



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MALINDI
(CORAM: OKWENGU, MAKHANDIA & SICHALE, J.J.A.)
CIVIL APPEAL NO. 41 OF 2013

BETWEEN

BRUCE JOSEPH BOCKLE APPELLANT

AND

COQUERO LIMITED RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Mombasa (Tuiyott, J) dated 27th February, 2013 and delivered on 14th March, 2013

In

MOMBASA H.C.C.C. No. 59 of 2006)

JUDGMENT OF THE COURT

In a judgment delivered on 27th February, 2013 in the High Court at Mombasa Civil Case No. 59 of 2006, **Tuiyott, J** decreed as follows:-

“(a) That a mandatory injunction is hereby granted requiring the defendant to forthwith pull down and remove from the said land the said construction and remove all his property of whatever nature as well as his workmen, servants or agents from the Plaintiff’s said land.

(b) That an injunction is hereby granted restraining the Defendant, himself, his servants or agents or otherwise howsoever from preventing the Plaintiff from erecting the boundary wall on the said land and from trespassing onto the Plaintiff’s land.

(c) That an injunction is hereby granted restraining the defendant by himself, his servants or agents or otherwise howsoever from remaining on or continuing in occupation of the said land.

(d) That the defendant is given 60 days from the date of this decision to comply with the orders of this Court failing which the plaintiff shall be at liberty to apply for its enforcement.

(e) That the plaintiff shall have costs of this suit ...”

That judgment and decree came on the heels of the pleadings filed, evidence adduced and submissions made in the suit commenced by way of plaint in the High Court by the respondent, **Coquero Limited** against the appellant, **Bruce Joseph Bockle**. In that suit, the respondent claimed that it was the registered proprietor of all that piece or parcel of land known as **LR No. 491**, “*the suit premises*,” which was as a result of a subdivision of **LR No. 24 section iv**. In or about 9th April, 2001, the respondent contracted **Kanjalu Building Contractors** to erect a boundary wall around the suit premises. However, the appellant unlawfully prevented the contractor from undertaking the works having wrongly entered the suit premises and notwithstanding repeated requests by the respondent to vacate and deliver up vacant possession the same, the appellant had refused to do so and if anything he had commenced erecting a house thereon. Accordingly, the respondent prayed for orders as per the decree aforesaid.

In his defence, the appellant asserted that he was not a trespasser to the suit premises, that the respondent’s certificate of title was invalid *ab initio* as it was irregularly obtained, as it had failed to comply with the decision and direction of the Coast Provincial Land Control Appeals Board and the Central Land Control Appeals Board and that the excision and or subdivision thereof was irregular because the respondent had not caused a survey to be carried out. On the whole, the actions of the respondent according to the appellant were unprocedural with the consequence that the subdivision and the resultant titles were fraudulent.

With the closure of the pleadings, the formal hearing of the suit commenced initially before **Sergon, J** before it was subsequently taken over by **Tuiyott, J** on 18th March, 2009. From the pleadings, documents filed including previous cases involving the parties filed and the rulings therein, the long and short of this dispute is that the suit premises were purchased by one, **Abdalla Zubedi (Abdalla)**, from one, **Joseph Thaddle Bockle (Joseph)**, the father of the appellant and former husband to **Mrs Tima Joseph Thaddle Bockle (Tima)**, the mother to the appellant who was then the registered proprietor of the entire land that was subsequently divided, a portion thereof resulting into the suit premises. The said Joseph held a general power of attorney donated to him by **Tima** which he used in the transaction. As the suit premises were agricultural land, the local Land control Board had to consent to the transaction. Accordingly, **Abdalla** applied to Kilifi Land Control Board for the consent but it was declined following an objection lodged by Tima. Abdalla successfully lodged an appeal against the refusal to the Coast Province Land Control Appeals Board which reversed the decision of the Kilifi Land Control Board and granted Abdalla consent on condition that a portion of the suit premises measuring 4 acres encompassing Tima’s residence be carved out and surrendered to Tima. Tima was aggrieved by that decision and accordingly appealed to the Central Land Control Appeals Board, which however confirmed the decision by the Coast province Land Control Appeals Board. Not happy with the outcome, Tima then moved to the High Court at Nairobi and filed **High Court Civil Case No. 3742 of 1991** in which she prayed for an injunction to restrain Abdalla from registering any transfer of the suit premises to himself. **Bosire, J** (*as he then was*) heard the application for injunction filed contemporaneously with the suit and dismissed it with costs.

Undeterred Tima this time around changed tact and sued for judicial review. In Nairobi **High Court Miscellaneous Civil Application No. 939 of 1991**, Tima sought for an order of certiorari to quash the decision of the Central Land control Appeals Board dated 11th June, 1991. Leave was granted which leave was to operate as stay of any transaction in relation to the suit premises. Though the substantive Notice of motion was subsequently filed, it was not prosecuted. Accordingly by an application dated 14th June, 1995, Abdalla sought to have the order of stay set aside or varied as it was oppressive to him. **Mboghli Msaghah, J** heard the application, duly obliged and vacated the order on 23rd July, 1997 and directed the respondent to proceed with the execution of the decision of the Central Land Control Appeals Board. Earlier on Abdalla had filed suit in the High Court, Mombasa being **Civil Case No. 3 of 1994**

against Joseph and Tima seeking their eviction from the suit premises amongst other prayers.

As all these suits were pending, Abdalla on the basis of the directive by Mbogholi Msagha, J. proceeded to have the original parcel of land subdivided into the suit premises and **Plot No. 492**. Whereas the suit premises were registered in the name of Abdalla, the sub-division number 492 was registered in the name of Tima and titles issued. On 10th May, 1996, Tima passed on leaving the dispute still raging. By then they had parted ways with Joseph. Her son, the appellant, took up the mantle and pushed the fight to another level. On 2nd October, 1997 he lodged a caveat on the title of the suit premises claiming beneficial interest. However, this caveat was subsequently vacated by the Registrar of Titles pursuant to a letter dated 21st November, 1997 addressed by the Registrar of Titles to the appellant. Prior to this the appellant had also on 7th September 1997 placed a caveat emptor notice in the local newspapers. Following the removal of the caveat, Abdalla sold and transferred the suit premises to the respondent. Since the purchase aforesaid the respondent had tried to take possession thereof but the appellant had forcibly prevented him from doing so, hence the suit.

