



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MAKHANDIA, KIAGE & ODEK, J.J.A)

CIVIL APPEAL No. 55 of 2018

BETWEEN

RICHARD KIPKEMEI LIMO.....APPELLANT

AND

HASSAN KIPKEMBOI NGENY.....1st RESPONDENT

LAND REGISTRAR – UASIN GISHU.....2nd RESPONDENT

CHIEF LAND REGISTRAR.....3rd RESPONDENT

ELDORET MUNICIPAL COUNCIL.....4th RESPONDENT

ATTORNEY GENERAL.....5th RESPONDENT

(An appeal from the judgment of the Environment and Land Court at Eldoret (A. Ombwayo J.) dated 9th February 2018

in

Eld. ELC Pet. No. 4 of 2013)

JUDGMENT OF THE COURT

1. The suit property in this matter is Eldoret Municipality Block 7/178. Both the appellant and the 1st respondent claim title and ownership of the property. Both have title documents to the property. The trial Judge in a judgment delivered on 9th February 2018 upheld the title of the 1st respondent and cancelled the instrument of title held by the appellant. Aggrieved, the appellant has lodged the instant appeal to this Court.

BACKGROUND FACTS

2. By an amended Petition filed on 10th December 2013 before the trial court, the appellant avows that he is the registered proprietor of the suit property. That he purchased the same in December 2003 from the then registered proprietor and acquired a Lease Title in February 2004. He averred that in mid July 2012, he came to learn that the 1st respondent had a Lease Title over the same parcel of land. That the 1st respondent unlawfully and fraudulently acquired that other title to the suit property.

3. One Enock Kibiwott Kiptanui named as the 6th respondent was a party before the trial court and incidentally he is not a party in this appeal. The said Mr. Kiptanui filed a plaint on 31st August 2012 in the High Court at Eldoret being Civil Suit No. 181 of 2012. He filed suit against the appellant herein. Mr. Kiptanui also alleged that he was the owner of the suit property. The Petition by the appellant and the suit by Mr. Kiptanui were consolidated and a single judgment delivered on 9th February 2018. The impugned judgment in this appeal arises from the consolidated cases.

4. In his Petition, the appellant itemised the particulars of the 1st respondent’s alleged fraud as:

(i) Applying for allotment of the suit land when he knew or ought to have known that the same was already registered in the name of the appellant.

(ii) Failing to disclose to the allotting authority that the suit land was not vacant.

(iii) Failing to conduct an official search on the suit property to establish whether or not it was private property.

5. As against the 2nd, 3rd and 5th respondents, the appellant itemised particulars of fraud as:

(i) Purporting to issue the 1st respondent with a Letter of Allotment for the suit property when the same already had a Lease Title in the name of the appellant.

(ii) Processing a Lease Title in the name of the 1st respondent when the appellant already had Title.

(iii) Failing to demand Letter of Consent to Transfer the suit property before registering the 1st respondent as owner thereof.

(iv) Deleting the name of the appellant in their records relating to the suit property without his consent.

(v) Purporting to enter in their records the name of the 1st respondent as owner of the suit property without ascertaining the nature of the transfer to the 1st respondent.

6. The appellant alleged the fraud and conduct of the 2nd, 3rd and 5th respondents engendered violation of his constitutional right to property *to wit*: loss of right to property without his consent; loss of ownership of the suit property without adhering to the due process of law and loss of right to ownership of the suit property without compensation.

7. In replying to the petition, the 1st respondent asserted that the Title held by the appellant over the suit property was illegal, null and void; that the appellant never purchased the suit property from the registered proprietor; that the appellant purported to purchase the property from one **Patrick Ngumba Mweni** who has never been registered as proprietor of the property; that at all material times, the said **Patrick Ngumba Mweni** was not the registered proprietor of the suit property and he had no authority to transfer the property to the appellant.

8. In further negating and disavowing the appellant's title, the 1st respondent gave details of how he acquired Title over the property. He gave *viva voce* evidence on the root of his title. He testified that by letter dated 29th April 1982, he applied to the President of the Republic of Kenya for allocation of a Plot marked as "21" which had been identified on the map. That by letter dated 13th August 1982, the Commissioner of Lands informed him that his application to be allocated the plot had been approved. That by letter dated 27th January 1983, the Commissioner of Lands forwarded to him a letter of allotment Reference No. 31710/XI/190. In the letter, he was obliged to pay Ksh. 22,083 as stand premium and other legal charges. That he forwarded a Banker's Cheque No. 076685 for the sum of Ksh. 82,183 to the Commissioner of Lands who issued a receipt dated 28th February 1983. That subsequently, the Director of Survey informed the Commissioner of Lands that the plot had been surveyed and assigned a number as Eldoret Municipality Block / VII/ 178. That on 16th April 2012, he visited the District Land Registrar's Office in Eldoret and was informed that the lease for the allocated plot had been registered and a certificate of lease issued in his favour; and he collected the same.

