**Wafula v Maru (Civil Appeal E094 of 2023)**
**[2024] KECA 1435 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1435 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT ELDORET**

**CIVIL APPEAL E094 OF 2023**

**SG KAIRU, FA OCHIENG & WK KORIR, JJA**

**OCTOBER 11, 2024**

**BETWEEN**

**FRANK WAFULA ..... APPELLANT**

**AND**

**MANSUKHALAL JESANG MARU ..... RESPONDENT**

***(Being an appeal from the Judgment of the Environment and Land Court of Kenya at Kitale (Nyagaka, J.) dated 16th October, 2023 in ELC Cause No. 103 of 2008)***

## JUDGMENT

1. In this appeal, the appellant Frank Wafula has challenged a judgment delivered on 16th October 2023 in favour of the respondent, Mansukhalal Jesang Maru, in which the Environment and Land Court (ELC) at Kitale (F. Nyagaka, J.) declared the respondent as the owner of the property known as Title No. Kitale Municipality Block 12/26 (the property) to the exclusion of the appellant. The court ordered the appellant to vacate the property forthwith, in any event not later than fifteen days from the date of the judgment, failing which he would be forcefully evicted. The ELC further restrained the appellant, by permanent injunction from entering, remaining on, encroaching, using or in any way interfering with the respondent's use of the property. He was also ordered to meet the costs of the suit.

2. In his Memorandum of Appeal, the appellant complains, among other things, that: the Judge erred in declaring the respondent the owner of the property; that non-compliance with Order 11 of the *Civil Procedure Act* led to miscarriage of justice; that the respondent's claim for mesne profits not having been successful, he should have been awarded costs; that crucial defence witnesses were blocked; and that suit was res judicata.

3. The background in brief is that the respondent instituted suit against the appellant by a plaint dated 27th November 2008, presented before the High Court at Kitale. The respondent's claim was that despite him being the registered owner of the property (Kitale Municipality Block 12/26) and a title

being issued to him on 5th December 2001, the appellant trespassed thereon and erected structures thereby depriving him of its use. He sought a declaration that he is the sole legal owner of the property to the exclusion of the appellant who should be ordered to vacate the said land and failing which he be forcefully evicted; mesne profits at the rate of Kshs. 10,000/= per annum with effect from 2008 until the final determination of the suit; permanent injunction; cost and interest.

4. The appellant filed a statement of Defence dated 22nd January 2009 denying the respondent's claim. In his Amended Defence and Counterclaim dated 10th October 2016, the appellant averred that his land was L.R. No. 2116/1124 Kitale Municipality and the respondent ought to cease interfering with his possession of the same. He averred that the respondent's suit was time barred, as it was filed beyond the 12-year period set out in the *Limitation of Actions Act*. By his counterclaim he asserted that the respondent fraudulently obtained title to the property and prayed for its cancellation.

5. The particulars of fraud pleaded were: obtaining documents which are all forgeries including the letter of allotment dated 28th November 1991; misleading the Ministry of Lands about his purported title number Kitale Municipality Block 12/26 hence issuance of a fake title; causing registration in respect of the property to himself; obtaining fake title in respect of the property; and using the title number Kitale Municipality Block 12/26 obtained through corruption knowing very well that he was in breach of special conditions of the lease.

6. The appellant's prayers in his counterclaim were for a declaration that he is the legal proprietor of land parcel number L.R. No. 2116/1124 Kitale Municipality to the exclusion of the respondent; an order for the certificate of lease in favour of the respondent over the property to be recalled for cancellation or be de-registered/revoked; a permanent order of injunction restraining the respondent and his agents, servants/ employees from in any way dealing with or interfering with quiet possession of the appellant's parcel of land L.R. No. 2116/1124 Kitale Municipality.

7. In his Reply to Defence and Defence to Counterclaim, the respondent pleaded that he followed due process in obtaining his title; he pointed out that there was conflict between the particulars of fraud in the amended defence and in the counterclaim. He reiterated that his plot of land was Kitale Municipality Block 12/26.

