



**Elizabeth Njeri Kamau (Suing as the Personal Representative of the Estate of Wainaina Mbuthia Ranji alias Wainaina Mbuthia Gachoki (Deceased) v Karanja & another (Civil Appeal 21 of 2018) [2022] KECA 51 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 51 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 21 OF 2018  
RN NAMBUYE, PO KIAGE & S OLE KANTAI, JJA  
FEBRUARY 4, 2022**

**BETWEEN**

**ELIZABETH NJERI KAMAU (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF WAINAINA MBUTHIA RANJI ALIAS WAINAINA MBUTHIA GACHOKI (DECEASED) ..... APPELLANT**

**AND**

**CYRUS JOSEPH KARANJA ..... 1<sup>ST</sup> RESPONDENT  
DISTRICT LAND REGISTRAR, KIAMBU ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the Judgment and Decree of the Environment and Land Court at Nairobi (P. Nyamweya, J.) dated 16th April, 2015 in E&LC No. 166 of 2007)*

**JUDGMENT**

1. This is a first appeal arising from the judgment and decree of the Environment and Land Court at Nairobi (P. Nyamweya, J.) (as she then was) dated and delivered on 16th April, 2015 in Nairobi ELC Cause No. 1666 of 2007.
2. The background to the appeal albeit in a summary form is that the appellant took out a plaint dated 11th October, 2005 against the respondents allegedly in her capacity as the personal representative of the estate of Wainaina Mbuthia Ranji alias Wainaina Mbuthia Gachoka (deceased). In the plaint, the appellant averred, inter alia, that on or about 12th June, 1958, the deceased who was a father-in-law was registered as the absolute proprietor of LR No. Ndumberi/ Ting'ang'a/448 (hereinafter referred to as the original suit property). On or about 10th July, 1995 the 1st respondent while in cahoots with the 2nd respondent and without her knowledge, consent and or participation illegally and wrongfully caused title to the original suit property to be subdivided into parcel numbers LR No. Ndumberi/ Ting'ang'a/1937, 1938 and 1939 (hereinafter referred to as the resulting suit titles), and purported to



cause parcel number 1937 to be registered in her sole names, parcel number 1938 in the joint names of the appellant and the 1st respondent while parcel number 1939 was registered in the 1st respondent's sole names.

3. To her knowledge, the 1st respondent never laid any claim to any portion of the original suit property before the demise of the deceased on 10th January, 2002. But only did so in 2004, prompting the appellant to carry out a search on the title to the original suit property. That is when she discovered the fraud whose particulars may be rephrased as purporting to subdivide the original suit property into the resulting suit titles without effecting those changes on the ground, and obtaining the necessary valid transfer and consents of the relevant area Land Control Board.
4. In a bid to forcefully take possession of the original suit property from her, the 1st respondent and those working in cahoots with him, caused the area police and CID to variously prefer close to eight (8) criminal charges against her and her eldest son and therefore prayed for orders to cancel titles for all the resulting suit properties in favour of the restoration of title to the original suit property in the names of the deceased.
5. In rebuttal, the 1st respondent filed a defence and counterclaim dated 26th January, 2006. In it, while conceding that the original suit property was originally registered in the names of the deceased denied that it was subdivided after the deceased's death. It was his assertion that the subdivision took place during the lifetime of the deceased into the three resulting suit properties, one of which he purchased from the deceased in the year 1995 during the deceased's lifetime and with the full knowledge of the appellant. He took possession of the portion he had purchased from the deceased and settled thereon in January 1995 and even buried thereon, his own brother in the year 2001 without any objection from either the deceased or the appellant. He denied any illegal, wrongful or fraudulent dealings with regard to the transactions that led to the closure of title to the original suit property giving rise to issuance of the titles to the resulting suit properties and put the appellant to strict proof.
6. In his counterclaim, the 1st respondent reiterated that he purchased the appellant's half share in parcel number 1938, following which the appellant attended the area Land Control Board and gave consent for the transfer of her half share in parcel number 1938 to him and that he has ever since enjoyed quiet and uninterrupted possession, occupation and use of the said parcel and prayed for the appellant's suit against him to be dismissed with costs and the counterclaim to be allowed with costs to him.
7. The appellant filed a reply to defence and defence to counterclaim dated 30th January, 2006, basically reiterating her averments in the plaint and denying the 1st respondent's averments in the defence and put him to strict proof.
8. In her defence to the 1st respondent's counterclaim, she asserted that the 1st respondent never purchased any portion of the original suit property from the deceased during the lifetime of the deceased, denied capacity to own or sell any portion of the original suit property as according to her, the same was still registered in the names of the deceased, maintained that all the transactions that resulted in the subdivision of the original suit property into the resulting suit properties were all fraudulent, and that the 1st respondent had never settled and or made use of any portion of the original suit property. Neither did she consent to any of the impugned subdivisions.
9. The cause was canvassed through the respective parties rival pleadings, oral testimony and 1st respondent's written submissions.
10. In her testimony to court the appellant asserted that her late husband, Peter Ndungu who was the only son of the deceased, died in 1992 and was buried on parcel number 1937 on which she resides. She was a stranger to the 1st respondent's allegations that the original suit property was subdivided in 1995



