



**Sketty (Administrator of the Estate of Nassor Mohamed Nahdy - Deceased) v Shah & 3 others
(Civil Appeal E123 of 2022) [2024] KECA 1179 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1179 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E123 OF 2022
SG KAIRU, AK MURGOR & KI LAIBUTA, JJA
SEPTEMBER 20, 2024**

BETWEEN

**MUNIR MOHAMED SKETTY (ADMINISTRATOR OF THE ESTATE OF
NASSOR MOHAMED NAHDY - DECEASED) APPELLANT**

AND

**JANENDRAH RAICHAND SHAH 1ST RESPONDENT
RAVJI RAMJI MANJI 2ND RESPONDENT
REGISTRAR OF TITLES 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT**

*(Being an appeal from the Judgment of the Environment and Land Court of
Kenya at Mombasa (Yano, J.) dated 9th March, 2021 in ELC No. 233 of 2009)*

JUDGMENT

1. This appeal arises from a judgment delivered by the Environment and Land Court (ELC) at Mombasa (C. K. Yano, J.) on 9th March 2021. In that judgment, the ELC issued a mandatory injunction in favour of Janendra Raichand Shah, the 1st respondent (hereafter Shah or the 1st respondent), ordering the appellant, Nassor Mohammed Nahdy, deceased, who was the defendant in the suit (and who is represented in this appeal by the Administrator of his estate, Munir Mohamed Sketty) to forthwith, and not later than 30 days from the date of the judgement, pull down and remove from the suit property known as Subdivision Number 890 (Original No. 284/99) Section III Mainland North, any construction and all his properties of whatever nature, as well as his workmen, servants, or agents, from the said property, and to deliver vacant possession to Shah, who was the plaintiff in the suit.
2. Other reliefs granted in the judgment included an order of injunction to restrain Nassor Mohammed Nahdy (the appellant), his servants or agents from preventing Shah from accessing the said property;



an injunction restraining the appellant, his servants or agents, from remaining or continuing in occupation of the said property and, in default, an order of eviction to issue; and an order for demolition of all illegal structures and building erected on the property by the appellant; and an order dismissing the counterclaim by the appellant. Nassor Mohammed Nahdy died during the pendency of the suit and was substituted for Munir Mohammed Sketty, the appellant herein, the administrator of his estate.

3. The background in brief is that Shah instituted suit against Nassor Mohammed Nahdy being Mombasa High Court Civil Case No. 233 of 2009 by a plaint dated 10th July 2009. An amended plaint dated 19th July 2012 was subsequently filed. He pleaded that he is the registered owner of property known as Subdivision Number 890 (Original No. 284/99) Section III Mainland North (the suit property); and that Nassor Mohammed Nahdy had wrongly entered the property and constructed various illegal buildings and structures and prevented him from peaceful enjoyment of the same and refused to vacate. He sought the reliefs that were ultimately granted in the impugned judgment as already stated.
4. In his defence and counterclaim, Nassor Mohammed Nahdy pleaded that he was already in possession of the property through and from his father Mohammed Ali Nahdy, who died on 21st August 1972 while seized, in fee simple, of the same; and that he remained in possession and became the legal and beneficial owner of the property as the administrator of the estate of Mohammed Ali Nahdy. He asserted that the 1st respondent's Certificate of Title over the property is fake, obtained irregularly and void, having been obtained from a person, Ravji Ramji Manji, who had no title or right over the property, and who could not pass a good title; that, in a previous suit, namely Mombasa High Court Civil Case No. 346 of 1993, the High Court had decreed that Nassor Mohammed Nahdy was the rightful owner of the property and not Ravji Ramji Manji.
5. In his counterclaim, Nassor Mohammed Nahdy averred that Nassor Ali Nahdy, who died on 25th September 1964, was the original owner of the property; that his brother, Mohamed Ali Nahdy, the father of Nassor Mohammed Nahdy, was appointed as the administrator of the estate of Nassor Ali Nahdy; that Mohamed Ali Nahdy died on 21st August 1972 whereupon Nassor Mohammed Nahdy became the administrator of his estate and "remains the indisputable legal and beneficial owner" of the property.
6. Nassor Mohammed Nahdy impeached the ownership of the property by Ravji Ramji Manji, who purportedly transferred the same to the 1st respondent, a trespasser; that in Mombasa High Court Civil Suit No. 346 of 1993, the court decreed that Ravji Ramji Manji did not have title to the property; and that his claim to have purchased the property from Ravji Ramji Manji was fraudulent.
7. The particulars of fraud pleaded in the counterclaim were that the 1st respondent acted actively as agent of Ravji Ramji Manji during the hearing of HCCC No. 346 of 1993, and was aware of the outcome of that case; that Ravji Ramji Manji had no title or interest to pass to him; that Nassor Mohammed Nahdy never transferred the property to Ravji Ramji Manji; and that the Certificate of Title and the Deed Plan "is not authentic and is a fraud, a forgery and hence illegal".
8. In his amended statement of defence and amended counterclaim dated 27th July 2012, Nassor Mohammed Nahdy joined Ravji Ramji Manji, the Registrar of Titles and the Attorney General in the suit as the 2nd to 4th defendants respectively. He pleaded that the Registrar of Titles was negligent in issuing a title "without consent of local land authority and without care". It was pleaded, as against Ravji Ramji Manji, named as the 2nd defendant, that he sold the property to the 1st respondent without "consent of the Land Control Board and therefore he did so fraudulently."