9. **Mr. Enock Kibiwott Kiptanui**, the 6th respondent before the trial court, gave *viva voce* evidence claiming he was also the registered proprietor of the suit property. In his testimony, he gave evidence on his root of title. He stated that his elder brother, **Mr. Abraham Kipsang Kiptanui** was State House Comptroller from 1983 to 1996. That during this period, his brother owned some parcels of land in Nakuru. That one **Mr. Philemon Chelagat** owned the suit property in Eldoret. That the said **Mr. Philemon Chelagat** agreed with **Mr. Abraham Kiptanui** to swap the land in Nakuru with the suit property in Eldoret. That upon swapping the properties, his elder brother **Mr. Abraham Kipsang Kiptanui** gifted him the suit property in Eldoret. That before **Mr. Philemon Chelagat** could transfer the property to him, the appellant showed up with a title that had been issued fraudulently. That there is no way the suit property can have three different owners.

10. During trial, the District Land Registrar for Uasin Gishu, **Ms. Hellen Kharemwa**, gave evidence in support of the Certificate of Title issued to the appellant. The Registrar disowned the Title of the 1st respondent. She stated that it was established that the suit property had two registers in the names of different parties. That a lease document was forwarded for registration in March 2012 and the registration was effected on 12th April 2012 in favour of the 1st respondent. That it was later discovered another register existed on the suit property with a title issued on 24th February 2004 as a transfer to the appellant from one **Rhoda Chelangat Kandie**. That the suit property was not transferred from the appellant to the 1st respondent. That the Land's Registry had no objection to the nullification of the title of the 1st respondent as this was a matter of double allocation of land and the first allocation to the appellant ought to prevail.

11. The evidence on record adduced before the trial court shows that the sale agreement that transferred the suit property to the appellant was between one **Patrick Ngumbao Mweni** as vendor and the appellant as purchaser. At the timewhen the sale agreement was signed, the registered proprietor of the suit property was one **Rhoda Kandie**. The appellant alleged that the said **Rhoda Kandie** had authorised **Patrick Ngumbao Mweni** to sell the land.

12. Upon evaluating the relevant evidence on record, the trial Judge dismissed the appellant's claim to the suit property and upheld the title of the 1st respondent. In his judgment, the Judge extensively expressed himself as follows:

"115. The petitioner (Richard Kipkemei Limo) purchased the suit property from one Patrick Ngumbao Mweni of ID No.

2118731 who was not the registered proprietor of the suit land. It is claimed in the agreement dated 22nd December 2003 that Patrick Ngumbao Mweni was the vendor and owner of the property. However, the certificate of search dated 17th December 2003 indicates that the property was registered in the name of Rhoda Chelangat Kandie as the Administrator of the Estate of Aron K. Kandie. There is no agreement of sale between Rhoda Chelangat Kandie and Richard Kipkemei Limo. Moreover, there is no agreement of sale between Rhoda Chelangat Kandie and Patrick Ngumbao Mweni. There is no certificate of lease registered in respect of the transfer from Rhoda Chelangat Kandie to Patrick Ngumbao Mweni and to the petitioner.

Richard Kipkemboi Limo simply has a certificate of lease and is in possession of the suit land. I have looked at the consent to transfer issued on 16th January 2003 and do find that the same was issued to Rhoda Chelangat Kandie in reference to a letter dated 15th December 2003. It appears that the consent was issued 11 months before the request for the consent. The issue that boggles legal minds is how did Patrick Ngumbao Mweni come into this matter as vendor and yet the property was not in his name? The consent to transfer was given by the Commissioner of Lands to Rhoda Chelangat who appears to have donated the power to sale (sic) to Patrick Ngumbao Mweni without a power of Attorney. Ultimately, title was issued to Richard Kipkemei Limo on 24th February 2004.....

122. The above facts raise the issue as to whether the parties herein complied with due process in acquiring their respective titles.....

125. I have gone through the pleadings and evidence on record and do find that the certificate of lease produced by the 1st respondent was properly and legally acquired as due process was followed. The certificate of lease produced by the petitioner was not procedurally obtained as the alleged vendor of the property was not the registered proprietor and therefore could not transfer non-existent rights to the petitioner.

130. The upshot of the above is that the petitioner has failed to demonstrate that he acquired the suit property regularly and procedurally and that he is the legal owner of the suit property and therefore I do dismiss the petition with costs and do hereby nullify the certificates of lease issued to the petitioner and 6th respondent and for avoidance of doubt, I do find that the 1st respondent obtained his title legally and therefore he is the lawfully registered proprietor...”