- during the lifetime of the deceased, denied being party to any Land Control Board consent procedures vide which her half share in parcel number 1938 was divested from her in favour of the 1st respondent.
11. The Kiambu Land Registrar, Mr. Wilfred Migiro stated that the registered proprietor of the original suit property was Wainaina Mbuthia who subsequently changed his name on 10th July, 1994 to Wainaina Mbuthia Ranji. The original title was subdivided in 1995. Parcel numbers 1937 was transferred to Elizabeth Njeri Kamau, the appellant, 1938 initially registered in the names of the deceased on 3rd September, 1995 was subsequently registered in the joint names of Cyrus Joseph Karanja and Elizabeth Njeri Kamau the 1st respondent and the appellant respectively in the same year, 1995. On 18th January, 2004 the appellant's half share in the said parcel was transferred to the sole proprietorship of the 1st respondent while parcel number 1939 was transferred to the 1st respondent on 10th July, 1995.
  12. The 1st respondent's evidence on the other hand was that he had personal knowledge that the original suit property was subdivided in 1995 during the lifetime of the deceased into parcel numbers 1937, 1938 and 1939. Parcel number 1937 was transferred to the appellant, 1938 registered in his and appellant's joint names while 1939 registered in his sole names. He maintained the appellant was privy to all the land transfer transactions vide which her half share in parcel number 1938 was divested from her and transferred to him while parcel number 1939 was given to him ex gratia because he took care of the deceased. He denied defrauding the appellant of her half share in plot number 1938 which he allegedly purchased from her for value.
  13. At the conclusion of the trial, the trial Judge analyzed the record and identified issues for determination namely, whether:
    - i. The subdivision of LR No. Ndumberi/Ting'ang'a/442 (read 448) and subsequent various transfers of the sub-divided parcels of land namely, LR No. Ndumberi/Ting'ang'a/1937, 1938 and 1939 was fraudulent.
    - ii. The transfer of appellant's half share LR No. Ndumberi/ Ting'ang'a/1938 to the 1st respondent was fraudulent.
    - iii. The parties herein are entitled to the remedies sought.
  14. Starting with the first issue, the Judge took into consideration the decision of the predecessor of this Court in the case of *Ratilal Gordhanbhai Patel vs. Lalji Makanji [1957] E.A 314* as approved by this Court in the case of *Joseph Karisa Mutsonga vs. Johnson Nyati [1984] eKLR* and *Koinange & 13 Others vs. Koinange [1986] KLR 23* on the threshold for sustaining a plea of fraud, and applying the above threshold to the rival evidence assessed on record dismissed the appellant's allegations of fraud as in the Judge's opinion, there was evidence on the record to demonstrate sufficiently that the subdivisions of the original suit property into the three resulting suit properties were carried out in 1995 during the lifetime of the deceased. Neither was there any evidence that these were instigated by the 1st respondent.
  15. On the second issue, the Judge took into consideration the decision in the case of *Munyu Maina vs. Hiram Gathiba Maina [2013] eKLR* for the holding, *inter alia*, that "when a registered proprietors root of title is under attack, it is not sufficient for such a proprietor to dangle the instrument of title as proof of ownership. He/she must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrance including any and all interests which need not be noted on the register."