9. Ravji Ramji Manji did not participate in the trial despite having been served by substituted service by advertisement in the newspaper.
10. In the end, Nassor Mohammed Nahdy in his counterclaim, prayed for judgment for: a declaration that he is the rightful owner of the property, and that the transfer in favour of the 1st respondent is void; and revocation of Certificate of Title in favour of the 1st respondent.
11. At the trial, Shah testified on his own behalf as PW1 and produced documentary evidence in support of his claim. He called one other witness, Bartholomew Mwanyingu (PW2) a licenced surveyor who produced a survey report. Munir Mohamed Sketty (DW1), having been joined in the suit as the administrator of the estate of Nassor Mohammed Nahdy, testified for the defence and in support of the counterclaim. He called one other witness, Mohamed Ahmed Mohamed Nahdy (DW2), an uncle to Nassor Mohammed Nahdy.
12. After reviewing the evidence and the submissions presented before him, the learned trial Judge in his judgment identified four issues for determination, namely, who is the registered owner of the property; whether the 1st respondent's title was obtained fraudulently, illegally and through unprocedural means; whether the 1st respondent was entitled to the reliefs sought; and whether the counterclaim was merited.
13. The Judge found that the 1st respondent is the registered proprietor and holder of an indefeasible title of the property Subdivision Number MN/III/890 (Original Number 284/99) Section III Mainland North and, therefore, entitled to vacant possession; that the appellant did not avail evidence of the alleged fraud; that the appellant's reliance on the judgment in HCCC No. 346 of 1993 is misplaced as that suit related to a different parcel of land, namely Parcel No. 284 Section III, and that that suit did not determine ownership of the suit property; that the matter of land control board consent was not pleaded, but was raised as an afterthought, and which, in any event, would be overcome by the equitable doctrine of constructive trust and proprietary estoppel; that the appellant failed to establish the counterclaim; and that, consequently, the respondent was entitled to the reliefs sought.
14. The appellant has challenged the judgment on sixteen grounds set out in his memorandum of appeal. However, during the hearing of the appeal, counsel for the appellant narrowed down the complaints to three issues. First, whether the trial Judge erred in failing to find that the transaction was void for lack of consent of the land control board. Secondly, whether the Judge failed to find that there was no transmission upon the death of the 2nd respondent's father and, therefore, the 2nd respondent could not pass good title to the 1st respondent. Thirdly, whether the Judge failed to consider the effect of the judgment in HCCC No. 346 of 1993.
15. Learned counsel Mr. L. Obonyo for the appellant submitted that, under section 6 of the *Land Control Act*, failure to obtain consent renders the transaction void; and that, in that event, the consideration paid is recoverable as a debt under section 7 of that Act. It was urged that the property in this case is undisputably agricultural land, and it was therefore imperative that land control board consent be obtained absent which the transaction is void. In support, reference was made to the case of Elizabeth Cheboo v Mary Cheboo Gimnyigei, Civil Appeal No. 40 of 1978; and the case of Gabriel Mskhoha Wamkota v Sylvester Nyongesa Donati [1987] KLR.
16. Regarding reliance on the equitable doctrine of constructive trust to override the requirements of section 6 of the *Land Control Act*, counsel urged that the decisions in Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagir [2014] eKLR; Mutsonga vs. Nyati [1984] KLR; and Kanyi Muthiora [1984] KLR 712 where the Court held that an implied or constructive trust in favour of persons who had paid purchase price for land had arisen despite the absence of Land Control Board consent had