GROUND OF APPEAL

13. Aggrieved by the judgment of the trial court, the appellant has lodged the instant appeal citing the following grounds:

“(i) The learned judge erred in law in finding that the appellant’s title was irregularly obtained whereas the same was acquired for valuable consideration and due procedure followed.

(ii) The judge erred in finding that the 1st respondent’s certificate of title was valid whereas no evidence had been adduced to that effect.

(iii) The judge erred in upholding the title in favour of the 1st respondent whereas the same was registered over 12 years since the first title was issued in favour of the appellant.

(iv) The judge erred in failing to consider the effect of limitation as provided under the Limitation of Actions Act and the Government Lands Act (repealed).

(v) The judge erred in basing his findings on issues that were not pleaded.

(vi) The judge erred in failing to consider the 1st respondent had not proved the appellant’s title was procured irregularly.

(vii) The judge erred in failing to find that the effect of cancellation of the appellant’s title will leave the suit property duly registered in the name of Rhoda Chelangat Kandie and not the 1st respondent.

(viii) The judge failed to appreciate the submissions by counsel for the appellant.

(ix) The judge erred in awarding costs to the respondents.”

14. In his memorandum of appeal, the appellant prays *inter alia* that the appeal be allowed and the judgment in favour of the 1st respondent be set aside.

15. At the hearing of the instant appeal, learned counsel *Messrs. Allan Rimui Ngigi Mbugua* and *Nathan Tororei* appeared for the appellant. Learned counsel *Mr. Victor Rapando* and *Mr. Jason Ondabu* appeared for the 1st respondent. Learned counsel *Mr. Dennis Wabwire* appeared for the 2nd, 3rd and 5th respondents and learned counsel *Mr. Omollo Aseso* appeared for the 4th respondent. All parties filed written submissions and list of authorities.

APPELLANT’S SUBMISSIONS

16. Counsel for the appellant recapped the grounds of appeal in the memorandum. The central theme in his submission is that parties are

bound by their pleadings and that the Judge erred in making a determination on an issue that was not pleaded by the 1st respondent. That the Judge erred in annulling and cancelling the certificate of title issued to the appellant when there was no prayer in the pleadings for such cancellation. That it was the appellant who petitioned for a declaratory order that the 1st respondent's title was null and void. That the 1st respondent did not file a cross-petition or a counterclaim seeking an order or a declaration that the appellant's title was a nullity; that there was no cross-petition to support the findings by the trial Judge. That the only counterclaim the court could properly consider was by the **Mr. Enoch Kibiwott Kiptanui** (6th respondent).

17. The appellant faulted the trial Judge for allowing the 1st respondent to lead evidence on issues pertaining to issuance of the Title in favour of **Rhoda Kandie**. That it is informative that **Rhoda Kandie** as well as the Estate of the late **Aaron Kandie** have never contested the sale of the suit property to the appellant; that the doctrine of privity of contract would bar the respondents from relying on the transaction precedent to the transfer in favour of the appellant to found their cause of action.

18. The appellant further faulted the trial Judge for ignoring the evidence of the Registrar of Lands **Ms. Hellen Kharemwa** who in her replying affidavit stated the appellant's title was the first to be registered and it should prevail; the Judge erred in failing to appreciate that the Registrar was categorical that **Rhoda Kandie** was properly registered as proprietor of the suit property and that there was no irregularity in that registration. Counsel submitted that the appellant was not expected to prove that **Rhoda Kandie** had a good title capable of being passed on to him.

19. The appellant further submitted that the learned judge erred in finding that the appellant obtained title irregularly without considering that if any. Counsel cited the Uganda Court of Appeal decision in **Katende -v- Haridar & Co. Limited [2008] 2 E.A. 173** where it was stated that a bona fide purchaser for value is one who *inter alia* acquires the property from a vendor who has an apparent valid title. It was urged that the appellant's title is protected by **Section 80** of the **Land Registration Act** which protects a bona fide purchaser for value who is in possession. All material times the appellant had no knowledge of any fraud or irregularity in the process through which **Rhoda Kandie** got to be registered as proprietor of the suit property.

20. Reiterating the ground of appeal that the Judge erred in upholding the 1st respondent's certificate of title, it was submitted that even if the court were correct in cancelling the appellant's title, the valid title should revert to the name of **Rhoda Kandie** and not the 1st respondent. Counsel submitted that there is no evidence on record impugning the process through which **Rhoda Kandie** obtained her registration and certificate of title to the suit property.