8. The hearing eventually commenced before the trial court (Mwangi Njoroge, J.) on 23rd October 2018. Bainito Ombudi Hussein, a Land Surveyor, testified as PW1. Counsel for the appellant, one Mr. Bororio, walked out of the trial court during the testimony of PW1 having failed to procure an adjournment. The respondent then testified as PW2 after which the respondent's case (as plaintiff) was closed. When invited to proceed with his defence and counterclaim, the appellant applied for adjournment to get counsel, which application was granted. Subsequently, the appellant through counsel, made an application to set aside the previous proceedings which appears to have been determined in a ruling delivered on 31st October 2018, which is however not included in the record of appeal but appears to have allowed re-opening of the case.

9. Numerous adjournments primarily at the instance of the appellant followed thereafter when the matter was scheduled for the recalling of the respondent's witnesses for purposes of cross examination. On 21st March 2019, PW1 was recalled and cross examined by the appellant's advocate Mr. Karani who then indicated that he had no instructions regarding cross examination of the respondent (PW2) whereupon the court reluctantly adjourned the matter. Subsequently, the appellant filed a notice to act in person and filed an application for review dated 28th March 2019 which was determined in a ruling delivered on 30th April 2019.

10. The hearing was then scheduled to resume on 18th September 2019 on the eve of which the appellant filed an application for stay of proceedings which was canvassed and a ruling in respect thereof delivered on 7th November 2019. Other applications by the appellant (dated 5th December 2019 and 24th June 2021) followed thereafter.

11. Justice Fred Nyagaka then took over the conduct of the matter and disposed of numerous applications by the appellant. On 6th June 2022, the respondent (PW2) was recalled and cross examined at length by the appellant on that date and on 18th July 2022 after which the respondent closed his (the plaintiff's) case.

12. The defence hearing commenced on the same day. The appellant testified as DW1. On 14th November 2022, Sharon Gerald, Land Registrar, Trans Nzoia County, testified as DW2. Thereafter, the appellant indicated that he had two more witnesses to call and that he was indisposed, and the matter was adjourned.

13. On 23rd February 2023, after other intervening adjournments, the appellant called George Wambura advocate as DW3 after whose testimony the appellant applied for and was granted adjournment to call other witness.

14. What followed was a preliminary objection filed by the appellant contending, among other things, that the respondent's suit was time barred under the *Limitation of Actions Act* and that the suit was res judicata. After it was canvassed, the same was dismissed. Thereafter the appellant was directed to proceed with trial. He applied for adjournment, which was declined. The court directing the appellant that if he did not wish to tender evidence, he closes his case. The defence case was ordered closed on 23rd February 2023. Thereafter submissions were filed and the impugned judgment subsequently delivered on 16th October 2023 hence the present appeal. We will advert to that procedural history later.

15. This being a first appeal, our mandate as provided in Rule 31(1)(a) of the Court of Appeal Rules is to re-appraise the evidence, evaluate it and draw our own inferences bearing in mind, and making allowance for the consideration that unlike the trial court, we have not ourselves seen or heard the witnesses. As stated by the Court in Paramount Bank Limited vs. First National Bank Limited & 2 Others (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR):

> " A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the *Civil Procedure Act*, a first Appellate Court can appreciate the entire evidence and come to a different conclusion."

16. During trial, and as already noted, the first witness to testify for the respondent was Bainito Ombudi Hussein (PW1) a Land Surveyor. PW1 was, at the time of his testimony, the County Surveyor. He produced the RIM map of the area from the Kitale Survey Office showing the location of the property. He also produced a Folio Register Number 226/194 showing how the survey was conducted and the measurements thereof. He stated that on the plan the plot was referred as 2116/1124, and that the Municipality was later given Blocks and the number changed to Block 12/26. He produced a Conversion Table prepared by the Director of Surveys. The witness explained the process of alienation of land being planning, survey, allotment and then lease preparation; that the process was complied

with in the present case. He identified the Certificate of Lease in respect of the property that was issued as a result.