- been overtaken. In that regard, counsel referred to the decision of this Court in David Ole Tukai vs. Francis Arap Muge & 2 others [2014] eKLR where the Court, after reviewing previous decisions, concluded that there is no room for the courts to import the equitable doctrine of constructive or implied trust into the Act granted the express unequivocal and comprehensive provisions of the [Land Control Act](#).
17. For the 1st respondent, learned counsel Ms. Kinuva holding brief for Ms. Patricia Langat for the 1st respondent submitted that the question of Land Control Board consent was not pleaded and did not form part of the appellant's case, having been raised for the first time during submissions. It was submitted that no evidence was led by the appellant to establish that such consent was either necessary or required; and that, even if the [Land Control Act](#) applied to the transaction, the equitable doctrine of constructive trust and proprietary estoppel overriding the requirement for consent in a controlled transaction would come to the aid of the 1st respondent. Cited in support are decisions of this Court in Willy Kimutai Kitilit v Michael Kibet [2018] eKLR; William Kipsoi Sigei v Kipkoech Arusei & another [2019]eKLR; and Aliaza v Saul, Civil Appeal No.134 of 2017 [2022] KECA 583 (KLR).
 18. Similarly, learned counsel Ms. Nimwaka Kiti for the 3rd and 4th respondents submitted that the issue of Land Control Board consent was not raised in the appellant's pleadings; and that parties are bound by their pleadings and should not be permitted to depart therefrom. The decisions of this Court in Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3others [2014] eKLR; and Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR, were cited.
 19. Turning to the second issue as to whether the Judge failed to find that there was no transmission upon the death of the 2nd respondent's father and that, therefore, the 2nd respondent could not pass good title to the 1st respondent, counsel for the appellant referred to section 108 of the Registered [Land Act](#) (repealed) and submitted that there could not have been a transfer of the property from the 2nd respondent's father to the 2nd respondent without probate or letters of administration. In that regard, it was urged that the Land Registrar had no right to insert the name of the 2nd respondent when the property had not been bequeathed to him, and that the 2nd respondent did not have a good title to transfer to the 1st respondent.
 20. For the 1st respondent, it was submitted that contrary to the appellant's claim, there was on record, at page 153 of the record, the Grant of Letters of Administration in accordance with the Will of Ramji Manji Arjan granted to the 2nd respondent, Ravji Ramji Manji, and duly sealed on 9th March 1988. It was urged that the appellant's contention was misplaced.
 21. Lastly, on the complaint that the Judge failed to consider the effect of the judgment in HCCC No. 346 of 1993, it was submitted for the appellant that that judgment declared that the 2nd respondent's father was trespassing on the property, that he was only a tenant and not the owner, and could not therefore pass title. Citing section 44 of the [Evidence Act](#) and the case of Kamunyu & others v Attorney General & others [2007] 1 EA116, counsel submitted that the judgment in HCCC No. 346 of 1993 is a judgment in rem and therefore binding, not only to the parties in that suit, but on the whole world. Consequently, it was urged that the suit before the learned Judge leading to the impugned judgment was res judicata.
 22. On the other hand, counsel for the 1st respondent submitted that, apart from the fact that the 1st respondent was not privy to that suit, the subject property in that suit was plot 284, which is different from the property the subject of the appeal; that, further, that the doctrine of res judicata on which the appellant relies does not apply; and that the ingredients of the doctrine of res judicata as explained in the case of Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] eKLR



are not fulfilled when Mombasa HCCC No. 346 of 1993 is juxtaposed with Mombasa ELC No. 233 of 2009 from which this appeal stems.

23. We have considered the appeal and the rival submissions within our mandate of re-appraising the evidence and drawing inferences of fact in accordance with rule 31(1)(b) of the Court of Appeal Rules. See *Selle & Another v Associated Motorboat Co. Ltd & Others* [1968] EA 123, where the Court stated that:

“... An appeal to this 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...”

24. We also bear in mind that the circumstances when this Court may interfere with the decision of the ELC are limited. As Madan, JA. stated in *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] eKLR :

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.

The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

25. With those principles in mind, we begin by observing that the suit before the ELC was initiated by Shah who asserted ownership of the suit property and sought orders against Nassor Mohamed Nahdy, who he considered a trespasser on the property, and hence the relief sought for removal of “any construction and all his properties” from the suit property. On his part, Nassor Mohamed Nahdy challenged Shah’s title to the property on grounds of fraud. The critical questions, therefore, as appreciated and identified by the learned trial Judge, were who the registered owner of the property is; and whether the 1st respondent’s title to the property was obtained fraudulently, illegally and through unprocedural means.