21. In further submission, the appellant raised the issue of limitation of actions. It was submitted that the Registrar testified that the appellant's certificate of title was registered first in time; that the register shows **Rhoda Kandie** was registered proprietor of the suit property as administrator of the estate of **Aaron Kandie**; that the learned Judge in upholding the 1st respondent's title ignored the proprietary interest of **Rhoda Kandie** over the suit property before the same was transferred to the appellant. It was submitted that if any cause of action was to be brought challenging the title issued to **Rhoda Kandie**, the same had to be done within 12 years from 1983 when **Rhoda Kandie** was allotted the land. For this reason, the appellant faults the learned judge for ignoring and circumventing the provisions of the Limitation of Actions Act in entertaining a suit for cancellation of title after 12 years. That when the suit property was allotted to the said **Rhoda Kandie**, it ceased to be an un-alienated government land and it was not available for allotment to the 1st respondent.

22. As regards the prayer sought in the memorandum of appeal, the appellant urged us to remit the suit back to the Environment and Land Court for re-hearing to enable **Rhoda Chelangat Kandie** and **Patrick Ngumbao Mweni** to be heard.

1st RESPONDENT'S SUBMISSIONS

23. The 1st respondent urged us to affirm and uphold the judgment of the trial court.

24. It was submitted that the appellant produced a sale agreement dated 22nd December 2003 to demonstrate that he purchased the suit property; that the vendor of the property is indicated to be one **Patrick Ngumbao Mweni** who has never been the registered proprietor of the suit property; that the appellant did not produce any documentary evidence to show how the suit property was transferred from **Rhoda Chelangat Kandie** to himself; that neither **Patrick Ngumbao Mweni** nor **Rhoda Kandie** was called to give evidence.

25. In refuting the legality of the appellant's title, it was asserted the appellant was not an innocent purchaser for value. That the burden of proof was upon the appellant to demonstrate how he obtained the title to the suit property; that it was within his knowledge how he procured and secured title to the property. Citing dicta from the case of **Munya Maina -v- Hiram Gathaiga Maina [2013] eKLR**, counsel stated that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership; the registered proprietor 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 encumbrances.

26. The 1st respondent bolstered the submission that the appellant was not an innocent purchaser for value by virtue of his conduct. Counsel cited the case of **Lawrence P. Mukiri Mungai -v- Attorney General & 4 others [2017] eKLR**, where it was held that the conduct of the appellant in deliberately failing to enter into a written sale agreement with the registered proprietor raises more questions and he cannot be treated as a bona fide purchaser for value.

27. Responding to the submission that the certificate of title issued to **Rhoda Chelangat Kandie** was first in time and should prevail, the 1st respondent urged us to follow the decision in **Wreck Motor Enterprises -v- The Commissioner of Lands [1997] eKLR** where it was held that title to landed property normally comes into existence after issuance of a letter of allotment, meeting the special conditions in the letter of allotment and actual issuance of the title document. (See also **Dr. Joseph arap Ngok -v- Moiwo Ole Keiwa & 5 others, Civil Application No. NAI 60 1997**).

28. Counsel submitted the trial court properly evaluated the evidence on record and correctly established that the 1st respondent, as against both the appellant and the 6th respondent, had demonstrated he had a good and valid root of title to the suit property; that the court did not err in finding the 1st respondent was entitled to ownership and possession of the property.

29. On the issue that the court erred in failing to revert title to the suit property to **Rhoda Chelagat Kandie**, it was submitted that the said **Rhoda Kandie** was not a party to the proceedings before the court. Further, that no material had been presented to show that the said **Rhoda Kandie** had a good title that ought to have been upheld; that no evidence was led to show **Rhoda Kandie** was allotted the suit property or to explain how she became registered as proprietor of the property; that no letter of allotment was produced as proof of compliance with the provisions of the law relating to allotment and registration as proprietor of the suit property.

30. On the issue of limitation of actions, it was submitted the matter was neither raised nor canvassed before the learned Judge and this Court ought not to entertain an issue that was not before the trial court.

2nd, 3rd and 5th RESPONDENTS SUBMISSIONS

31. In opposing the appeal, the 2nd, 3rd and 5th respondents posed the question that as between the appellant and the 1st respondent, who had a valid title to the suit property? Counsel submitted that where a dispute arises as to the validity or legality of title documents, it is incumbent upon the title holder to demonstrate that his title is genuine and to go the extra mile and demonstrate the procedure and process followed prior to acquisition of the title. That where a title holder is unable to show the procedure and process followed in the acquisition of the title, **Section 26 (1) (b)** of the **Land Registration Act** entitles the court to impeach the title. Furthermore, that **Article 40 (6)** of the Constitution does not protect property that has been acquired unlawfully and unprocedurally.