With this uncontested background information regarding the dispute, how did the witnesses fare during the trial? Before **Sergon, J., Frankline Pereira**, a director of the respondent testified that the respondent had purchased the suit premises from Abdalla at a consideration of Kshs.4,000,000/-. The suit premises were then transferred and registered in the name of the respondent followed by the issuance of certificate of title, a copy whereof he tendered in evidence. The suit premises were being managed on respondent's behalf by one, **Mr Buyu**. On a visit to the suit premises, to fence it, Buyu was obstructed by the appellant. He reported the incident to Kikambala police station but no action was taken. In the year 2001, the respondent engaged the services of **Kanjalu Contractors** to put up a fence around the suit premises but the contractor was chased away by the appellant. Thus the respondent had been unable to develop the suit premises. At the time of purchasing the suit premises the respondent had not been made aware of any dispute between Abdalla and the appellant. The respondent was thus an innocent purchaser for value without notice. It therefore prayed to be granted the orders sought in the plaint.

When the suit next came up for hearing on 1st March, 2012, for reasons which are not readily apparent on the record, Tuiyott, J took over. Respective parties agreed that the case proceeds from where it had reached before Sergon, J. The respondent then closed its case.

The appellant testified in person. His case was that his mother, Tima owned the entire land, the precursor to the suit premises. She had since passed on and by a grant dated 13th October, 1998, he had been appointed the administrator of her estate. He had resided on the suit premises for over 47 years with his family. He further testified that on the suit premises there used to be a school for orphans that had since been relocated. On the suit premises too was his garage **Tekie Auto Engineers**. He was aware of the dispute over the suit premises involving Tima and Abdalla both of whom had passed on. Abdalla had claimed ownership of the suit premises which Tima disputed resulting in several cases between the two. Though the two Appeal Boards had sanctioned that 4 acres out of the suit premises should be curved out in favour of Tima and 20 acres to Abdalla that decision had not been implemented. He was not aware of any plan submitted or survey carried out for purposes of complying with the decision. Nor was he aware whether any member of his family had been notified or contacted by the registrar, Commissioner of Lands or Director of Survey in respect of the decision. Because of the dispute he had placed a caveat emptor in the Daily Nation and Standard Newspapers warning any prospective buyers of the existence of a dispute. He further testified that a certificate of title issued to Abdalla talks of 21.05 acres which was one acre more than the Appeals Board had awarded him. He was also aware that one, **Kiguru** who is a licensed surveyor at some point came to the suit premises with a pick-up full of people. However, he refused them entry to survey the suit premises. He was also aware that **Kanjalu Building Contractors** had come to the suit premises to plant beacons and put up a perimeter wall. However, he refused them entry as well. As far as he was concerned neither Abdalla nor the respondent had taken possession of the suit premises. He therefore sought the dismissal of the suit with costs. With that, the appellant too, closed his case.

In a reserved judgment delivered on 27th February 2013, Tuiyott, J as already stated found in

favour of the respondent. That determination provoked this appeal on seven grounds to wit:-

“1. That the Learned Judge erred in law and fact in holding that the Certificate of Title of the suit property known as Plot No.491/IV/MN issued in the name of the Respondent was indefeasible despite the court expressing grave doubts as to its regularity and legality. As such, the court was obliged in law to order that such a certificate of title was of no legal effect as it was obtained illegally.

2. That the Learned Judge erred in law and in fact in making a finding that the Respondent holds a good title to Plot No. 491/IV/MN despite the fact that there was illegality in the manner in which Plot No.24/IV/MN was subdivided to create Plot No. 491/IV/MN and No. 492/IV/MN. Consequently, the resultant title of Plot No.491/IV/MN ought to have been declared by the court as void and a nullity.

3. That the Learned Judge erred in law and in fact in making an order that the Appellant should vacate from the suit property known as Plot No. 491/IV/MN despite the Appellant having testified in court that he and his family have always been in possession of the suit property and still holds the original certificate of title of Plot No. 24/IV/MN issued in the name of the Appellant’s late mother and which parcel of land was the original plot of land that was irregularly subdivided to Plot No. 491/IV/MN and plot No. 492/IV/MN.

4. That the Learned Judge erred in law and in fact in disregarding all evidence touching on the caveat and the doctrine of lis pendens whose effect would have been to invalidate the Certificate of Title of Plot No. 491/IV/MN issued to the Respondent.

5. That the Learned Judge erred in law and in fact in failing to hold that the subdivision of Plot No. 24/IV/MN to create Plot No. 491/IV/MN and Plot No. 492/IV/MN without the approval of the then Coastal Provincial Land Control Appeal Board and Central Land Appeal Board who were seized of the dispute ran contrary to the doctrine of lis pendens and consequently the resultant titles and the purported transfer of Plot No. 491/IV/MN to the respondent was a nullity ab initio.

6. That the Learned Judge further erred in law and in fact in upholding procedural technicalities over administration of substantive justice by arriving at the conclusion that the Appellant had failed to impeach the respondent’s title to the suit property known as Plot No. 491/IV/MN on account of a procedural flaw.

7. That the Learned Judge erred in law and in fact in arriving at a decision that was wholly against the weight of the evidence that had been adduced.”

Over the years, there has developed a practice which has since acquired the force of law that the first appellate Court in dealing with first appeals, transforms itself into the trial court however without the benefit of seeing and hearing the witnesses as the trial court, interrogate and re-evaluate the evidence a fresh so as to reach its independent conclusion as to whether to sustain or overturn the trial court’s judgment. In other words as a first appellate court in this appeal we are expected to approach the whole of the evidence on record from a fresh perspective and open mind. We should analyze, evaluate, weigh and interrogate all the evidence on record afresh and arrive at our own independent conclusions. In doing so however, we should always bear in mind that unlike the trial court which had the advantage of hearing, seeing and observing the witnesses as they testified and possibly assess their demeanour, we are disadvantaged in that regard as our conclusions are based on the word of the record. It is precisely for this reason that as an appeal court we must accord due respect to the factual findings of the trial court. See generally **Selle v Associated Motor-boat Company Limited (1968) EA 123** and **Williamson Diamonds Ltd v Brown (1979) EA 1**.

