonstrate the interest it had in the suit property could not challenge the title held by the 2<sup>nd</sup> respondent but, the same could only have been raised by the company which was the original allottee of the suit property.
25. The Judge found that the appellant did not establish its claim against the respondents. The learned Judge found the 2<sup>nd</sup> respondent's counterclaim against the appellant as related to recovery of possession of the suit property from the appellant proven on the required standard. In conclusion the appellant's suit against the respondents was dismissed with costs. The Judge found no merit in the 2<sup>nd</sup> respondent's



claim for damages and dismissed the same. However, he entered judgment in favour of the 2<sup>nd</sup> respondent for the claim of possession and ordered the appellant to vacate the suit property and deliver vacant possession to the 2<sup>nd</sup> respondent within 30 days from the date of service of the decree upon it. The costs of the counterclaim were awarded to the 2<sup>nd</sup> respondent as against the appellant.

26. Aggrieved and dissatisfied with the said judgment the appellant preferred an appeal to this Court. In its memorandum of appeal dated 21<sup>st</sup> September 2018, the appellant faults the learned judge on six (6) grounds but reduced them to (4) four main issues for determination as follows:

1. Whether the learned Judge erred in failing to find that the 1<sup>st</sup> respondent and/or the 2<sup>nd</sup> respondent acted fraudulently;
2. Whether the learned Judge erred in concluding that the appellant had no locus standi;
3. Whether the learned Judge erred in failure to find the appellant was in occupation of the suit property and that the 2<sup>nd</sup> respondent patronized the subject premises as a paying customer of services offered by the appellant in recognition of the appellant's proprietary rights;
4. Whether the learned Judge erred in failing to consider that the appellant, as an NGO was a trustee of Cross Current Indigenous Network Limited and therefore had locus standi.

27. At the hearing of the appeal before us on 14<sup>th</sup> November 2023, present was learned counsel Mr. Masika for the 2<sup>nd</sup> respondent. There was no appearance for the appellant and the 1<sup>st</sup> respondent. The appellant though absent filed its written submissions dated 12<sup>th</sup> June 2019. The 1<sup>st</sup> respondent filed no submissions. The 2<sup>nd</sup> respondent also filed its submissions dated 10<sup>th</sup> July 2019, which he briefly highlighted before us.

28. We have considered the evidence adduced before the superior court, the submissions of counsel, both oral and written, and the law and the cases relied upon by both parties. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in *Selle vs. Associated Motor Boat Co.* [1968] EA 123, thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).”

29. This Court further stated in *Jabane vs. Olenja*, [1986] KLR 664, thus:

“This Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular *Ephantus Mwangi v Duncan Mwangi Wambugu* (1982-88) 1 KAR 278 and *Mwanasokoni vs. Kenya Bus Services* (1982-88) 1 KAR 870.”