17. The respondent testified as PW2. He stated that he is a medical practitioner and a businessperson resident in Kitale; that the property was allocated to him in 1991 through an allotment letter dated 28th November 1991. That he made the requisite payment by bankers' cheque and was issued with a receipt; that the original allotment letter got misplaced and he made a report to the police and obtained a police abstract in that regard. He produced the police abstract, copy of the allotment letter, PDP, receipt issued in respect of the Banker's cheque. He stated that originally, the plot was number 2116/1124 which was converted to Kitale Municipality Block 12/26 as indicated in the Conversion Table; that a Lease was issued to him on 5th December 2001 and a Certificate of Lease issued to him on the same date, both of which he produced. He also produced the green and white cards showing extracts of the register.

18. It was his testimony that without his consent, the appellant moved into the property, occupied it in 2008 and constructed Mabati structures and toilets and produced photographs depicting the same and urged the court to order his removal and for the dismissal of the appellant's counterclaim.

19. Cross-examined at length by the appellant, the respondent stated that the allotment letter referred to the property as an un-surveyed residential plot in Kitale Municipality but contained no plot number; that he did not sign the allotment letter; that he could not recall when the property was surveyed and was only given documents after the survey was completed; that he was given the allotment in 1991 and the title issued to him in 2001 after he had cleared the payment of rates; that the title was issued to him by the Commissioner of Lands was genuine.

20. When shown a Sale Agreement dated 14th March 1996 between the appellant and Moses Wabomba Kwengu as seller and the appellant as buyer, he acknowledged that according to that agreement, the appellant was indicated as having bought the property 2116/1124 from the said Moses Wabomba Kwengu for Kshs. 750,000.00. He denied that he irregularly acquired the property stating that he was cleared by the DCIO from the allegations of unlawful acquisition of the property.

21. Cross examined on the differences in his names as appearing in the pleadings and the documents, he maintained that the names refer to him and the differences are inconsequential.

22. The appellant on the other hand testified that he purchased Plot No. 2116/1124 from one Moses Wabomba Kweyu (Kweyu) on 14th March 1996; that Kweyu was the allotee of un- surveyed residential plot 2116/1124 Kitale Municipality (an excision 2116/402 and 403) as evidenced by the survey plan referenced as Folio Register 22/194 generated on 7th September 1992, letters of allotment, survey plan and Deed Plan No. 174447. He stated that the respondent orchestrated his arrest and prosecution in Kitale CMCRC No. 3070 of 2008 for the offence of forcible detainer, but he was acquitted by the court on 23rd September 2011; that the respondent's title to the property was investigated and found to be fraudulent and the respondent admitted holding a forged letter of allotment dated 28th November 1991 that gave rise to the title to the property.

23. In support of his case, the appellant produced letters of allotment for Plots 12, 13 and 14 all dated 13th June 1991; survey plan No 226/194; sale agreement dated 14th March 1996; letter from Kitale Physical Planning Office dated 20th April 2009; letter from Kitale District Land Registrar dated 31st January 2011; RIM dated 6th March 2017; letter from ODPP dated 7th August 2018; letter from DCI dated 14th September 2018; Copy of RIM; and Transfer Form dated 28th June 1994.

24. In cross examination, the appellant stated that he did not have any title showing that either he or Kweyu was registered as the owner of Plot 2116/1124 Kitale Municipality.

25. The next defence witness was the Land Registrar of Trans Nzoia County, Sharon Gerald, (DW2). She stated that based on Ministry of Land records where she was employed, the lease in respect of the property was in the name of the respondent; that the lease was registered in Kitale on 5th December 2001; that by a letter dated 31st January 2011, the respondent was given notice to comply with the conditions of the lease; and that the respondent responded to it; and that based on the lease document and a Certificate of Lease issued to the respondent, the respondent was granted a lease for a term of 99 years.