16. Applying the above threshold to the rival evidence on record ruled that the 1st respondent had not discharged the burden of proof cast upon him by the appellant, that she was a stranger to all the transactions that resulted in her half share in the said suit property being divested from her and vested in the sole names of the 1st respondent, for the 1st respondent's failure to demonstrate proof of existence of a sale agreement between him and the appellant and payment of the alleged purchase price of Kshs.350,000.00 to the appellant. Nor that she attended the Land Control Board for purposes of consenting to the transfer of her half share in the said parcel in favour of the 1st respondent.
17. The Judge also invoked section 34 of the *Evidence Act* and admitted as evidence a record of proceedings in Criminal Case No. 2532 of 2004 in fact tendered in evidence by the 1st respondent. In these proceedings, one, Peter Muigai Kibiu (PW3), a Land Registrar had testified on oath with respect to the alleged transfer of the appellant's half share in LR No. Ndumberi/Ting'ang'a/1938 to the 1st respondent. It was this witnesses position that there were irregularities in the manner the transfer was effected in that the correct stamp duty was not paid, the consent form was both in carbon and in ink, neither was it dated. The transfer was for the whole parcel instead of a half share. Neither was any consideration indicated. On the basis of the totality of the above, the Judge held the view that in the face of the irregularities pointed out above by the witness in the criminal proceedings, the certificate of title issued to the 1st respondent as sole proprietor of parcel number LR No. Ndumberi/Ting'ang'a/1938 was tainted and could not therefore be sanctioned. It was therefore amenable to rectification pursuant to section 143 of the Registered *Land Act* and section 80 of the *Land Registration Act*, 2012, especially when the 1st respondent had not denied taking part in the transactions that resulted in the appellant being divested of her half share in the said parcel and the 1st respondent registered as the sole proprietor of the same parcel.
18. On remedies the Judge relied on the case of *Trouistik Union International & Another vs. Jane Mbeyu & Another [1993] eKLR* and section 29 of the *Civil Procedure Act* and ruled that the appellant had no capacity to act as a legal representative of the deceased estate for want of possession of a grant of representation to the estate of the deceased and dismissed appellant's claim on behalf of the estate of the deceased but granted relief for the restoration of her half share in parcel number 1938 under the prayer "any other relief that the court would deem fit to grant" and issued orders as follows:
- “1. The registration of Cyrus Joseph Karanja as the sole proprietors of title number Ndumberi/Ting'ang'a/1938 and all subsequent proprietors herein thereof be cancelled forthwith, and the registration of the said title shall revert back to Cyrus Joseph Karanja and Elizabeth Njeri Kamau as joint proprietors in equal shares.
  2. Cyrus Joseph Karanja and Elizabeth Njeri Kamau shall jointly and equally meet the costs of the said registration of Ndumberi/Ting'ang'a/1938 in their joint names.
  3. Elizabeth Njeri Kamau be and is hereby permanently restrained from interfering in any manner with the occupation and possession by Cyrus Joseph Karanja of land parcel Ndumberi/Ting'ang'a/1939.
  4. Each party shall meet their respective costs of this suit.”
19. The appellant was aggrieved and filed the appeal under consideration raising fifteen (15) grounds of appeal which we find prudent not to set them out seriatim as the appeal was never prosecuted.