30. Having considered the evidence and the submissions of parties, we find that the issues for determination by us is four- fold: whether the learned Judge erred for finding that the appellant had no locus standi to bring this suit; whether the 1<sup>st</sup> respondent and/or the 2<sup>nd</sup> respondent acted fraudulently; whether the Judge erred for failure to find the appellant was in occupation of the suit property and further failed to consider that the 2<sup>nd</sup> respondent patronized the subject premises as a paying customer of services offered by the appellant at the suit property; and, whether the learned Judge erred for failing to consider that the appellant, as an NGO was a trustee of Cross Current Indigenous Network Limited.
31. The appellant became philosophical regarding the critical issue of locus standi, urging that to raise it was a technicality that ought not to overshadow integrity and dignity on the part of the court. It relied on the case of Randu Nzai Ruwa & 2 Others vs. Secretary, IEBC, [2016] eKLR, where the Court held that lack of consent of the AG to sue, relied upon by the respondent to defeat the suit was a hurdle to access to justice that had no place under *the Constitution* of Kenya, 2010.
32. The appellant's submission was that locus standi or any other technical or procedural deficiency should not be raised against it in order to compromise the duty of the court to maintain its dignity and integrity and grant it access to justice and for that proposition seeks that this Court be persuaded by the decision of Court of Appeal for Eastern Africa in Mistry Amar Singh vs. Serwano Wofunira Kulubya [1963] EA 408 which quoted with approval the case of Scott vs. Brown, Doering, McNab & Co. [1892] 2 QB 724, and this Court's decision in Mapis Investment (K) Limited vs. Kenya Railways Corporation [2006] eKLR.
33. Mr. Masika for the 2<sup>nd</sup> respondent submitted that the appellant is a non-governmental organization (NGO) which was registered on 25<sup>th</sup> September 1997 and thus had no legal or factual basis to lay a claim over the suit property by virtue of a letter of allotment issued in 1992. He contended that the suit property was issued to a different entity which although going by the same name, was a limited liability company incorporated in 1991.
34. Mr. Masika urged that the trial court rightly held that the suit property belonged to the 2<sup>nd</sup> respondent and that the appellant, in fact, had no locus standi to lodge any claim in relation thereto as against the 2<sup>nd</sup> respondent. For that proposition counsel relies on this Court's case of Agriculture Finance Corporation vs. Lengetia Limited & Jack Mwangi [1985] eKLR where this Court, dealing with the issue of privity of contract restated that a contract affects only parties to it and cannot be enforced by or against a person who is not a party, even if the contract was made for his benefit and purports to give him the right to sue or to make him liable upon it
35. Counsel emphasized that there was a distinction between the appellant NGO and the Limited Company going by the same name and urged that the learned trial Judge rightly made his finding on issue of locus standi, that an entity which was not in existence at the time the letter of allotment was issued could not purport to rely on that letter of offer or allotment to lay a claim on the suit property. Furthermore, that most importantly the letter on which the appellant purportedly lays its claim was actually cancelled before a new letter of allotment was issued to the 2<sup>nd</sup> respondent.
36. Certain facts are not in dispute. First is that the suit revolves around LR No. 209/11835, the suit property and its ownership. Secondly, the appellant, Cross Current Indigenous Network, is an NGO that was registered on 25<sup>th</sup> September 1997 by three persons; namely, Pastor Boaz Omondi, Mr. Daniel Waithaka Mwangi and Mr. Timothy Mpaayei. There was also a limited Company going by, the same name, Cross Indigenous Network Ltd that was incorporated by Dr. Bennet and Mr. William Bommet in December 1991. We noted that the 1<sup>st</sup> respondent's witness did not make a distinction between these two entities in his evidence, creating the impression that to his mind, both were one and the same thing.



The correct position is, going by the registration documents that were exhibited in Court, the two were distinct entities, registered six years apart, and registered by different personalities, as shown above.

37. The other important fact to note is that the suit property was allocated on 15<sup>th</sup> May 1992 in the name of the limited company. That is a fact that cannot be denied since, as at the time the suit property was allocated to the limited company, (1992) the appellant NGO was non-existent.
38. The issue then is which of the two entities had the locus standi to sue to claim ownership of the suit property?
39. We have considered the judgment of the learned trial Judge. What the learned Judge found was that the suit was brought in the name of the appellant NGO by the name of Cross Current Indigenous Network, while the proper plaintiff should have been a Ltd Company with a similar name Cross Current Indigenous Network Ltd, which from the evidence, was the initial allottee of the suit land in 1992. That the appellant did not establish a nexus between the appellant and Cross Current Indigenous Network Ltd. Furthermore, the learned Judge stated that he was not satisfied, after examining the documents of incorporation/registration of each of the two entities, that the appellant had demonstrated a nexus between the NGO and the Ltd Company. He found that the Memorandum of Association of the company did not show any intention to convert the Ltd Company to an NGO. The learned Judge also noted that the Limited Company wrote and objected to the registration of the appellant as an NGO, which the NGO Coordination Bureau acknowledged but nevertheless registered it.
40. We shall begin by considering the cases relied on by the appellant. The case of *Randu Nzai Ruwa & 2 Others vs. Secretary, The Independent Electoral and Boundaries Commission & 9 Others*, (supra), does not apply and does not aid the appellant. The cited case was brought as a public interest case, and the respondent challenged failure by the appellant to seek and obtain the consent of the Attorney General. The Court found that challenge a technicality and a hurdle to access to justice. Furthermore, the law had changed by virtue of Article 258 of *the Constitution*. The challenge of the appellant's locus standi to sue, as demonstrated in judgment of the superior Court and by this Court, is not idle.
41. The appellant also relied on the case of *Mistry Amar Singh vs. Serwano Wofunira Kulubya* [1963] EA 408, where the Privy Council, on appeal from a judgment and order of the East African Court of Appeal, of Lord Morris of Borth-y-Guest in his speech quoted with approval the following quotation from the judgment in *Scott vs. Brown, Doering, McNab & Co* (3), [1892] 2 QB 724 Lindley LJ at p.728:-

“Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.”
42. With due respect to the appellant, this case does not apply to the issue at hand, as the question before the Court in the cited case was whether the contract between the parties was an illegality for lack of registration, even though that was not a matter pleaded or argued before the superior Court.
43. Whether a party has locus to institute a suit is a point of law and is one that can determine the entire suit, if it is found the plaintiff lacked locus to institute the suit. The evidence before the Court



shows that the suit property, then unsurveyed but identifiable by number, was allocated to the Cross Current Indigenous Network Ltd in 1992. It is the legal position and thus trite that once a company is incorporated it exists as a legal person from that date of incorporation; it can acquire its own property, and has rights and liabilities separate from those of its members. Simply put, it is a juristic person. This was enunciated in the seminal case of *Salomon vs. A. Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22. In *Amin Akberali Manji & 2 Others vs. Altaf Abdulrasul Dadani & Another* [2015] eKLR this Court discussed at length the issue of locus in relation to a limited liability company. It held thus:

“..... The centuries-old case of *Salomon vs. Salomon Company Limited* [1895-99] All ER 33 laid that principle to rest. There is also no argument that the proper plaintiff in any proceedings or action in respect of a wrong done to the company, is the company itself. Again, that was established over 160 years ago in *Foss vs. Harbottle* [1843] 67 ER 189 (the Foss case), popularly referred to in company law as “the rule in *Foss v. Harbottle*” (the rule). The rule was restated by Jenkins L. J. in the case of *Edwards vs. Halliwell* [1950] All ER 1064 as follows:-

The rule in *Foss-v-Harbottle*, as I understand it, comes to no more than this. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio; or if the simple majority challenges the transaction, there is no valid reason why the company should not sue.”

44. In the case of *Athi Highway Developers Ltd vs. Westend Butchery Ltd & 6 Others Civil Appeal No. 246 of 2013* this Court followed the summing up of the rule by Lord Denning M.R in *Moir vs. Wallerstainer* [1975] 1 All ER 849 thus:

“It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss V. Harbottle* [1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue.”

45. As the Court in the above case stated, a company is a legal person, capable of suing and being sued. The party that had the locus to bring the suit was the Ltd Company, which was the one, if aggrieved by the action of the 2<sup>nd</sup> respondent to have the suit property registered in its name in place of the Company, could bring the suit to recover the same. The appellant did not exist when the suit property was allocated to the Ltd Company. In the circumstances, it cannot purport to rely on the allotment letter written in favour of a different entity. The appellant was not the proper party, since it was not at any time the beneficiary of the suit property. We find that the learned Judge was right to find that the appellant had no locus standi to institute the suit.