With this in mind, we now turn to consider the appeal. It is common ground that the respondent purchased the suit premises from Abdalla who had in turn purchased it from Joseph on the strength of a

power of attorney donated to him by Tima. Much as Tima denied knowledge of such transaction, that denial can only be taken with a pinch of salt. In the ruling by Bosire, J in **Nairobi High Court Civil Case No. 3742 of 1991** dated 8th November, 1991, the circumstances leading to Tima's registration as the proprietor of the original parcel of land and the circumstances under which a portion thereof was sold to Abdalla are outlined. It is instructive that those facts have never been challenged. The facts are simply this; Tima got married to Joseph who used to be a civil servant. While so he acquired the parcel of land and had it registered in the name of Tima. The land was later charged to Barclays Bank Ltd to secure the repayment by the couple of a loan obtained by them. Repayment became irregular and were threatened with foreclosure. It was then that Joseph approached Abdalla for financial assistance to redeem the suit premises which assistance he was given.

In return they agreed to give him a portion of the land, the suit premises. Joseph then used a general power of Attorney donated to him by Tima over the land to enter into an agreement to sell a portion thereof to Abdalla. Though Tima subsequently denied having executed the power of Attorney and called it a forgery, it was again established in this ruling, that Tima was being less than candid with that assertion. For in March, 1989 she had sworn an affidavit before Kenneth Marende, a Commissioner for oaths in support of an application filed in **Mombasa SRM's Court Civil Application No. 17 of 1984** in which she deponed that she had, donated a power of Attorney to her husband to deal with the suit premises, but that he had misused it. Consequently she was driven to revoke it.

However, it is instructive that the revocation was after the agreement had been executed between Joseph and Abdalla and there had been part performance of the agreement. Bosire, J went on to hold that the power of Attorney was valid and that the revocation of the power of Attorney if at all could only affect future transactions. The acts which had been done in exercise of the power donated and before it was revoked would not be invalidated by the revocation. Revocation would thus not affect the agreement between Abdalla and Joseph. That finding having not been challenged, it cannot be the case of the appellant that Abdalla never bought the suit premises from his parents nor that Abdalla never sold and transferred the suit premises to the respondent. Indeed reading through the evidence and submissions of the appellant he seems to indirectly admit that indeed the suit premises were sold. His only concern was the manner in which the subdivision and subsequent transfer was effected; that the respondent eventually got more than what he had bargained for; that the subdivision was not in tandem with the decisions of the appeals board; that there had been no survey, nor had the mother title to the original parcel of land been surrendered.

In our view all these mis-steps cannot divert from the fact that the suit premises were voluntarily sold to Abdalla by Joseph and in turn Abdalla sold and transferred the same to the respondent. That sale was binding on Joseph and his off-springs and or successors, the appellant being one of them.

It is common ground that the appellant has to-date refused to part with the possession of the suit premises to the respondent though two titles according to the appellant are in existence, in the name of the respondent and Tima respectively. It is also common ground that Tima has since passed on and the appellant is now the administrator of her estate. Similarly, Abdalla has since also passed on. It is further common ground that the appellant was sued by the respondent in his personal capacity as a trespasser to the suit premises. Finally, it is common ground that Abdalla was never made a party to this suit although all the complaints regarding his untowered conduct if at all in the transaction are directed at him.

We shall collapse, the appellant's complaints into three and deal with them seriatim. The first ground is that the sale and subsequent transfer of the suit premises to Abdalla and thence to the respondent was a nullity on account of fraud, illegality and procedural irregularities and that the transaction having been tainted as aforesaid resultant titles were a nullity and could not therefore pass good title to the respondent. The fraud, illegalities and procedural irregularities complained of were, failure to obtain the consent of the relevant Land Control Board to the transaction; failure to carry out survey before the subdivision; was carried out that in any event the subdivision carried out, did not accord with the decision of the appeals board; that the subdivision was carried out despite the caveat and caveat emptor in place by the appellant; that there was non-surrender of the mother title and finally that, the transfer was effected in violation of the doctrine of *lis pendens*.

Mr Gikandi, learned counsel for the appellant submitted that in its judgment the Court found that the sub-division of **Plot No. 24** into the suit premises and **Plot No. 492** may well have been tainted with illegality. With that finding the court ought to have downed its tools and investigated the illegalities. The issue had been pleaded in the defence; and evidence had been led and even addressed in the submissions. In support of this proposition counsel relied on the case of **Mistry Amar Singh v Serwano Wofunira Kulobya [1963] EA 408**, which posits that whenever an act of illegality is brought to the attention of the Court, then the court will not allow anybody to benefit from such an illegality, which proposition was also reiterated in the case of **Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 Others [2004] eKLR**. Counsel urged us to hold that the minute the trial court found that the Certificate of Title of the suit premises issued to the respondent was procured illegally and irregularly, it was obliged to dismiss the respondent's suit, and more so since the respondent had not entered a cross-appeal against the said finding of illegality and irregularity. Concluding his submissions on this aspect counsel stated that a court of law should always give a bow to the law by enforcing the law and frowning upon any act tainted with illegality.

In response, Ms Ngigi, learned counsel for the respondent submitted that the trial court Judge addressed himself to **section 23** of the Registration of Titles Act (RTA) and made no finding that the respondent was guilty of fraud. She stated that the appellant was relying on alleged illegalities committed by Abdalla to impeach the title held by the respondent. Further, counsel submitted that when it comes to a title issued under the RTA, the title is questionable where it has been proven that the registered owner committed a fraud in the process of acquiring it. In this case the appellant had fallen short of proving that the respondent perpetuated any fraudulent acts.