20. The 1st respondent was partially aggrieved with the trial Judge's decision and filed a cross-appeal raising six (6) grounds of cross-appeal subsequently condensed into three (3) thematic issues in his written submissions dated 15th July, 2019 namely whether:
- i. The transfer of the appellant's half share in parcel number LR No.Ndumberi/Ting'ang'a/1938 to the cross-appellant was fraudulent.
  - ii. The absence of a sale agreement and or consideration document warranted the order taking away the 1st respondent's right as sole proprietor of land parcel number LR No. Ndumberi/Ting'ang'a/1938; and, lastly,
  - iii. The trial court restricted itself to the orders sought before it by the respective parties herein.
21. In support of issue number 1, the cross-appellant relies on the definition of fraud as set out in *Black's Law Dictionary* namely, that fraud consists of some deceitful practice or willful device resorted to with the intention to deprive another of his right or in some manner to do him an injury and the case of [\*Gichinga Kibutha vs. Caroline Nduku \[2018\] eKLR\*](#) on the essentials of common law deceit namely; false representation of an existing fact; with the intention that the other party should act upon it; the other party did act on it; and the party suffered damage, and, faults the trial Judge for the failure to properly appreciate and take into consideration the appellant's admission that she was charged, tried and convicted in Criminal Case No. 2532 of 2004 for giving false information with regard to the transaction that led to the divestation of her half share in parcel number 1938 and causing it to be registered in the sole names of the 1st respondent as a sole proprietor and against which conviction she never appealed; and that she had also admitted that she was also declined an injunction relief with regard to the same parcel of land for her failure to disclose in her documentation in support of that application for the said relief that she had been convicted in Criminal Case No. 2532 of 2004 for giving false information with regard to transactions touching on parcel number 1938.
22. On proof of fraud, the cross-appellant relied on the same case law that the Judge had relied on for the threshold for sustaining a plea of fraud and invites this Court to find that the appellant did not discharge her burden of proof of fraud against him in so far as divestation of her half share in parcel number 1938 in his favour was concerned. This Court was urged to find that the trial court misdirected itself in concluding that the appellant signed the transfer forms not knowing what she was executing contrary to the evidence on the record in the criminal proceedings which indicated explicitly that the transfer and consents were subjected to scrutiny by a document examiner whose results indicted explicitly that those documents were duly executed by the appellant hence his assertion that he followed the right procedure in effecting the transfer of the appellant's half share in LR No. Ndumberi/ Ting'ang'a/1938 in his favour. His entitlement to the above suit property should not therefore have been vitiated by the trial court on the mere allegation by the appellant that she did not give her consent to the said transaction and that she executed the transfer and consent documents under the impression that they were for electricity supply well knowing that he was a mechanic and did not work for any electricity supply company. He also faults the trial Judge for the failure to appreciate and take into consideration the appellant's evidence on oath that she went with the 1st respondent to the Land Control Board where she gave her consent.
23. According to him the errors noted on the transfer documents as observed by the trial Judge did not warrant the cancellation of title number LR No. Ndumberi/Ting'ang'a/1938 nor rip the cross-appellant of his entitlement to the whole of the said property a position this Court urged to reverse.



24. In support of issue number 2, he relies on the proviso to section 3(3) of the *Law of Contract Act* and the case of *Willy Kimutai Kitilit vs. Michael Kibet* [2018] eKLR and submits that his claim of entitlement to the whole parcel No. 1938 should not have been defeated solely for want of production of an agreement of sale or proof of payment of attendant consideration.
25. In support of issue number 3, the cross-appellant relies on the decision in the case of *Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others* [2014] eKLR in support of his submission that there was no specific prayer in the appellant's plaint that sought rectification of title to parcel number 1938 and restoration of the appellant's names therein as a joint owner. It was therefore erroneous for the trial Judge to grant relief to the appellant not specifically prayed for in her pleading solely because she had sought "any other relief that the court may deem fit to grant" and decline to grant him the relief specifically prayed for in his counter-claim namely, quiet possession and enjoyment of parcel numbers LR No. Ndumberi/Ting'ang'a/1938 and 1939. On the totality of the above submissions, he urged the court to dismiss the appeal in its entirety and allow the cross-appeal in its entirety.
26. The 2nd respondent both in its written submissions and digest of authorities condensed the fifteen (15) grounds of appeal raised in the memorandum of appeal into six (6) issues and addressed them as such. We find no basis to set these out on the record and address them for want of prosecution of the appeal by the appellant. The submissions are however silent with regard to the cross-appeal.
27. This is a first appeal. We remind ourselves that, our duty as a court of first appeal donated by section 29(1) of this Court's Rules is to re-evaluate, re-analyze and re-consider the evidence adduced before the trial court and draw out our own conclusions thereon. In *Peters v. Sunday Post Ltd* [1958] EA 424, the Court held that;

"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide"

See also *Gitobu Imanyara & 2 others vs Attorney General* [2016] eKLR, wherein this Court stated that;

"[A]n 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 allowances in this respect"

28. We have considered the record in light of the above mandate and cross-appellant's representations in support of the cross-appeal. The issues that fall for our determination in the disposal of both the appeal and the cross-appeal are:
- i. The court is entitled to pronounce itself on the appeal notwithstanding want of its prosecution by the appellant
  - ii. The transfer of the appellant's half share in land parcel number LR No. Ndumberi/Ting'ang'a/1938 to the 1st respondent was fraudulent?