26. George Wambura (DW3) a retired Advocate of the High Court of Kenya stated in his testimony that on 28th June 1994 (sic), at the request of Kweyu, he witnessed a "Form of Transfer" in relation Parcel No. 2116/1124 Kitale Municipality; that Kweyu identified himself with his national Identity Card, signed the Form of Transfer which he, DW3, countersigned. He stated that he did not verify whether Kweyu was the owner of the property; that the Transfer Form did not bear any seal or stamp of the Land Registrar nor did it provide for the signature of the appellant, but it was meant to transfer the property.

27. Having considered the evidence and the submissions, the learned Judge of the ELC in the rather lengthy judgment dealt with a myriad of issues on which the court had been addressed and in respect of which the trial court found: there was no public interest in the litigation; the suit could not be defeated for non-joinder of parties; despite there being no pre-trial conference, the suit progressed well without prejudice to the parties; that the appellant dragged the hearing of the suit by his frivolous applications and the court was not to blame; that failure to issue a demand letter would be relevant in an award of costs; the appellant acquiesced in the misnomer of the respondent by filing a defence, an amended defence and even a notice of preliminary objection and could not resile on his actions; the subject suit was not a reopening of Kitale Criminal Case 3070 of 2008; that conversion is a factual matter that need not have been pleaded; the respondent is the lawful owner, to the exclusion of the appellant, of the property initially registered as L.R. No. 2116/1124 Kitale Municipality and converted to Kitale Municipality Block 12/26; the appellant is in occupation and a trespasser on the property; there was no proof of the allegations of fraud against the respondent; the respondent satisfactorily explained the reason for failing to comply with condition 2 of the letter of allotment issued to him by failing to develop the property; and that the respondent failed to prove his claim for mesne profits.

28. Ultimately, as already indicated, the court declared the respondent as the owner of the property and ordered the appellant to vacate.

29. During the hearing of the appeal before us on 24th April 2024, the appellant appearing in person relied on his written submissions which he orally highlighted. Learned counsel for the respondent Mr. Nyamu also relied on his written submissions which he orally highlighted.

30. Urging the appeal, the appellant submitted that the Judge unfairly admitted the respondent's documents into evidence whose authenticity was questionable; some were copies while others were certified by unauthorized persons; that some of those documents were public documents under Section 79 of the *Evidence Act* and there was no compliance with Section 68 and 80 of the *Evidence Act*. In support, the appellant cited the case of Attorney General vs. Torino Enterprises Ltd (2022) eKLR.

31. On the ownership of the property, the appellant submitted that he proved his counterclaim; that none of the witnesses faulted the sale agreement he entered into with Kweyu over L.R. No. 2116/1124 Kitale Municipality which he has occupied for over 27 years, and he is an innocent purchaser for

value to the exclusion of the respondent; that the respondent's title on the other hand was not backed by a valid survey plan, certified beacon certificate, certified Registry Index Map from the Director of Survey to support its existence on the ground; that the Commissioner of Lands acted illegally and fraudulently in accepting payment from the respondent and issuing the respondent with an invalid allotment letter dated 28th November 1991; that no proof was presented to show that the respondent was initially registered as owner of L.R. No. 2116/1124 as opposed to L.R. No. 2116/VII/38 Kitale Municipality which the learned Judge failed to pronounce whether it was converted; that the Judge failed to appreciate that the respondent did not produce his application letter to the Commissioner of Lands seeking allocation of the property.

32. It was urged that in any event, the respondent having defaulted in complying with the terms and conditions of allocation regarding development, the Judge should have held that the property reverted to the National or County Government.

33. Moreover, the appellant further submitted, the trial court lacked jurisdiction to determine the matter, the suit having un-procedurally been transferred from the High Court to the ELC and furthermore the matter was res judicata on account of Kitale SPMCC No. 334 of 2011.

34. According to the appellant, the learned Judge erred in delivering judgment without first having made a site visit to ascertain whether the property exists; that he was not given a chance to call crucial witnesses including the in charge of DCI- Land Fraud Unit, a licensed surveyor and Kweyu; that the proceedings were conducted unfairly and the trial court wrongly relied on the evidence of an incompetent witness PW1; that the parties were denied an opportunity to participate in a pretrial conference and to frame the issues for determination. It was submitted that the Judge erred in failing to award the appellant costs for defending the claim for mesne profits which was dismissed.