46. As we stated earlier, the issue of locus standi to sue is a point of law capable to terminate the case without going into other issues. However, we shall consider the other issues raised in this appeal for completeness.
47. The second issue raised is whether the learned Judge erred for failing to find that the 1<sup>st</sup> respondent and/or the 2<sup>nd</sup> respondent acted fraudulently.
48. In the appellant's written submissions, it contends that the 2<sup>nd</sup> respondent acted fraudulently as it knew very clearly that Cross Current Indigenous Network was not its department when it wrote the letter of 16<sup>th</sup> September 1997 asking the 1<sup>st</sup> respondent to register the suit property in its name from that of Cross Current Indigenous Network. The appellant submits that the 2<sup>nd</sup> respondent willfully misrepresented itself and misled the 1<sup>st</sup> respondent that it should obtain an allotment and title that it was neither entitled to nor deserved. The appellant cited the case of *Derry vs. Peek* [1889] UKHL 1 for the proposition that it established the three (3) part test for fraudulent misrepresentation as against the 2<sup>nd</sup> respondent in that the 2<sup>nd</sup> respondent knew the statement it made to the 1<sup>st</sup> respondent that Cross Current Indigenous Network was a department of the appellant (i) to be false; (ii) that it did not believe the statement to be true, (ii) or was reckless as to its truth.
49. Citing this court's decision in *Denis Noel Mukhulo Ochwada & Another vs. Elizabeth Murungari Njoroge & Another* [2018] eKLR which cited with approval the case of *Mohamed Fugicha vs. Methodist Church in Kenya, CA No. 22 of 2015*, the appellant seeks to persuade the court to find that fraud on the part of the respondents was sufficiently particularized and proved by it.
50. Relying on the case of *Satrya Investments Limited vs. J.K. Mbugua* [2013] eKLR, Mr. Masika submits that this Court has recognized the primacy of a certificate of title over a letter of allotment. Further, that in upholding the precedence of a certificate of title over a letter of allotment, the court upheld the sanctity of title arising from section 23(1) of the Registration of Titles Act (repealed). In addition, Mr. Masika submits that the superiority of a certificate of title barring proof of the existence of fraud on the part of title holder over a letter of allotment received earlier recognition by this Court in *Wreck Motor Enterprises vs. Commissioner of Lands & 3 Others* [1997] eKLR.
51. Lastly, relying on the case of *Evans Kidero vs. Speaker of Nairobi City County Assembly & Another* [2018] eKLR where Mativo, J. (as he was then) cited this Court's decision in *Jennifer Nyambura Kamau vs. Humphrey Mbaka Nandi* [2013] eKLR counsel for the 2<sup>nd</sup> respondent contends that fraud must be proved as a fact by evidence, and, more importantly, that the standard of proof is beyond a balance of probabilities.
52. The appellant relies on misrepresentation as the basis of establishing fraud on the part of the respondents. It urges that it established the three (3) part test for fraudulent misrepresentation as against the 2<sup>nd</sup> respondent in that the 2<sup>nd</sup> respondent knew the statement it made to the 1<sup>st</sup> respondent that Cross Current Indigenous Network was a department of the appellant the statement to be false; that the 2<sup>nd</sup> respondent did not believe the statement to be true, and/or it was reckless as to its truth.
53. The critical issue is when the appellant posits that the 2<sup>nd</sup> respondent made a false representation in the letter it wrote to the 1<sup>st</sup> respondent dated 16<sup>th</sup> September 1997, what does that mean? The impugned letter was before the superior Court. The offending part of the letter provided thus:

“Cross Current Indigenous Network is a department of AIC and for that reason, we are now requesting you to change the allottee's name of the suit property from Cross Current to AIC.”



54. We note that the appellant was registered on the same month that the impugned letter was written. There can be no doubt that the letter was not referring to the suit property as having been allotted to the appellant, but to the Ltd Company. Having contextualized the 2<sup>nd</sup> respondent's letter to the 1<sup>st</sup> respondent, the issue is what evidence the appellant brought to show that misrepresentation was made?

55. As this Court stated in the case of Kinyanjui Kamau vs. George Kamau [2015] eKLR:

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

56. Earlier in of Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA. (as he then was) stated that :

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

57. At paragraph 10 of the Plaintiff, the appellant set out the following particulars of fraud:

- (a) Registering Plot No. C-Hill Area in the name of the 2<sup>nd</sup> respondent when the appellant was clearly the original allottee of the said plot.
- b. issuing title to Plot no. L.R. 209/11635 to the 2<sup>nd</sup> respondent in spite of the appellant's status in relation to the said land.
- c. issuing title to the suit Plot to the 2<sup>nd</sup> respondent who had neither applied for it nor paid any premium.
- d. issuing title to the suit Plot to the 2<sup>nd</sup> respondent only after the appellant had developed the suit land and commenced operations thereon a fact that was at all material times within the knowledge of both respondents.
- e. failing to revoke the plaintiffs allotment before offering the land to the 2<sup>nd</sup> respondent
- f. failing to notify the appellant of any intended revocation of the allocation
- g. the 2<sup>nd</sup> respondent who has been a beneficiary of the services rendered by the appellant on the property and knew of the appellants status surreptitiously got itself registered as the owner without informing the appellant of its changed status
- h. the 2<sup>nd</sup> respondent even after acquiring the title surreptitiously in 1998 has not exercised any ownership rights until now
- i. aware of its illegal title the 2<sup>nd</sup> respondent has attempted to gain possessory rights over the property and it has only attempted to do so by claiming it has been given the premises,



business and property by Trabs World Radio acting on behalf of Cross Current International Ministries.