32. Echoing the submissions by the 1st respondent, it was stated that no evidence was led to prove that **Rhoda Kandie** was allotted the suit property or that she complied with the special conditions of allocation or that any lease was ever forwarded and registered in her favour. Counsel submitted that no evidence was led that indeed **Rhoda Kandie** was not a phantom as she was neither enjoined to the suit nor summoned as a witness. That in the absence of a letter of allotment in favour of **Rhoda Kandie** and of evidence of compliance with the special conditions for allocation and issuance, it was safer to conclude the said **Rhoda Kandie** had no better title than the 1st respondent. Counsel submitted that in any event, there is no evidence **Rhoda Kandie** transferred the suit property to the appellant. In addition, it was submitted the appellant had failed to demonstrate he was an innocent purchaser for value; the evidence demonstrates the appellant purchased the suit property from a person who was not registered as proprietor of the same; that on preponderance of evidence, the learned judge correctly arrived at the conclusion that the appellant's title was not properly acquired.

33. As to whether the learned judge should have ordered that the suit property be reverted back to **Rhoda Kandie**, counsel submitted that a court cannot sanitize an illegality; that the evidence on record demonstrated that **Rhoda Kandie** did not procedurally acquire title to the suit property. That in any case, the appellant was neither an heir nor a personal representative of the estate of **Rhoda Kandie**.

34. The respondents submitted that the Judge did not err in disregarding the opinion of the Land Registrar **Ms. Hellen Kharemwa** who testified that the appellant's title was first in time and should prevail. It was submitted the opinion of the Land Registrar is not binding on the court.

35. On the issue of limitation, it was submitted there is no time limit as to when an action for enforcement of constitutional rights can be brought.

4th RESPONDENT'S SUBMISSIONS

36. Counsel for the 4th respondent in opposing the appeal associated himself with and adopted the submissions of the 1st, 2nd, 3rd and 5th respondents.

37. Counsel urged there were two critical issues for determination namely: whether the appellant's title was irregularly acquired and whether the 1st respondent's certificate of title was valid. In its written submissions, the respondent rehashed the background facts to the dispute between the parties. It was emphasized that the 1st respondent has been making payments for land rent, rates, as well as rates charges from the time the suit property was allotted to him to date. Citing dicta from the case of **Chemei Investments Limited -v- Attorney General & others Nairobi Petition No. 94 of 2005**, it was submitted that the Constitution protects higher values of integrity and rule of law based on indefeasibility of title cannot protect property that has been unlawfully acquired.

38. Counsel submitted that the appellant in his petition as drafted failed to identify the exact person who allegedly transferred or sold him the suit property; and he failed to demonstrate the person who sold him the property had acquired it lawfully. The 4th respondent submitted that it never consented to the transfer of the suit property in favour of the appellant and it is not aware of any proprietary interest of the appellant over the suit property.

ANALYSIS and DETERMINATION

39. We have considered the grounds of appeal as well as submissions by all counsel and the authorities filed in the matter. Being a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions. In **Selle -vs- Associated Motor Boat Co. [1968] EA 123**, it was expressed thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw

its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif -v - Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).”

40. We have identified the key issues for determination in this appeal as follows:

- i) *Whether the transfer of the suit property to the appellant by one Patrick Ngumbao Mweni is valid in law.*
- ii) *As between the certificate of title over the suit property held by the appellant and 1st respondent, which prevails.*
- iii) *Did the learned judge make a determination on an un-pleaded issue?*
- iv) *Did the judge err in circumventing the issue of limitation period?*
- v) *Whether the learned judge erred in evaluating the evidence on record and arrived at an erroneous decision.*
- vi) *Whether the appellant is entitled to the orders sought as per the memorandum of appeal.*

41. In his petition, the appellant simply states he purchased the suit property, **Eldoret Municipality Block 7/178**, from the then registered owner in December 2003. It should be noted that the appellant does not identify and name the person from whom he purchased the suit property. During trial, it became evident that the appellant purchased the suit property from one **Patrick Ngumbao Mweni** who was not the registered proprietor of the suit property. A sale agreement dated 22nd December 2003 was produced in evidence and is on record. The agreement shows **Mr. Patrick Ngumbao Mweni** bearer of ID No. 2118731 of P. O. Box 7268 Eldoret as the vendor. The appellant is named as the purchaser. In the sale agreement, the vendor is described “as the owner of the suit property now appearing in the name of **Rhoda Chelangat Kandie**.”

42. One of the grounds urged in opposing the instant appeal is that the appellant did not acquire the suit property from the registered proprietor; that the said **Mr. Patrick Ngumbao Mweni** has never been the registered proprietor of the property and consequently, he had no capacity in law to transfer the suit property to the appellant; that the said **Patrick Ngumbao** had no recognized proprietary legal interest in the suit property.