35. Mr. Nyamu, on the other hand submitted that as demonstrated by the evidence of PW1, the property, the title known as Kitale Municipality Block 12/26 resulted from was a conversion of Plot No. 2116/1124 and the respondent is the registered proprietor; that it was established that the different reference numbers refer to the same property; that the appellant failed to prove fraud in the acquisition of the property by the respondent; that none of the allotment letters that the appellant produced refer to Plot No. 2116/1124; that despite the appellant's claims that he purchased the property from Kweyu, he did not produce any evidence of ownership by Kweyu; and that the appellant's counterclaim was rightfully and properly dismissed by the trial court as no evidence was present to support the claims of fraud.

36. It was urged that the respondent demonstrated that he has been paying rent to the County Government whilst the appellant, while insisting he owns the property, tendered no evidence to demonstrate payment of rates and land rent; that although the appellant is in possession of the property, he led no evidence to justify his continued occupation of property that justifiably belongs to the respondent.

37. Counsel submitted that contrary to the claims by the appellant, he was given every opportunity by the trial court to prosecute his claim, was granted many adjournments to call his witnesses to no avail; and that there were no procedural infractions by the trial court in admitting documents into evidence.

38. Although the appellant has raised a myriad of complaints with the judgment of the trial court, the overarching issue for determination is whether the learned Judge erred in declaring the respondent the owner of the property. Related to that is the question whether the appellant established fraud as against the respondent to the required standard to impeach the respondent's title to the property. Other issues are whether the suit was res judicata, and whether the appellant's rights to fair trial were violated by the trial court.

39. We begin with the issue whether the learned Judge erred in declaring the respondent the owner of the property. As already indicated, the respondent in his plaint asserted that he is the registered owner of the property, comprised in Title No. Kitale Municipality Block 12/26 measuring 0.5532 of a hectare. He averred that the appellant had trespassed on it. The appellant on the other hand in his defence and counterclaim asserted that the respondent's title was obtained fraudulently; that the parcel of land claimed by the respondent and purported to be Kitale Municipality Block 12/26 is different from the parcel of land occupied by the appellant, namely, L.R. No. 2116/1124 Kitale Municipality. The appellant prayed for a declaration that he is the legal proprietor of L.R. No. 2116/1124 Kitale Municipality to the exclusion of the respondent and that the Certificate of Lease held by the respondent "over the manufactured Title No. Kitale Municipality Block 12/26 be recalled for cancellation or be de-registered/revoked."

40. The respondent produced in evidence a Certificate of Lease in his favour in respect of the property issued by the Kitale District Registry under the since repealed Registered *Land Act* certifying him as the registered proprietor of the leasehold interest for a term of 99 years from 1st December 1991. He also produced a Certificate of Official Search showing the entry of his name in the register on 5th December 2001.

41. Section 27 of the repealed Registered *Land Act* provided in relevant part that the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease. Section 28 of that Act provided that the rights of a proprietor shall not be liable to be defeated except as provided in the Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register.

42. The *Land Registration Act* Cap 300, the successor of the repealed Registered *Land Act*, under Section 26 provides that a title, acquired by fraud, or misrepresentation, where a person is proved to be a party can be attacked. Similarly, a title acquired illegally, un-procedurally or through a corrupt scheme can be vitiated. That Section provides:

> " 26.
>
> (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
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> a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
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> b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."

43. In the case of Funzi Development Ltd & Others vs. County Council of Kwale, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR this Court stated that:

> "...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title."

44. In effect, whereas a certificate of title is to be taken as prima facie evidence that the person named as the proprietor is the absolute and indefeasible owner, it can be challenged if it is demonstrated that it was obtained through fraud, misrepresentation, illegally, un-procedurally or by way of a corrupt scheme.

45. In the case of Embakasi Properties Limited & Another vs. Commissioner of Lands & Anor [2019] eKLR the Court expressed that:

> "Although it has been held time without end that the certificate of title is: "....conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof", it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the *Land Registration Act*, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired "illegally, un-procedurally or through a corrupt scheme".