Counsel submitted that Abdalla, who did the sub-division was not a party to the suit and the respondent could not answer claims raised by the appellant against him. Counsel asserted further that the respondent did not sub-divide the land, but was an innocent purchaser for value who relied on the accuracy of the title and the register as a guarantee to his title under the Torrens land tenure system. She stated that the duty of the respondent did not require him to look into the history of the title as the RTA did not require the same. Counsel further argued that even if Abdalla obtained the title irregularly, the only way the respondent's title could be invalidated would be if the respondent had knowledge of the fraud. Counsel cited the case of **Moya Drift Farm Ltd v Theuri, (1973) EA 114** and stated that it should not be correct for the appellant to argue that because of the irregularities committed by a person who was not a party to the suit the respondent's title would be declared a nullity. Counsel further relied on the case **Nairobi Permanent Markets Society & 11 others v Salima Enterprises & 2 Others, Civil Appeal No. 185 of 1997 (UR)** to buttress her argument that where it is not shown that a person is a party to any fraud or misrepresentation perpetrated upon another during the acquisition of a property, nor any averment on the knowledge of being a party to any irregularity in the transaction, then the person has an absolute and indefeasible title over the property and this cannot be interfered with. In addition, the authority required a party to disclose any interest or right they have to the property that is the suit premises in the absence of which they cannot interfere with the other parties' right of ownership by putting a hold on its activity or development on the suit land. In support of the argument that the respondent has an indefeasible and absolute title to the suit premises as no fraudulent acts were proven to have been perpetrated by it in the acquisition of the suit premises nor was it in the know about any fraudulent activities touching on the sub-division and attaining of the Certificate of Title that may have been committed by Abdalla, counsel relied on the case of **Dr Joseph N. K. Arap Ng'ok v Justice Moiwo Ole Keiwua & 5 others, Civil App. No. Nai 60 of 1997**, where the Court found that **section 23(1)** of the RTA gives an absolute and indefeasible title to the owner of the property which can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party and such is the sanctity of title bestowed upon the title holder under the Act. Highlighting **section 24** of the RTA, Counsel submitted that a deprived owner is entitled to damages and if the appellant has thus been deprived, his remedy is in damages.

In our view the appellant's assertion that the respondent's acquisition of the suit premises smacked of fraud and illegalities cannot stand scrutiny. In the case of **Koinange & 13 others v Koinange [1968] KLR 23** it was held that allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the

balance of probabilities. Counsel for the appellant seems to be laying their obligation to strictly prove the fraud allegedly committed by the respondent on the court by calling upon it to investigate the issue whether pleaded or not. Parties ought to know that they have an obligation to present a *prima facie* case of fraud or illegality before the court can investigate the issue. Mere mention of fraud or illegality in passing will not do. In the case of **Westmont Power (Kenya) Limited v Westmont Power (Kenya) Limited [2003] eKLR** the court in addressing the issue of pleading fraud as a defence stated that

“Setting up one’s case or defence is to compose, propound, posit, or begin to develop and show the structure of the case of defence. One is required to place in view the line of case or defence and show the structure of the case of defence intended to be pursued ...”

The point being made here is this, that the appellant was expected to build a structure showing that his case was about fraud, illegalities and misrepresentation by way of pleading. He was to construct a *prima facie* case of fraud or illegality. The trial court would only have allowed him to pursue that line of defence after he had presented a *prima facie* case of fraud or illegality. However this was not the case here. The appellant merely mentioned the issue in passing in paragraph 11(a) and (f) of the defences, thus *“The plaintiff and Abdalla Zubedi irregularly and illegally obtained the certificate of title to subdivision plot numbers 491 and 492 IV mainland north was through misrepresentation and fraud”*. The appellant made no attempts to give particulars of fraud, misrepresentation or illegalities as required. Nor did he make any counterclaim against the respondent.

Experience in our courts has shown that many a defendant hope to get away with it by merely pleading fraud or illegality or a bare denial. It has however to be understood clearly, that a general allegation or a bare denial is not sufficient. The mere assertion of fraud or illegality can no more entitle a defendant to have leave to defend than can a mere assertion that he gave value entitle a plaintiff to judgment. There must be particularity in the defendant’s allegations. A general allegation of fraud or illegality and misrepresentation as was the case here was not sufficient to infer liability on the part of those who are said to have committed it.

Indeed **Order 35** of the Civil Procedure Rules require the parties to state a very explicit case of fraud or illegality, or rather of facts suggesting fraud or illegality, and a mere statement that fraud or illegality had been committed, is not in compliance with the provisions of **Order 35**. The provisions of that Order forbid a general or evasive allegation of fraud or illegality but some actual fact or circumstances which taken together imply, or at least very strongly suggest, that a fraud or illegality must have been committed, those facts being assumed to be true. Unfortunately, the appellant did not meet this threshold. This being our view of the matter, we cannot see how the case of Mistry Amar Singh (*supra*) can be of assistance to the appellant in the absence of any particulars of fraud, misrepresentation or illegalities pleaded and attributed to the respondent.

The appellant in their submissions on fraud and knowledge of irregularities touching on the suit premises canvass the issue by questioning how Abdalla obtained an imperfect title. However it is a matter of curiosity as the trial court rightly noted why the said Abdalla and or his estate was not enjoined in the suit. The appellant apparently relies on the *“imputed knowledge”* to assert that the respondent perpetuated a fraud. Due to the seriousness of the offence of fraud, the appellant had a burden of adducing sufficient particulars to demonstrate how the respondent was a party to the fraud and illegalities since the alleged fraud or illegalities if at all were perpetrated by Abdalla. There was no attempt at all to create a nexus between the respondent and Abdalla. The mere fact that the same advocate acted for both Abdalla and the respondent cannot suffice. In fact at paragraph 11 of the defence, the appellant merely stated that the plaint was defective and did not disclose any cause of action and that the plaintiff’s certificate of title was invalid *ab initio* on account of having been acquired irregularly and illegally. As it can be readily seen the alleged particulars if any were to buttress the averment that the plaint was defective and did not disclose any cause of action and the validity of the title. The appellant of course referred to the issues of land control board, the excising of the suit premises without survey being carried out on the ground and that the subdivision was undertaken unprocedurally. However these do not adequately amount to particularity in the appellant’s allegations on the respondent’s alleged fraudulent actions. Nor could those malfeasance be attributed to the respondent. Faced with shortcomings in the

pleadings, we do not see how the trial court could thus down the tools and investigate the fraud unless a *prima facie* case of fraud or illegality had been presented.