43. On this issue, the trial Judge made a finding and concluded as follows:

“125. I have gone through the pleadings and evidence on record and do find that the certificate of lease produced by the 1st respondent was properly and legally acquired as due process was followed. The certificate of lease produced by the petitioner was not procedurally obtained as the alleged vendor of the property was not the registered proprietor and therefore could not transfer non-existent rights to the petitioner....” (emphasis supplied)

44. In the instant matter, the appellant obtained his interest over the suit property through a sale agreement with one **Patrick Ngumbao Mweni** who was not the registered proprietor of the suit property. Whereas the sale agreement acknowledges that the property was then registered in the name of **Rhoda Chelangat Kandie**, there is no evidence on record to prove that the said **Rhoda Kandie** had instructed or authorized or consented to the sale of the suit property. In any event, the sale agreement describes the vendor as the owner of the property, it does not describe him as an agent of the registered proprietor. We find the sale agreement was false in a material particular and it materially misrepresented the ownership and proprietorship of the suit property. We appreciate that a sale agreement *per se* is not the instrument of transfer of real property. However, from the facts on record, the legal question is whether the said **Mr. Patrick Ngumbao Mweni** had legal capacity to transfer the suit property to the appellant. Transfer of real property and any proprietary right and interest therein is statutorily regulated in Kenya. The first condition precedent to an effective transfer of proprietary interest is that the transferor must have legal capacity to transfer.

45. In this matter, no evidence was led to demonstrate and establish the legal capacity of **Patrick Ngumbao Mweni** to deal with and transfer the suit property. It is the duty of the vendor of property to prove that he/she has legal capacity to transfer. In addition, if his/her title is under challenge, the vendor must establish the root of title to the property. In the instant matter, **Patrick Ngumbao Mweni** had no legal capacity to transfer the suit property. As the trial Judge correctly noted, there is no power of attorney on record vesting any legal authority upon **Patrick Ngumbao Mweni** to transfer the suit property as vendor. A seller cannot confer an illusory or non-existing title on a buyer simply by stating so in the sale agreement. For this reason, we find the trial Judge did not err in arriving at the conclusion the appellant did not acquire any legal proprietary right or interest over the suit property under the sale agreement dated 22nd December 2003.

46. The next issue for our determination is as between the certificate of title held by the appellant and the 1st respondent, which prevails. The determination of this issue depends on the root of title of each certificate of title. This Court in **Munyu Maina - v - Hiram Gathiha Maina**, Civil Appeal number 239 of 2009, held as follows:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor 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 encumbrances including any and all interests which would not be noted in the register.”

47. In **Sammy Mwangangi & 10 others -v - Commissioner of Lands & 3 others [2018] eKLR**, this Court expressed itself as follows:

“47. It is thus our considered view that the respondents have successfully shown how they acquired their title by producing all the documents that must be in place before a Grant could be issued and registered in their favour.

48. The 3rd and 4th respondents have sufficient evidence to prove that they acquired the suit property lawfully. Indeed, we agree with the learned Judge that no evidence was called by the appellants to show the 3rd and 4th respondents acquired the titles unlawfully to enable this court order for their cancellation.

50. Having found that the respondents were allocated the suit property lawfully, their titles cannot be impeached. In view of the fact that the appellants failed to prove the allegations of fraud in the acquisition of the title, consequently they failed to prove their case on a balance of probabilities. For all the foregoing reasons, having re-evaluated the evidence before us, we are not persuaded that the learned Judge erred in arriving at the conclusion she made. The judgment now impugned was based on sound law and evidence, and the same cannot be impeached.”

48. In the instant appeal, the evidence on record as led by the 1st respondent demonstrates the procedure that he followed that led to his being registered as the proprietor of the suit property. In recap, the evidence is that the 1st respondent by letter dated 28th April 1982 applied to the President of the Republic for allocation of the suit property; by letter dated 13th August 1982, he was notified by the Commissioner of Lands that the Government had approved his application for allocation of the property; by letter dated 27th January 1983, the Commissioner of Lands forwarded to him a letter of allotment; the 1st respondent paid the requisite stand premium which was stipulated; subsequently, a certificate of lease was issued to the 1st respondent.

49. Conversely, the appellant led evidence to show how he came to be registered as proprietor of the suit property. The evidence led by the appellant is that he purchased the property from one **Richard Ngumbao Mweni**. We have determined that the said **Richard Ngumbao Mweni** had no legal capacity to transfer the suit property to the appellant.

50. On record, there is evidence that the suit property had been registered in the name of **Rhoda Chelangat Kandie**. The certificate of lease issued in favour of **Rhoda Chelangat Kandie** over the suit property was in 2004. Conversely, the certificate of lease issued to the 1st respondent was in 2012. However, the 1st appellant applied for allotment of the suit property way back in 1982. His application for allotment of the suit property was approved in 1983. In the case of **Dr. Joseph Arap Ngok -v- Justice Moijo Ole Keiwa & 5 Others [1997] eKLR** this Court held that *“it is trite law that landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held”*.