- iii. The absence of a sale agreement and or consideration document warranted the order of the court divesting the 1st respondent of the half share in parcel number LR No. Ndumberi/Ting'ang'a/1938.
  - iv. The trial Judge fell into error when she ordered rectification of the register of land parcel number LR No. Ndumberi/Ting'ang'a/1938 to restore the appellant's ownership of the half share in the said property under the prayer "any other relief as the court may deem fit to grant."
29. Starting with issue number (i), it is on record that counsel for the cross appellant at the start of the plenary hearing invited this Court to dismiss the appeal for want of prosecution. We refrained from employing our policing powers to act on that invitation for the reason that the cross-appeal was anchored on it and without it being withdrawn, first, dismissing the appeal in the manner we had been invited would have rendered the cross-appellant nonsuited on his cross-appeal. Having analyzed the cross-appeal, we now find it prudent to pronounce ourselves on the appeal and dismiss it for want of prosecution. We also find it prudent to add that as correctly found by the trial Judge, it was a non-starter in so far as the appellant purported to champion the interests of the estate of Wainaina Mbutia Gachoka without being properly appointed as an administrator of the estate of the deceased. The appeal is accordingly dismissed with no order as to costs as none were awarded by the trial Judge.
  30. Turning to issue numbers (ii), (iii) and (iv), we find these are interrelated and will be dealt with as one as the substratum of all the three is one namely, how the appellant's half share in the said parcel was divested from her and vested in the 1st respondent as the sole proprietor of the said parcel.
  31. It is common ground on the record that the subject parcel was one of the resulting subdivisions of the original suit property. It was initially registered in the names of the deceased and then subsequently registered in the joint names of the appellant and the cross appellant. The appellant initiated litigation before the trial court challenging the entire process which led to the extinction of the original suit title in favour of the titles to the resulting subdivisions. The trial Judge following a thorough analysis of the rival position before the trial court found, inter alia, that: the deceased was the sole proprietor of the original suit property, it was subdivided during his lifetime way back in 1995 giving rise to three resulting subdivisions namely numbers LR No. Ndumberi/Ting'ang'a/1937, 1938 and 1939, parcel 1937 was registered in the sole names of the appellant, 1938 initially in the sole name of the deceased and subsequently in the joint names of the appellant and the cross-appellant while 1939 was registered in the sole names of the cross-appellant.
  32. The core issue in the cross-appeal as we have already mentioned above is how the appellant's half share in parcel number 1938 was divested from her and vested in the cross-appellant to make him the sole proprietor of the said parcel. We adopt the reasoning of the Judge and our assessment set out above with regard to the evidence on how the appellant's half share was divested from her and vested in the 1st respondent.
  33. It is sufficient for us to state that two reasons were given by the Judge as to why she ruled in favour of the appellant on these three issues namely, that the documentation on the basis of which the cross-appellant anchored his counterclaim of sole proprietorship of the said parcel were tainted with illegality. Second, want of proof of purchase of the said half share by the cross-appellant by way of production of an agreement of sale between them and proof of payment of the purchase consideration.
  34. We have revisited the record on our own and considered it in light of the above position and find no error was committed by the Judge on the conclusion reached on this issue. Our reasons are as follows, firstly, the documents relied upon by the Judge in vitiating the cross-appellant's claim in his counterclaim



that he was entitled to quiet enjoyment of the whole parcel as a sole proprietor and found that these were tendered in the criminal proceedings by an official from the office of the 2nd respondent, and produced in evidence without any objection and were therefore authentic. The record of the criminal proceedings had been tendered in evidence in the civil proceedings giving rise to this appeal by the cross-appellant himself. The Judge simply considered them under section 34 of the *Evidence Act*.