Raising the issues of consent of the Land Control Board, or lack of it, failure to carry out a survey before subdivision, differences in the acreage, failure to surrender mother title and doctrine *lis pendens* in evidence cannot translate into particulars, fraud, illegalities and or misrepresentations. It is also instructive that all the alleged improprieties in the acquisition of the title are not attributable to the respondent. Rather, they are attributed to Abdalla who as we have already stated was never made a party to the suit in his lifetime. Why this was not done, it is difficult to fathom. The respondent cannot be expected to be held to account for the malfeasance of Abdalla. Secondly, even if the appellant had proved fraud and illegalities, we doubt whether the respondent's title could have been nullified since it is quite apparent that it was not party to the fraud or illegalities that preceded its acquisition of the suit premises nor was it proved that it had knowledge of the fraud, illegalities and misrepresentations. As it turns out, the respondent was actually a purchaser for value without notice. That being the case and pursuant to *section 23* of RTA its title is sacrosanct and cannot be quashed or nullified. Finally, as correctly pointed out by counsel for the respondent, even if fraud and illegality was proved, the appellant's remedy does not lie in the nullification of the respondent's title but in damages. For all these conclusions we find the cases that were cited by the respondent, Moya Drift Farm, Nairobi, Permanent Markets Society, and Dr. Joseph N. K. Arap Ng'ok (all supra), to the point and very helpful

We would wish to address a little more the accusations levelled against the respondent regarding the validity or otherwise of its certificate of title to the suit premises. We shall first address the issue of the consent of the Land Control Board. It is common ground that though Kilifi Land Control Board had denied Abdalla, the consent, Abdalla successfully appealed the refusal and both the Coast and Central Land Control Appeals Board reversed the refusal and granted Abdalla the consent. That consent was with a rider though that, the respondent should spare 4 acres for Tima encompassing her house and Abdalla takes the remainder. In compliance with the aforesaid, Abdalla duly carried out the instructions. However it appears that there was some mistake in the acreage indicted in the resultant titles. Whereas Tima's 4 acres are intact, Abdalla ended up with 21 acres. However, in our view, this alone cannot invalidate the resultant title as it is purely an administrative matter. We are certain that the land on the ground did not expand in tandem with the aforesaid titles. The acreage remained the same. In any case, who should be complaining? Tima got her 4 acres. In our view the mistake in the acreage in the title to the suit premises is a matter that can be corrected - administratively as no prejudice was occasioned to the appellant by the omission. The complaint that Abdalla should have gone back to the chairman of the Appeals Board to sanction the sub-division is neither here nor there. Once the consent was granted on terms, it was upon Abdalla to execute the consent in compliance with the conditions. He did so. In any case going back to the chairman was unnecessary given the directive by Mbogholi, J allowing Abdalla to execute the decision of the Appeals Board. Again one would have expected that if Tima or the appellant was unhappy with the execution of the decision of the Appeals Board by Abdalla, they would have taken up the concerns with the Appeals Board for appropriate remedy. They did not do so. They cannot now be heard to complain. In the face of all the foregoing the appellant's argument that there was no consent given cannot just wash. The consent was given by the appeals board. Though its execution was problematic in terms of the acreage, that cannot be the basis for the appellant to assert that there was no consent. By allowing the appeal which essentially meant that Abdalla was granted the consent, the appeal boards were not re-writing the contract for the parties as alleged by the appellant. Abdalla made the application. It was on appeal granted on terms. The condition imposed did not amount to re-writing the contract. It cannot be true that the board merely grants or refuses the consent as applied. Counsel for the appellant did not point to any particular provision of the law or any authority for the proposition that on an application for consent the land control board can only grant or refuse the application as presented. If that be the case then what would an appellate process serve? The mere fact that the appeals board overturned the decision of Kilifi Land Control Board and granted the consent on terms did not amount to it re-writing the contract for the parties nor did it exceed its mandate. In any event, this issue was not raised in the evidence of the appellant in his submissions or ground of appeal. Accordingly appellant is barred from raising the same. In the case of **Stallion Insurance Company Ltd v Ignazio Messina & C.S.P.A (2007) 3KLR** this Court emphasized the need to bear adherence to **Rule 101** then similar to our current **Rule 104** of the appellate Court Rules which forbids a party, at the hearing of an appeal to argue

that the decision of the superior court should be reversed or varied on any other ground except on those grounds specified in the memorandum of appeal unless leave of court is first sought and obtained. The appellant was legally represented at all times and his defence was not amended at any point. Again though the issue of jurisdiction of the Appeals Board is a new issue, we hasten to add that the decision was never the subject of an appeal by the appellant nor did he seek to have the same set aside.

On the question as to whether or not the subdivision was carried out without the survey on the ground, we can only go by the word of the appellant. However, we do not think that the appellant was truthful given his denials on obvious and mundane things. We do not see how the registrar of title would have approved the subdivision and issued titles without evidence of the process of sub-division being strictly adhered to. We doubt that the Registrar would have sanctioned the transaction without following the laid down procedures. In any event, even if there had been such an anomaly, the respondent cannot be blamed. The appellant should have brought on board the Registrar of Titles to explain the anomaly. Further he could also have brought into the suit Abdalla to offer evidence as to how he went about the sub-division. The respondent cannot be expected to carry the cross for these two. Given that the respondent concedes that a surveyor by the name Kiguru came to the suit premises at some point but he repulsed him, we are satisfied nonetheless that he did carry out the survey which subsequently formed the basis of the sub-division. The assertions by the appellant to the contrary are simply unbelievable.

With regard to caveat emptor, we note that this was lodged in the daily Nation of 7th September, 1997; hardly 2 months after Mbogholi Msagha, J had given the respondent the green-light to proceed as per the decision of the Appeals Board. The Notice was by the appellant in his capacity as “*intended Administrator for the estate of the late Tima J.A. Thaddle Bockle.*” Two things stand out in this Notice, the appellant was not a party to any suit and secondly, he was not the administrator of the estate of the deceased, then. In the premises the caveat emptor stood on a quicksand and was of no legal consequence. Indeed it would appear that it was placed merely as a ploy to frustrate the directive by Mbogholi Msagha, J aforesaid.

As for the caveat, we note that it was again lodged by the appellant on 2nd October, 1992 claiming beneficial interest. However by a Notice dated 21st November, 1992 the Senior Registrar of Titles, Mombasa required of the appellant to show cause why the same should not be removed. Apparently, no cause was shown by the appellant and the caveat was subsequently removed. That removal whether properly executed or not cannot be attributed to the respondent. The respondent cannot be the fall guy for the registrar of Titles. It is only the latter who could explain the circumstances that led to the removal of the caveat. He should have been made a party to the suit. He was not and the appellant must solely shoulder the consequences. In any case, the legality of the caveat was doubtful given the fact that the suit premises had been sold and transferred to the respondent who had in its possession, a certificate of title and pursuant to section 230 of the RTA, it was indefeasible. Thus the appellant had no interest in the property and could not therefore stand in the respondents or Abdalla’s way.