26. To the extent that the appellant claimed that the 1st respondent’s title to the property was obtained by fraud as particularized in his pleading, it was incumbent upon him to prove fraud on a level above a balance of probabilities. It is an established legal principle that fraud must be specifically pleaded and strictly proved. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another*, Civil Appeal No. 106 of 2000 [2000] eKLR, Tunoi JA expressed himself thus:

“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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett* [1878] 7 Ch. D 473 at 48,...”



27. See also *Kinyanjui Kamau v George Kamau* [2015] eKLR where the Court observed that:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v 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; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

28. As already stated, the particulars of fraud attributed to the 1st respondent were that he actively acted as agent of Ravji Ramji Manji during the hearing of Mombasa Civil Case No. 346 of 1993 and acted against the ruling therein in that he was “actually evicted and would have no title to pass”; that he knew that the said Ravji Ramji Manji had no interest or right over the same; that Ravji Ramji Manji, the 1st respondent’s alleged transferor, had no interest known in law and could not pass title to any one; and that the 1st respondent was privy to production of a fake Title Certificate; that Nassor Mohammed Nahdy never transferred the property to Ravji Ramji Manji; that the Deed Plan is not authentic and is a fraud, a forgery and hence illegal. What then was the evidence presented before the trial court?
29. In his testimony, the 1st respondent stated that the property is situated in Kikambala, Majengo; that in the 1950’s, the property was owned by Ramji Manji Arjan, who bequeathed it to his son Ravji Ramji Manji, the 2nd respondent, under a Will; that, in 2001, Ravji Ramji Manji relocated to the United Kingdom leaving the property under his care; that, upon return of Ravji Ramji Manji in 2002, he agreed to sell to him two parcels plot 48A and 97A for Kshs. 1.5 million each and an agreement for sale concluded before M. A. Metho Advocate in 2002; that he thereafter got a transfer for plot 890 (original No. 284/99) and the Deed Plan. He produced receipts for payments made to Doshi & Doshi Advocates as well as the Will and Grant of Probate of the Estate of Ramji Manji. It was his testimony that, having purchased the property, he obtained Certificate of Title dated 26th February 2003 issued to him. He produced the agreement for sale, the transfer and the search as exhibits. He stated that, after buying the property, he continued farming on it and later Nassor Mohammed Nahdy evicted him in 2009 claiming to be the owner of the property although he did not show him his title.
30. On cross-examination, the 1st respondent stated that, from his childhood, he knew that the property belonged to the family of Ramji Manji; that he was not aware that Ravji Ramji Manji had been sued in HCCC No. 346 of 1993, and neither did he assist Ravji Ramji Manji in that case, and nor did Ravji Ramji Manji inform him of that case. He stated further that he was not aware of who ordered the subdivision of the original plot.
31. He testified further that he entered into the agreement with Ravji Ramji Manji before the Chief; and that his lawyer prepared the transfer which was registered at the lands office whereupon he obtained a title deed. He denied colluding with the Land Registrar to get a fake title deed. He stated that, upon acquiring the property, and after it was registered in his name, he charged it to the bank to obtain a loan. He maintained that he got the property and the title legally and did not do so by fraud. He stated that he did not appear before any Land Control Board. When referred to the judgment of the High Court in HCCC No. 346 of 1993, he stated that the same was referring to “land no. 284 Section III/MN, which is “the big land measuring over 1500 acres” whereas his property is plot No. 890.