46. Sections 107 and 109 of the *Evidence Act* provide as follows:

> " Section 107(1) – "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."
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> And Section 109 – "the burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person."

47. It is an established legal principle that fraud must be specifically pleaded and strictly proved. For instance, in Vijay Morjaria vs. Nansingh Madhusingh Darbar & another, Civil Appeal No. 106 of 2000 [2000] eKLR, Tunoi, JA expressed 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 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..."

48. The particulars of fraud that were pleaded by the appellant as already stated were that the respondent obtained documents which were all forgeries including a letter of allotment dated 28th November 1991; that the respondent misled the Ministry of Lands and was issued with a fake title number Kitale Municipality Block 12/26 and caused the same to be registered in his name through corruption and in breach of the special conditions of the lease. However, beyond the claims, no evidence was led by the appellant in support.

49. In Kinyanjui Kamau vs. George Kamau [2015] eKLR the Court expressed 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:
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> > "...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..."

50. The evidence shows that after the respondent was required to surrender his title in respect of L.R. No. 2116/VII/38, the Commissioner of Lands offered the respondent an un- surveyed residential plot by a letter of allotment dated 28th November 1991 which required the respondent to pay stand premium and other charges amounting to Kshs. 33,190.00; that although he belatedly made the payments, he was issued with a Lease for 99 years over Title No. Kitale Municipality Block 12/26. He explained that the allotment letter did not have a reference number for the plot as it was un-surveyed at the time; that the survey was done, which gave rise to Plot No. 2116/1124 which was later converted to give rise to Title No. Kitale Municipality Block 12/26.

51. The appellant on the other hand produced allotment letters in respect of residential Plot No. 12, 13 and Plot No. 14 Kitale Municipality addressed to Moses Wabomba Kweyu, as well as Sale Agreement dated 14th March 1996 between Moses Wabomba Kweyu as vendor and himself in respect of Plot No. 2116/1124. He also produced a Form of Transfer dated 28th June 1994 by which the said Moses Wabomba Kweyu transferred 'all his right title and interest' in Plot No. 2116/1124 to the respondent.

52. PW1 explained how Title No. Kitale Municipality Block 12/26 came into being following a conversion from Plot No. 2116/1124. As the learned trial judge summed it:

> " The evidence of PW1 one Bainito Ombudi Hussein, the County Surveyor, on the existence, survey and conversion of the suit land was clear and unshaken. He produced as P. Exhibit 1 a certified true copy of the Registry Index Map (R.I.M.) of Kitale Block 12 which showed the position of the parcels of land as were on the ground. He stated further that land parcel Kitale Municipality Block 12/26 existed on the
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> RIM. He also produced as P. Exhibit 2 a Folio Register in respect of plot Kitale Municipality Block 12/26, being, F/R Number 226/194 which showed how the survey was conducted and the measurements thereof indicating the acreage on the title. That on the Plan the plot number was referred as 2116/1124.
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> He stated that plot number 2116/1124 was changed later to Kitale Municipality Block 12/26. He produced as P. Exhibit 3 the certified copy of a conversion table prepared by

the Director of Surveys in respect of the whole of Kitale Municipality. About the time of conversion, he said he did not have firsthand information as to when it was done but it was done by government through the Director of Survey.

The Defendant called DW2, one Sharon Gerald, a Land Registrar in Trans Nzoia County lands office. She gave evidence that turned out to be in favour of the Plaintiff. Her evidence as to who was the owner of the suit land was unshaken too: it was the Plaintiff."