Counsel for the appellant also raised the issue of the sub-division of Plot No. 24/IV/MN into two plots which was undertaken without the surrender of the original Certificate, mother title and emphasized the trial court remarks on the lack of an explanation on how such a process took place. Counsel submitted that by virtue of **section 70** of the Registrar of Titles Act the said sub-division and issuance of the two Certificates of Titles was unlawful. We do not think that the respondent should bear blame for this. It is only the Registrar of Titles who could have offered an explanation if at all. As previously stated, he was not enjoined in these proceedings. It is also possible that Tima may have been required to surrender the mother title and she refused to do so to frustrate the process of subdivision given the acrimonious manner in which the dispute has evolved and raged over time. In such scenario, we do not think that the Registrar of Titles is powerless or under the mercy of a party who deliberately refuses to surrender the mother title when called upon to do so.

We now turn to consider the issue of *lis pendens* and inadequacy of the judgment which is the appellant’s second set of complaints. Counsel for the appellant takes issue with the trial court’s decision to disregard all evidence touching on the doctrine of *lis pendens*. Counsel maintained that the respondent disclosed through their affidavits that there were pending suits between Abdalla and Tima which were

Mis. App. No.939 of 1991 and **Nairobi High Court Civil Case No. 3742 of 1991**. Counsel further submitted that witnesses gave evidence attesting to the aforementioned. Counsel also referred to the list of issues as framed by the respondent and that issues No. 9 and No. 10 captured the doctrine of *lis pendens*, the centre piece of this dispute. He submitted that the respondent did not object to the evidence on this issue being led and actually testified on the same. Counsel submitted further that under **Rules 4 and 5 of Order 21** of the Civil Procedure Rules, the trial court was under an obligation to make a determination on the issue. Relying on the authority in **Standard Chartered Bank of Kenya Limited** (supra) counsel advanced the proposition that whenever a trial court fails to make a determination of any issue that is before the Court it would amount to an abdication of such Court's duty and the resultant judgment would be incomplete and therefore unreliable. Counsel further referred to the case of **Watamu v Kiarie and Galaxy Paints Co. Ltd v Faccon Guards Ltd (2000) 2 EA 385**, for the proposition that failure to determine all the issues in dispute renders the judgment incomplete and therefore unreliable. Counsel in concluding in his submissions stated that it was a grave misdirection on the part of the trial court to fail to determine the issue due to the impact it had on the entire case and thus the judgment was incomplete and this Court ought to set aside the same by virtue of the fact that it had thereby been rendered unreliable.

A question arises here, as to whether this Court should address this issue regarding an incomplete judgment when it is not captured in the memorandum of appeal. A perusal of the Memorandum of Appeal filed by the appellant shows clearly that this was not one of the grounds of appeal. This Court's hands are therefore tied in addressing this issue. In the case of **Stallion Insurance Company Ltd** (supra) this Court stated whilst emphasizing **Rule 101**, the predecessor to the current **rule 104** of this Court's Rules that, at the hearing of an appeal a party without leave of the court could not argue that the decision of the superior court should be reversed or varied except on a ground specified in the memorandum of appeal. This is sufficient to dispose off the issue. However, is it true that the Judge did not address issues Nos. 9 and 10 as claimed by the appellant? We do not think so. Those issues were:-

“9. *Has the decision in High Court Civil Case No. 3742 of 1991 been challenged and lawfully awaiting determination and if so, does it in any way affect this suit?*

10. *Is Mombasa high Court Civil Case No. 3 of 1994 pending hearing and if so, what if any is the relevance of the said suit to this suit in law?*

The trial court addressed this twin issues in its judgment. The Judge chose to disregard all evidence touching on the doctrine of *lis pendens*. This was because the trial court felt that the appellant was at the time seeking to introduce matters that had not been specifically pleaded in his defence. The appellant sought to address the issues of existence of **High Court Civil Case No. 3742 of 1991** and **High Court Civil Case No. 3 of 1994** under the umbrella of the doctrine of *lis pendens*. When the Judge disregarded all evidence touching on the alleged doctrine of *lis pendens*, he in fact addressed issues 9 and 10. This is because the two matters raised in the issues as framed by the respondent fell according to the appellant under the net of the doctrine of *lis pendens*. In disregarding the application of the doctrine of *lis pendens* to the suit the Judge basically decided that the two suits did not affect the instant suit nor did they have any relevance to the framed suit.

In any event, our careful reading and appreciation of the two issues and as correctly observed by counsel for the respondent they do not really amount to the doctrine of *lis pendens*. To our mind, the appellant was basically pleading sub-judice rule. Nothing really barred the appellant from specifically pleading the doctrine. It is our view that the appellant has realized too late in the day that he ought specifically to have pleaded the doctrine in his defence if he wanted to rely on it but since he did not, he must look for a pleading that could remotely incorporate the doctrine though not intended. He conveniently finds that in issues 9 and 10 as framed by the respondent.

The Judge framed the issues for determination from the pleadings as well as those framed by the respondent. It is instructive to note that the appellant never framed issues for determination. Thus there were no agreed issues framed upon which the Judge will have been called upon to make a determination on each. The Judge in his wisdom collapsed all the issues for determination into 3 as he deemed them to

be pertinent, and he cannot be blamed. We do not think that the Judge was under any obligation to address all issues as framed by the respondent. He had that discretion to avoid overlapping and repetitive issues. The law requires that judgments in defended suits should contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decisions. It is not a requirement that issues framed by one party to the suit should be accorded determination on issue by issue basis. As already stated the appellant did not frame his own list of issues to be determined, only the respondent did so. He cannot thus blame the Judge for collapsing the issues as framed by the respondent into a few relevant ones for determination. The appellant cannot seek to piggy ride on the issues as framed by the respondent and claim that they raised the issue of *lis pendens* when in actual fact they were basically on subjudice rule. The situation would have been different had the appellant framed his own issues or if there was a list of agreed issues for determination between the appellant and respondent and the same had not been exhaustively considered by the Judge. The respondent has not complained that their issues as framed were not satisfactorily answered. Based on the fact that the issue of an incomplete judgment was not raised in the Memorandum of Appeal, and for the other aforesaid reasons we find this complaint to be unwarranted. The propositions in **Standard Chartered Bank of Kenya Limited** (supra) and **Watamu v Kiarie** (supra) are inapplicable given the circumstances of this case since by disregarding the said issues and stating that they were inadequately pleaded by the appellant and could not be used as a defence against the respondent, which would have amounted to trial by ambush, the trial Court did indeed address the issues.