32. Bartholomew Mwanyingu, a licensed surveyor testified as PW2 on behalf of the 1st respondent. He produced his survey report dated 18th January 2019 relating to parcel No. MN/III/284 and MN/III/890 (formerly 284/99). He stated that the object of the survey was to establish the acreage of plot No. 284 and whether it exists in the survey records, and if not, when it ceased to exist. He reported that parcel No. 284 was originally 1590 acres, and that the original owner was Mbwana Bin Maro and company; that several parcels were excised therefrom starting with MN/III/549-551 and plot 284 ceased to exist in the survey records; and that the suit property, parcel 890, was one of six excisions that was done on 19th May 1988 and has an acreage of 9.779 hectares or 24.164 acres, and is registered in the name of the 1st respondent.
33. The appellant, Munir Mohammed Sketty, testified for the defence and in support of the counterclaim. His evidence was that Nassor Ali Nahdy died in 1964; that his brother Mohamed Ali became his administrator; that, when Mohamed Ali died in 1972, Nassor Mohamed Nahdy became the administrator; and that, when Nassor Mohamed Nahdy died in 2005, he (Munir Mohammed Sketty) became the administrator. It was his testimony that one Mohamed Ahmed Nahdy (DW2), an uncle to Nassor Mohamed Nahdy, instructed Zimmerlin Surveyors in the 1980's to carry out a survey on several plots, including plot No. 890; that Zimmerlin Surveyors carried out the exercise, undertook subdivisions, and took Deed Plans to the Director of Survey; that he took Deed Plans for Plot No. 890, 1002 and 1004 to Nassor Mohamed, who managed to get title deeds for plots 1002 and 1004; that somebody else must have picked the deed plan for plot 890, but was aware that the title of that plot was in the name of 1st respondent, which he urged the court to nullify.
34. Munir Mohammed Sketty stated further that he recalled having gone to court in connection with HCCC No. 346 of 1993, which was instituted by Nassor Mohamed Nahdy against Ravji Ramji Manji, who had refused to vacate the property, and that the court ordered him to vacate the property within 30 days and to pay mesne profits; and that the 1st respondent got title over the property in 2002 when that case was going on, and that there was no Land Control Board consent.
35. Under cross examination, the witness stated that he is not the administrator of the estate of Mohamed Ali Nahdy; that he is the administrator of the estate of Nassor Mohamed Nahdy, who was his uncle; and that the Deed Plan in respect of plot 890 was misplaced by Nassor Mohamed. He conceded that 1st respondent was not a party in HCCC No. 346 of 1993, which related to plot 284/III/MN from which Ravji Ramji Manji was ordered to vacate.
36. Mohamed Ahmed Mohamed Nahdy, DW2, who indicated that he was 70 years old when he testified, stated that he is an uncle to Nassor Mohamed Nahdy, who was the defendant; that he is the one who instructed Zimmerlin Surveyors to undertake a survey; that Zimmerlin Surveyors gave him the Deed Plans which he then gave to Sheikh Nassor; that the land in Kikambala was family land, but that he could not remember selling the property to 1st respondent.
37. As already stated, the learned Judge was not satisfied, upon evaluation of the evidence, that fraud was proved, and upheld Shah's title and dismissed the appellant's counterclaim. It bears repeating that the appellant's counterclaim and challenge to the 1st respondent's title was hinged on claims of fraud. However, the appellant's focus in this appeal has shifted, primarily, to the question of whether Land Control Board Consent in respect of the transfer of the property in favour of the 1st respondent was obtained.



38. As submitted by counsel, parties are bound by their pleadings. In *Kinyanjui Kamau vs. George Kamau Njoroge* [2015] eKLR, the Court observed that:

“Parties are indeed bound by their own pleadings. See *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR (Civil Appeal No. 219 of 2013). Of course if an issue arises in the course of hearing, and the same is fully canvassed by the parties, then even if that issue was not pleaded, then the court will make a determination on the matter. As was held in *Odd Jobs v Mubia* [1970] EA 476, “a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.”

39. In the present case, the issue of land control board consent was raised in the context of claims of fraud. Specifically, in the amended statement of defence and amended counterclaim dated 27th July 2012 when Ravji Ramji Manji, the Registrar of Titles and the Attorney General were introduced and named in the suit as the 2nd to 4th defendants respectively, the appellant averred that the Registrar of Titles was negligent in issuing a title “without consent of local land authority and without care” and, in reference to Ravji Ramji Manji who was named as the 2nd defendant, it was averred, as a particular of fraud, that he sold the property to the 1st respondent “then he had not consent of the Land Control Board and therefore he did so fraudulently.”

40. On cross-examination of the 1st respondent by counsel for the appellant, he stated that he was aware “that there is usually a Land Control Board that sits. Before the land was transferred to me, I did not appear before any Land Control Board.” Munir Mohamed Sketty on his part in his substituted witness statement at page 184 of the record made absolutely no mention of Land Control Board consent. However, in his testimony, he stated that the 1st respondent “got title in 2002” and that “there was no consent form (sic) the Land Control Board.” The appellant’s second witness Mohamed Ahmed Mohamed Nahdy made no reference at all to the question of land control board consent.