35. It is therefore our finding that the Judge was entitled to act on that evidence and being documentary no oral evidence was required or permissible in law to be called for to clarify any aspect. They showed clearly the transactions were tainted and could not therefore be relied upon to sanction and or validate the change. The second reason was that since the cross-appellant claimed purchase and payment of consideration for the said half share, the onus was upon him to prove his assertions that his sole proprietorship in the said parcel was obtained procedurally which the Judge found wanting.
36. Section 107 and 109 of the *Evidence Act* Cap 80 Laws of Kenya are relevant. These provide explicitly as follows:
- 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.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
  109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
37. Since the appellant was the first contending party that she was a stranger to cross-appellant's contention that she voluntarily divested herself of her half share in the said parcel, she had the burden to demonstrate that she had no hand in that change, a burden she discharged both in her pleadings and evidence as affirmed by the trial court. The burden then shifted on to the cross-appellant to prove firstly, purchase, secondly, payment of consideration and thirdly, procedural documentation. None were laid before the trial Judge. Neither has any such basis been laid before us on appeal. All that the cross-appellant has asserted before us if we got him right is that lack of the above factual proof was not sufficient basis for denying him his right to the whole share in the said parcel. The very law he has urged us to use to protect his entitlement in the said parcel as correctly vested is the very law that the Judge used to balance the competing rival claims between him and the appellant and found the version of the appellant plausible and therefore believable, a position we have said was and still is well founded both on the facts and on the law. This is borne out by the content of the appellant's reply to defence and defence to counterclaim when she put the cross-appellant to strict proof on his assertions that appellant's half share in the said property was procedurally, lawfully and legally divested from her and vested solely in him. The cross-appellant as the party put to strict proof by the appellant was obligated both in law and in fact to prove purchase which he failed to do.
38. Turning to the mode of according the relief to the appellant, it is correctly contended by the cross-appellant that it was granted under "any other relief that the court may deem fit to grant" which the cross-appellant contends went contrary to the guiding principle that parties are bound by their pleadings.



39. The position in law on pleadings is now well settled. In *Captain Harry Gandy vs. Caspar Air Charters Limited* [1956] 23 E.A.C.A. 139 the predecessor of the court was explicit that:

“Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.”

while in *Odd Jobs vs. Mubia* [1970] E.A 476 the predecessor of the court added that:

“A court may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the issue has been left to the court for decision.”

40. In *Ole Nganai vs. Arap Bor* [1983] KLR 233 the court was explicit that a court has no power to grant orders neither pleaded nor prayed for by the parties. See also *Galaxy Paints Co. Ltd V Falcon Guards Ltd* (2000) EA 885 wherein it was held, inter alia, that:

“The issue of determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court’s determination. Unless pleadings were amended, parties were confined to their pleadings. *Gandy vs. Caspair* (1956) EACA 139 and *Fernandes vs. People Newspapers Ltd* (1972) EA 63.”

41. Our take on the above crystallized position on the binding nature of pleadings both on the parties and the court, that the appellant having pleaded for “any other relief that the court may deem fit to grant” against which the cross-appellant filed no protest or alternatively applied to have it struck out, it was sufficient invitation for the court to address it and grant it where appropriate.

42. As to whether the circumstances that gave rise to this appeal were appropriate for granting the said relief, the position we take is that taken by the predecessor of this Court in the case of *Rex Hotel Limited vs. Jubilee Insurance Company Limited* [1972] E. A 211 as approved by this Court in [Timsales Limited vs. Samuel Kamore Kihara](#) [2016] eKLR for the holding, inter alia, that “a relief that qualifies to be awarded under the above prayer is one that is consequential to the main relief.”

Herein, our position is that cancellation of the registration of the subject parcel in the sole name of the cross-appellant and restoration of the registration of the subject parcel in the joint names of the appellant and the cross-appellant was consequential to the main relief that the appellant had sought from the court, namely, cancellation of the registration of the resulting parcels and rectification of the register through restoration of the original suit title and was therefore properly awarded by the trial Judge.

43. The upshot of the totality of the above assessment and reasoning is that we find no merit in both the appeal and the cross-appeal. They are accordingly dismissed with no order as to costs. The appeal for want of prosecution as already stated above and the cross appeal for want of merit as also stated above. We affirm the judgment of the trial Judge. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**P. O. KIAGE**



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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