Returning to the issue of *Lis Pendens* even if we were to give the benefit of doubt to the appellant and assume that indeed the doctrine of *lis pendens* was discernable in the proceedings even if specifically not pleaded or framed as an issue, we doubt whether it could hold in the circumstances of this case.

In his submissions on the doctrine, Mr Gikandi stated that by reason of **section 23** of the RTA the Court found that the respondent's Certificate of Title to the suit premises was indefeasible and there were absolutely no facts that existed that could have been used to demolish the effectiveness of the said Certificate of Title. Mr Gikandi deemed this conclusion as erroneous in that the trial court failed to take into account the fact that it was common ground to both the appellant and the respondent that there were in existence suits pending involving the same suit premises; being **Nairobi High Court Misc. App. No.939 of 1991** and **Nairobi High Court Civil Case No. No.3742 of 1991**, **Mombasa High Court Civil Case No. 3 of 1994**. As such counsel argued, **section 52** of the Indian Transfer of Property Act (ITPA) which was then applicable, completely prohibited any alienation of the suit premises while the suits were pending. Counsel submitted that the purported sub-division of Plot No.24/IV/MN to the respondent was carried out when the said suits were still pending in the Court and from the evidence of both the appellant and the respondent it was confirmed that the sub-division and transfer were effected during the pendency of the suits. Counsel referred us to the decision of this Court in **Festus Ogada v Hans Mollin [2009] eKLR** where it was held that the minute it is demonstrated that an alienation took place without the approval of the Court during the pendency of a suit, the alienation is rendered wholly illegal and the Court will not allow it to stand. Counsel further relied on Mulla on Transfer of Property Act, 1882 which categorically affirms the view that the doctrine of *lis pendens* overrides the doctrine of innocent purchaser for value without notice. Counsel maintained that by allowing the alienation that was effected on 5th September, 1998 by Abdalla to the respondent of the purported Plot No. 491/IV/MN that was the subject-matter of pending suits, the court blessed, Abdalla's acts of impunity from which the respondent benefited. Counsel again drew the attention of the Court to the cases of **Mistry A Amar v Kulobya** (supra) and **Standard Chartered Bank Kenya Ltd** (supra) for the proposition that the trial court should not have countenanced such an illegality and nor should this Court.

Ms Ngigi in rebutting the arguments by the appellant started by restating the fact that the issue of *lis pendens* was never pleaded by the appellant in his defence and that he merely raised the issue of sub-judice. That the trial Judge was right to reject any evidence on *lis pendens*. Counsel further submitted that in any case the suits were not being prosecuted by the parties who filed them. Further counsel emphasized that the decision by Mbogholi Msagha, J allowed Abdalla to deal with the land despite the pending suits, which thus removed the application of the doctrine as Abdalla had the authority of the Court to proceed with the execution of the decision of Appeals Board. Counsel further argued that the appellant's mother died on 10th May, 1996 which means that the suits she had filed against Abdalla had

abated by operation of the law by the time the transfer was effected. The same would apply to the Mombasa case. The doctrine of *lis pendens* by virtue of the abatement of the suit was thus inapplicable. To support this proposition counsel cited the Supreme Court of Nigeria's remarks in the case of **Olori Moors Company Ltd & 2 Others v Union Bank of Nigeria Plc**, that:-

“The expression lis pendens variously interpreted in different forms means a pending action or suit or a controversy in court particularly in relation to the subject matter of a property.”

In this appeal, one would ask whether the doctrine of *lis pendens* was really applicable at the time of the transfer of the suit premises from Abdalla to the respondent seeing that by the time the transfer was effected, Tima had died and the suits had abated. **Order 24, Rule 3(1) and (2)** provides that

“Where ... a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. (2) Where within one year no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned.”

In as far as the two suits in Nairobi are concerned, it is common ground that the same have never been prosecuted. In both cases, Tima was the plaintiff and Abdulla, the defendant. However, Tima passed on sometimes on 10th May, 1996. To date there has been no substitution of Tima in the aforesaid suits to enable the suits to move forward. Accordingly and in terms of the provisions of Order 24, Rule 3 those suits abated. It is also instructive that the transfer of the suit premises to the respondent was effected on 15th March, 1998 almost 2 years after the death of Tima. The same reasoning would apply to Mombasa suit. However, in this suit Abdalla was the plaintiff whereas Joseph and Tima were the defendants. The respondent sought damages for trespass and injunction against them. This suit just like the others has never been prosecuted and has since abated following the death of both Abdalla and Tima. Abdalla, having been the plaintiff we doubt whether in the circumstances, the doctrine would apply against him. While addressing the purpose of the principle of *lis pendens*, Turner L. J, in *Bellamy vs Sabine* [1857] 1 De J 566 held as follows:-

*“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation **pendent lite** were permitted to prevail. The plaintiff would be liable in every case to be defeated by the Defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”*

From the utterances of the learned Judge, an inference would be drawn that the purpose of maintaining the status quo of the suit property pending litigation of a suit would be to protect the plaintiff against the defendant alienating the property before judgment or decree.

From the inference drawn above, the doctrine of *lis pendens* may not apply to a party to a suit who has filed the suit against their interest. The doctrine of *lis pendens* looks to protect the plaintiff as against the defendant alienating/dealing with the suit property, Zubedi being the plaintiff in the Mombasa case was thus the party to be protected by the doctrine of *lis pendens* if any other suit was to be filed touching on the suit property. The case may have been different if Tima at the time, looked to alienate the property for purposes of selling it and a suit arose looking to facilitate those acts, in that situation, Abdalla would have pleaded that doctrine of *lis pendens* stopped Tima from alienating the suit property and transferring it to a third party during the pendency of his suit thus the transfer by Tima in the envisaged scenario ought to have been invalidated.