41. It is clear, based on the foregoing, that the issue of land control board consent was raised tangentially. There was no plea, either in the defence or in the counterclaim, that the suit property is “agricultural land” or that the transaction was a “controlled transaction” for purposes of the *Land Control Act*, and no direct evidence was led on the matter. Little wonder therefore that the learned Judge of the ELC did not frame the question of Land Control Board consent as one of the issues for determination. In our view, the learned Judge rightly concluded that “the issue of consent was an afterthought” and that, given the facts and the circumstances of the case, the doctrine of estoppel applied.

42. In that regard, the circumstances here are not dissimilar to those in *Kinyanjui Kamau v George Kamau Njoroge* (supra) where this Court stated:

“In the present appeal, the issue of lack of consent of the Land Control Board was only mentioned in passing by George (DW2), and was not canvassed by the parties, and having not brought this issue for full interrogation before the trial court either by pleading it or by leading evidence on it, we agree that the appellant was then estopped from raising it in his grounds of appeal.”

43. We hold, therefore, that the complaint that the learned Judge erred in failing to nullify the 1st respondent’s title on account of the absence of Land Control Board consent has no merit.



44. Next is the question whether the Judge failed to find that there was no transmission upon the death of the 2nd respondent's father, and that, therefore, the 2nd respondent could not pass good title to the 1st respondent. In that regard, the learned Judge stated as follows:

“Although the defendant's [appellant's] case was that there was no sale to Mr Ravji Ramji Manji or to anybody else, Munir Mohammed Sketty (DW 1), in his witness statement filed on 17th of January 2017 stated that he knew that on or about November, 1969, his deceased grandfather Muhammad Ali agreed to sell to Ramji a portion of the plot, but added that the sale did not materialise. From this evidence it is clear that there was a sale over a portion of Parcel MN/III/284 between Mohammed Ali and Ramji. Even though the defendant's witness states that the sale did not materialise, there was no explanation given as to why the transaction did not materialise.”

45. In his bid to demonstrate the root of his title, the 1st respondent, in his supplementary witness statement dated 16th April 2013 and filed on 17th April 2013, stated that part of the property was purchased by Ramji Manji Arjan, the father of the 2nd respondent from whom the 1st respondent purchased the suit property. He stated that, prior to purchasing the property from Ravji Ramji Manji in 2002, he had leased the same from Mr. Manji; that, early in 2002, they entered into an agreement for sale as Mr. Manji was intent on disposing of the property. He stated that Mr. Manji furnished him with the death certificate in respect of his late father Ramji Manji Arjan as well as the last Will of his late father bequeathing all his property to Mr. Manji; that Ravji Ramji Manji was the lawful successor to the property, the same having been bequeathed to him under the Will of Ramji Manji Arjan and following the Grant of Probate in favour of Ravji Ramji Manji. He produced the said Will as well as the Grant of Probate.

46. The 1st respondent was therefore able to demonstrate the root of title, which ultimately led to his Certificate of Title. As the learned Judge correctly found, the 1st respondent produced documents showing that Ramji Manji Arjan had purchased an undivided share in Plot 284/Section III/MN amongst them the Grant of Probate in P&A Cause No. 87 of 1986 in respect of the estate of Ramji Manji Arjan, which was granted to the 2nd respondent from whom the 1st respondent purchased the property. Accordingly, we find no merit in this complaint.

47. Finally, the contention that the Judge failed to consider the effect of the judgment in HCCC No. 346 of 1993 is not supported by the record. PW2, a licensed land surveyor, who produced his survey report demonstrated that Parcel Number 284/99 was sub-divided into several plots, including Parcel No. MN/III/890, an excision from the larger Parcel Number 284/99. The testimony of DW2 was to the same effect that Zimmerlin Surveyors undertook the sub- divisions resulting in several Deed Plans.

48. The learned Judge was therefore correct in holding that the appellant's “reliance on HCCC No. 346 of 1993 to show that the plaintiff [1st respondent] is not the owner of the suit property is... misconceived” because “the orders that the court was deciding in that case were the eviction of Manji from Parcel No. 284 Section III”, and that judgment did not determine the ownership of the suit property. We respectfully agree.

49. To impeach the findings by the learned Judge, the appellant had to demonstrate that the judge misdirected himself in law or that he misapprehended the facts, or that he took account of considerations of which he should not have taken account, or that he failed to take account of considerations of which he should have taken account, or that his decision is plainly wrong. The appellant has failed to do so.



50. Consequently, the appeal fails and is hereby dismissed with costs to the 1st respondent. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

A. K. MURGOR

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Dr. K. I. LAIBUTA Carb, FCIArb.

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