51. Persuasively, in **Mike Maina Kamau -v - Attorney General [2017] eKLR**, the High Court correctly expressed that “given that the history and root of this title can be traced, the Court finds and holds that the Plaintiff herein holds a good title to the suit property which title has not been cancelled and/or revoked.

52. In the instant appeal, we have examined the record. There is no evidence indicating the procedure that was followed that led to **Rhoda Chelangat Kandie** being entered in the register as proprietor of the suit property. As correctly observed by the trial court, there was no evidence that **Rhoda Chelangat Kandie** applied for allocation of the suit land or that the application was approved or a letter of allotment was issued in her favour. All that is on record is a certificate of lease in the name of **Rhoda Chelangat Kandie** and a subsequent transfer to the appellant.

53. Notwithstanding the foregoing, the appellant asserts that the dispute over the suit property relates to double allocation. That the appellant’s certificate of lease was issued in 2004 while the 1st respondent’s certificate of lease was issued in 2012. It is the appellant’s case that his certificate of lease having been issued earlier in 2004, it is the first in time and prevails. This position was supported by the testimony of the Land Registrar **Ms. Hellen Kharemwa**.

54. The trial judge made a finding that the dispute in this matter is not one of double allocation and the concept of first in time does not apply. In so finding, the Judge expressed:

“128. The principle of double allocation only applies where all titles were procedurally and legally issued and therefore the first in time prevails.

129.....the titles for the petitioner and 6th respondent was not issued by mistake but unprocedurally and irregularly.”

55. We are cognizant of the decisions such as **M’ikiara M’Rinkanya & Another -v- Gilbert Kabeere M’Mbijiwe, (1982-1988) 1KAR 196**, where it was held that where there is a double allocation of land, the first allotment prevails and there is no power to allot the same property again. (See also **Kariuki -v- Kariuki (1982-88) KAR 26/79 and Otieno and Matsanga, (2003) KLR 210**).

56. On our part, we have considered whether the two certificates of title that were issued over the suit property are a case of double allocation. Double allocation arises when there are two or more otherwise valid certificates of title issued erroneously and in good faith by the lands office. When there is fraud, misrepresentation, deliberate mistake, irregularity or unlawfulness in the procedure for registration, double allocation does not arise. The 1st respondent has demonstrated the procedure and root of title that he followed to obtain title to the property. The appellant purchased the suit property from a person who was not the registered proprietor. His certificate of title has no legal foothold. In refuting the 1st respondent’s title, the appellant asserted that he had no duty to prove how **Rhoda Chelangat Kandie** obtained her certificate of lease over the suit property.

57. The legal issue that ensues from this state of affairs as between the appellant and the 1st respondent in this: who had the legal and evidential burden to prove that root of title of the certificate of lease held by the appellant and **Rhoda Chelangat Kandie**? It is well established that he who alleges must prove. **Section 107** of the **Evidence Act (Cap 80)** provides: -

"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."

58. A party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.

59. In the instant matter, in his petition, the appellant sought a declaratory order that his certificate of lease was valid. He also sought a declaratory order that the 1st respondent's certificate of lease was a nullity. The legal and evidential burden lay upon the appellant to prove the validity of his certificate of lease and to lead *prima facie* evidence that the 1st respondent's certificate was a nullity.

60. **Article 40 (6)** of the *Constitution* stipulates that the right to property does not extend to property that has been found to have been unlawfully acquired. In this regard, the appellant had the burden to prove the root of his title and to demonstrate that he procedurally and lawfully acquired title to the suit property. In other words, whereas the legal burden of proof is on he who asserts that a property comes within the provisions of **Article 40 (6)** of the Constitution, the evidential burden is on a registered proprietor to rebut an assertion that his property was unlawfully acquired and demonstrate that the property does not come within the provisions of **Article 40 (6)** of the Constitution.

61. This Court has often times stated that when a certificate of title is under challenge, the root of title must be proved. The lawfulness of the acquisition of title must be demonstrated to oust the provisions of **Article 40 (6)** of the Constitution. In the instant matter, the appellant never led convincing evidence to establish the root of his title. We thus find that the trial court did not err in finding that the certificate of title held by the appellant was null and void.