58. Considering the evidence called by the appellant against the pleaded particulars of fraud, one cannot fail to note that the particulars were not supported by the evidence. For instance, in paragraphs (a) to (c), the appellant's claim that it was allotted the suit property is factually not correct. And in paragraphs (d) the averment that the appellant developed the suit property cannot be correct as the appellant admitted through its witnesses that developments on the suit property was carried out through overseas support Paragraph (e) was confirmed in evidence that the allotment of 1992 was cancelled before the allocation to the 2<sup>nd</sup> respondent was effected. The other paragraphs could not be proved as the appellant was not in existence during the events leading to change of ownership of the suit property and further it had no claim or any interest in the suit land. No evidence was laid before the Court to establish the same, we find no evidence to support any of the pleaded particulars of fraud,
59. The final point we raise on this issue is the fact the ground relied upon by the appellant in support of fraud, that is fraud through misrepresentation, was clearly not particularized in the plaint. It is trite that a party is bound by their pleadings, that particulars of fraud intended to be relied on must be pleaded and proved. The appellant did not succeed in proving what it pleaded. See *Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another* [2000] eKLR and *Kinyanjui Kamau vs George Kamau* [2015] eKLR:
60. In conclusion, we find that the learned Judge's finding cannot be faulted. The Judge was right to find that no fraud was proved by the appellant in this case on the requisite standard.
61. The other issue is whether failure on the part of the learned Judge to find the appellant was in occupation of the suit property was an error, and whether failure to consider that the 2<sup>nd</sup> respondent patronized the subject premises as a paying customer of services offered by the appellant as recognition by the 2<sup>nd</sup> respondent of the appellant's proprietary rights.
62. The learned Judge referred to and set out in detail the averments in the plaint as filed by the appellant, and contextualized them as against the evidence that was adduced by the parties. He concluded that the suit property was allocated to the Limited Company and not the appellant, and that at the time the appellant did not exist and thus could not claim the suit property. Furthermore, by the time the appellant was registered, all the construction on the suit property had been completed, funded through Dr. Bennet and support from overseas. Thus, the appellant, not only lacked locus to institute the suit, but had no claim over the suit property. Therefore, being in occupation did not aid his claim.
63. We find that the Judge cannot be faulted for finding the appellant's suit could not challenge the 2<sup>nd</sup> respondent's title to the suit property. That is the correct position. If the appellant lacked the capacity to institute the suit, it could not have had capacity to challenge the 2<sup>nd</sup> respondent's title. After all, the directors of the appellant NGO, Pastor Omondi and Mr. Mpaayei were at some point, employees of the 2<sup>nd</sup> respondent, and there is evidence an eviction notice was served on them, by the 2<sup>nd</sup> respondent and registration of the appellant NGO opposed by the directors of Cross Current Indigenous Network Ltd.
64. On the issue the appellant raised that Cross Current Indigenous Network Ltd was trustee of the appellant NGO, the appellant submits that it is not substantially contested that the promoters of the company had all along wanted to register an NGO but at that time the Kenyan government had frozen registration of NGOs hence, through consultation from the appellant's advocate, the appellant was advised to register a not-for-profit company which was later registered as a NGO on 25<sup>th</sup> September 1997. For this reason, the appellant contends vehemently that Cross Current Indigenous Network



Limited holds the suit property in trust for the appellant and that this Court should construe trust as a matter of fact and in equity.

The appellant relies on the case of Juletabi African Adventure Limited & Another vs. Christopher Michael Lockey [2017] eKLR and Mombasa Bricks & Tiles Ltd & 5 Others vs. Arvind Shah & 7 Others [2019] eKLR.

65. The 2<sup>nd</sup> respondent on its part urged that as it had the title to the suit property which has not been challenged, its title to the suit property is indefeasible. It relied on the case of Wreck Motor Enterprises vs. Commissioner of Lands & 3 Others, (supra), in support of that proposition.

66. The issue of trust was not canvassed before the superior Court and is being raised here for the very first time. Our answer to this is simple. In the case of Mary Kitsao Ngowa & 36 Others vs. Krystalline Limited [2015] eKLR, this Court has previously dealt with such an issue and pronounced itself thus;

“...we must also appreciate the fact that, this is not even an issue that was canvassed before the trial court. The issue regarding the interpretation, meaning and application of section 90 of the *Employment Act* was never placed or canvassed before the trial court for determination. The jurisdiction of the appellate court is to look into issues that were presented before the trial court. A court cannot be said to have erred on an issue that was never argued before it...”

67. We have said enough in this appeal. Having carefully considered all the issues arising in this appeal, we have come to the conclusion that the appeal has no merit and is for dismissal.

68. Accordingly, we uphold the learned Judge’s judgment dated 4<sup>th</sup> April 2018. The 2<sup>nd</sup> respondent will have the costs of this appeal and of the suit and the counterclaim before the superior court as against the appellant.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**J. LESIIT**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