53. Apart from demonstrating the many efforts he made through, for instance, complaints to the Directorate of Criminal Investigations, instigating the Land Registrar to forfeit the respondent's lease for non-compliance with the special conditions of the lease, and appeals for cancellation of the respondent's title, he tendered no evidence to support the claims that the acquisition of the property was irregular, unprocedural or through corruption on the part of the respondent as the appellant claimed. Fraud, as this Court stated in the case of Fuji Auto Trading Company Limited vs. National Bank of Kenya Limited (Civil Appeal 383 of 2019) [2021] KECA 168 (KLR) (Civ) (19 November 2021) (Judgment) cannot be inferred. There ought to be cogent evidence. Consequently, we are unable to fault the finding by the trial judge, which we uphold, that:

> " ...that plot number LR. No. 2116/1124 Kitale Municipality measuring 0.5532 hectares and Kitale Municipality Block 12/26 of similar measurements are one and same, contrary to the averment and oral contention by the [appellant] save that the former was the number the same parcel of land bore before being converted to the new land regime, R.L.A. Chapter 300 (now repealed). I find further that the [respondent] is the lawful owner of all that parcel of land initially registered as LR. No. 2116/1124 Kitale Municipality and converted to Kitale Municipality Block 12/26 to the exclusion of the [appellant]"

54. As to whether the suit was res judicata, the appellant raised this matter by way of a preliminary objection. It was canvassed before the learned Judge through submissions and determined in a lengthy ruling dated 2nd March 2023 dismissing the objection. That ruling is not the subject of the present appeal. It is not properly raised in this appeal, and we decline the invitation to address it.

55. As to whether the appellant's rights to fair trial were violated by the trial court, the appellant complains that no pre-trial was conducted, and that he was deprived an opportunity to frame issues and to call witnesses. The appellant has taken issue with the non-compliance with Order 11, failure to award costs on the dismissed claim, failure to calculate mesne profits and refusal to call essential witnesses.

56. As regards Order 11, the learned Judge made a finding to the effect that despite there being no pre-trial conference, the suit progressed well; that the appellant dragged the hearing of the suit when he filed frivolous applications and was blaming the court for delaying hearing of the suit. In our view, all the issues raised by the appellant in his amended defence and counterclaim and in his submissions were exhaustively addressed by the trial court which made pronouncement on all the issues raised in his pleadings.

57. Whereas pre-trial conference is a critical part of case management, we discern no prejudice suffered by either party for omission to hold a pre-trial conference in this case. As indicated, all the matters raised by the parties were exhaustively addressed by the learned Judge.

58. As regards costs for the claim for mesne profits which was declined, the general principle is that costs are in the discretion of the court and generally they follow the event. The event for this purpose was that the respondent substantially succeeded in his claim while the appellant failed in his defence and counterclaim. We are unable to fault the Judge in the way he exercised the court's discretion in that

regard. See Kisuaa & 2 others vs. Kisanda Kilanda Enterprises (Civil Appeal 428 of 2018) [2023] KECA 373 (KLR); and Mbogo vs. Shah [1968] EA 93, regarding the circumstances when the Court may be justified to interfere with the exercise of judicial discretion.

59. On the alleged refusal of opportunity to call defence witnesses, we have earlier in this judgment set out to an extent, the procedural history before the trial court. The record of the trial court is replete with all manner of applications the subject of numerous rulings and applications for adjournments made by the appellant which give the impression that the appellant was determined to drag out the matter endlessly. It is no wonder that in a ruling delivered by the learned Judge on 5th December 2022 in respect of the appellant's 'preliminary objection' on jurisdiction made midstream, the Judge stated:

> " The applicant is a man of zeal: fully determined to make applications after another in this matter. The obvious reason is for him to delay the matter as much as he possibly can. This is despite the fact that this court has on two occasions ruled that the applicant files not any application without leave of the court. Since he understands the orders of the court he resorted to a clever way of raising the present issue..."

60. We hold that there is no merit in the complaint that the appellant was denied an opportunity to call witnesses. He was accorded every opportunity to do so but it is evident, based on the procedural history that he had no intention of having the matter concluded.

61. All in all, the appeal is devoid of any merit. It is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF OCTOBER, 2024.**

**S. GATEMBU KAIRU, FCIArb**

**.....**

**JUDGE OF APPEAL**

**F. OCHIENG**

**.....**

**JUDGE OF APPEAL**

**W. KORIR**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**