62. It is settled law that in an action for declaration of title to land, a claimant must succeed on the strength of his case and not on the weakness of the defence. However, where the defendant's case supports that of the claimant and contains evidence on which the claimant may rely, the claimant is entitled to rely on and make use of such evidence. In the instant matter, it was incumbent upon the appellant to lead evidence to prove his case. The sale agreement upon which the appellant rests his claim refers to **Rhoda Chelangat Kandie** as the registered proprietor of the suit property. From the word go, the appellant knew or ought to have known that the validity of his title to the suit property is grounded on the validity of the certificate of title held by **Rhoda Chelangat Kandie**. If the certificate of lease held by **Rhoda Chelangat Kandie** is invalid, it would follow that the appellant's certificate would be invalid. In this matter, it was incumbent upon the appellant to lead evidence establishing the root of title of **Rhoda Chelangat Kandie**. This he failed to do with the consequence that there is no evidence on record establishing the procedural validity and lawfulness through which **Rhoda Chelangat Kandie** acquired her certificate of title. For this reason, we find that the Judge did not err in annulling the certificate of lease in the name of **Rhoda Chelangat Kandie**. Likewise, the Judge did not err in failing to make an order reverting the title back to **Ms. Rhoda Chelangat Kandie**.

63. A ground urged in this appeal is that the judge erred in making a determination on an unpleaded issue. The appellant contends that the judge erred in making a determination that the appellant's certificate of lease was unlawfully and unprocedurally acquired because there was no cross-petition or counter-claim by the 1st respondent seeking such an order.

64. In ***Galaxy Paints Co. Ltd. -vs - Falcon Guards Ltd.***- **EALR (2000)2 EA 385**; it was stated that the issues for determination in a suit generally flow from the pleadings and a court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination. Likewise, in ***Odd Jobs -v- Mubia*** (1974) **EA 476** it was stated as follows:

"A court may base a decision on an unpleaded issue where, it appears from the course followed at the trial, that the issue has been left to the court for decision..."

65. In the instant matter, we have examined the Petition filed by the appellant. One of the prayers sought a declaration that the appellant is the lawfully registered owner of the suit property. Another prayer is a declaration that the 2nd, 3rd and 5th respondents' conduct in purporting to transfer/register the suit property in favour of the 1st respondent is unconstitutional. Also sought was an order of mandamus compelling the 2nd, 3rd and 5th respondents to nullify the letter of allotment and or certificate of lease issued to the 1st respondent over the suit property; and an order of mandamus to compel the respondents to delete the name of the 1st respondent as owner of the suit property.

66. In our considered view, the prayers for the trial court to declare the title held by the appellant valid and that held by the 1st respondent a nullity put in issue the validity of the two certificates of lease held by the parties. Arising from the prayers sought in the petition, it was proper and incumbent upon the learned Judge to make a determination as to which of the two certificates of lease was valid. We find that the Judge did not err in making such a determination as the petition by the appellant was a pleading that put in issue the validity of the two certificates of lease.

67. In concluding his submission before us, the appellant urged us to make an order for re-hearing of the suit before the trial court to enable **Rhoda Kandie** and or **Patrick Ngumbao Mweni** to be heard. We have considered this submission in light of the prayers in the memorandum of appeal. The memorandum of appeal as filed contains no prayer for re-hearing or retrial of the suit. This Court in ***Abdul Shakoore Sheikh - v- Abdul Najib Sheikh and 2 others***, **Civil Appeal No 161 of 1991** held that as a general rule, a party is not entitled to reliefs which he has not specified.

68. Further, in the instant matter, the appellant as the petitioner before the trial court was duty bound to call any witnesses that were relevant and crucial to his case. A re-hearing is not a proper remedy to enable a party to fill gaps or bolster its case. It is not the duty of a judge to call

any witness or to direct a party to call a particular witness. A court makes a determination based on the evidence tendered by the parties. That is the essence of the adversarial justice. The appellant has not pointed to us any law that allows us to order a re-hearing to enable a party to summon or call more witnesses with a view to fill gaps in its case. We find the prayer for re-hearing has no merit.

69. On limitation period, this was never raised nor canvassed before the trial court. The Supreme Court in **Coast Professional Freighters Limited -v- Welsa Bange Oganda & 2 others [2019] eKLR** held that an appellate court should not entertain additional issues that were not grounds of appeal in the court below. Guided by this decision, we find that all the grounds urged by the appellant that were not canvassed before the court below have no merit as we have no jurisdiction to consider and determine contestations on matters of fact or points of law that were neither raised nor canvassed before that court.

70. For the various reasons stated, the totality of our evaluation of the evidence on record and the law relevant in this matter is that the learned Judge did not err in dismissing the appellant's Petition. This appeal has no merit and is hereby dismissed. The judgment of the trial court dated 9th February 2018 be and is hereby affirmed and upheld. The costs of this appeal shall be paid by the appellant.

Dated and delivered at Eldoret this 25th day of July 2019

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.