It is worthwhile to note that the Rule on abatement of suit where no application is made for substitution of the plaintiff following the death has been framed in mandatory language *“Where within one year no application is made ... shall abate so far as the deceased plaintiff is concerned.”* The

doctrine of *lis pendens* applies during the pendency of a suit. In so far as the three cases are concerned, the doctrine is inapplicable as the suits abated upon Tima's death and the lack of a legal representative making application to be substituted as the plaintiff. There was thus no pending suit for the doctrine to be applicable to during the transfer of the suit premises to the respondent.

Secondly, a question arises as to whether the doctrine applies when the court grants a party authority to deal with the suit premises as it happened here. In **Misc App. No. 939 of 1991**, Mbogholi Msagha, J expressly authorized Abdalla to execute the decision of the Appeals Board. In our view, Abdalla having acted on the basis of a lawful court directive that has to-date not been challenged, varied, reviewed or set aside, he cannot be accused of violating the doctrine. Bosire, J too in his ruling had found as a fact that the suit premises were sold to Abdalla by Joseph on the strength of a power of attorney donated to him by Tima. Again this finding has not been the subject of any appeal, review, variation or even being set aside. In view of this the application of the doctrine was ousted the moment that Bosire, J so found and Mbogholi Msagha so directed. The authorities relied on by the appellant which comprise section 52 of the ITPA, Mulla's book "Transfer of Property Act," and the case of ***Olori Motors Company Ltd*** (supra) merely reiterate that the doctrine of *lis pendens* looks to maintain the status quo over a property which is the subject matter of litigation or pending suit. We have absolutely no quarrel with that restatement of the law. However, they are irrelevant to the circumstances obtaining in this case and of no assistance at all to the appellant. The appellant seems to also conveniently forget the proviso to the application of the doctrine which is to the effect that the property can be alienated with the authority of the court. The authorities produced before this Court all support the proposition that the property cannot be transferred or otherwise dealt with by any party to the suit or the proceeding. However the proviso is to the effect "... *except under the authority of the Court and on such terms as it may impose.*" This is an exception which is enunciated under **section 52** of ITPA and restated in the case of ***Festus Ogada*** (supra). As already stated Mbogholi Msagha, J lifted the stay that had been granted stopping any transaction touching on the property and gave Abdalla the liberty to transact on the land as per the decision of the Appeals Board. Abdalla thus had the authority of the Court to sub-divide the said property and transact on it thus ousting the doctrine of *lis pendens*.

On the ground that the judgment by the trial court was totally against the weight of the law and evidence and which is the 3rd and last complaint by the appellant, Mr Gikandi submitted that the judgment delivered by the trial court was totally against the weight of the Law and Evidence that had been accepted by the trial Court. He stated that from the evidence it was clear that there were pending suits in Mombasa and Nairobi by the time the transfer to the respondent was effected, no Land Control Board consent was ever obtained, the subdivision of the suit property was effected without the surrender of Certificate of the mother title which was still in the custody of the appellant and when a caveat was still in place. Based on the evidence mentioned above, counsel opined that the respondent should have been frowned upon by the Court and should not have left a Court of Law carrying a judgment in his favour. He further submitted that in strict adherence to the Law a court may have made an obiter determination that the respondent should have been investigated for fraudulent conduct in conspiracy with the late Abdalla in the manner in which the two went about acquiring the certificate of Title of the suit premises. In light of the above, counsel submitted that the holding by the trial court was against the weight of the evidence and the law and where a judgment by the Court must be based strictly on the evidence and the law, any judgment that falls short of the same is unreliable and on appeal, it should be set aside. Finally, counsel submitted that on account of the issues of illegality and irregularities that they highlighted, the Certificate of Title for the suit premises was a nullity. For these submissions counsel relied on the case of ***Benjamin Leonard Macfoy and United Africa Co. Ltd (1962) A.C. 152*** to the effect that something cannot stand on nothing and a nullity always begets a nullity and such is the fate of Certificate of title of the suit premises.

The respondent countered these submissions by stating that the Judge had noted that the appellant in his defence and submissions had failed to rise to the occasion to plead specifically and adequately on issues touching on caveats, *lis pendens*, fraud, misrepresentation and irregularities. The Judge dealt with the material before him and reached the correct decision. That decision was based on both law and evidence. The decision cannot be faulted on that basis.

As highlighted by the Judge in the judgment, the appellant failed to enjoin any parties that would have been crucial to the defence of the suit to aptly answer his misgivings and accusations. Most of the allegations were directed against Abdalla or the registrar of Titles yet they were never parties to the suit. The respondent cannot and could not be called upon to answer for the misdeeds if at all of these third parties. It is also worth of consideration the provisions of **Order VI Rule 4(1)** of the Civil Procedure Rules which *inter alia* provides:

“A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud ... or any fact showing illegality ... which he alleges makes any claim or defence of the opposite party not maintainable.”

It is clear to this Court just as the trial court that the appellant had looked to get away with merely alleging the issues of illegality or irregularity without showing any particulars as of fraud and misrepresentation and how the respondent perpetrated or had actual knowledge of the same, a trend which he seeks to carry forward to this Court. The Courts of justice have been very hesitant to let a party who pleads fraud or misrepresentation to benefit from their lack of diligence and have normally held that the defendant must build a structure showing that there was fraud, construct a *prima facie* case of fraud or illegality. The court acts on it and gives leave to defend only after a defendant has presented a *prima facie* case of fraud or illegality. The Judge acted on the material placed before him as well as the law as he understood. He cannot be faulted in his conclusions. In view of that we have said and as correctly held by the learned Judge, the resultant titles were neither irregular, illegal, fraudulent nor even a nullity. The appellant has failed to create a *prima facie* case as against the respondent thus the MACFOY principle cannot be said to apply as against the respondent.

With general allegations and bare denials that have failed to meet the legal threshold of proper pleadings, lack of particularity in the appellant’s allegations of fraud or illegality to infer liability on the part of the respondent who is alleged to have committed the alleged fraudulent actions and the appellant looking to raise issues that were never pleaded in the trial court, we are satisfied that the trial court did indeed enter an appropriate judgment based on the weight of evidence and law placed before it.

It is for all these reasons that this appeal must fail. Accordingly, it is dismissed with costs to the respondent.

Dated and delivered at Mombasa this 3rd day of April, 2014

H. M. OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

/saa