



Kaberia & 3 others v Mutisya & 2 others (Environment and Land Appeal E001 of 2024) [2024] KEELC 5392 (KLR) (17 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E001 OF 2024**

**CK NZILI, J
JULY 17, 2024**

BETWEEN

**JOSEPH KABERIA 1ST APPELLANT
CHARLES GITONGA M’IMWENDWA 2ND APPELLANT
ELIZABETH KATHAO 3RD APPELLANT
DIOCESE OF MERU TRUSTED REGISTERED 4TH APPELLANT**

AND

**ZACHARY MUTISYA 1ST RESPONDENT
KABERIA MUTUMA 2ND RESPONDENT
NELLY NKIORTE 3RD RESPONDENT**

*(Being an appeal from the Judgment of Hon. T. Gesora –
CM in Maua CMCC No. 27 of 2017 delivered on 6.12.2023)*

JUDGMENT

1. The appellants, who were the 1st, 2nd, and 3rd defendants at the lower court, had been sued by the respondents as the plaintiffs by a plaint dated 22.2.2017. The respondents described themselves as the chairman, secretary and treasurer of the Rwaene Water Project; herein, after the project, sued the 1st appellant in his capacity as the father in charge of Maua Catholic parish and Maua Catholic Primary School. The respondents averred that the project was a self-help group registered under the Ministry of Gender, youth, and Social Development, said to have commenced its operations in 1986. It was averred that the sole purpose of the project was to serve clean water to the residents, initially fifty in number, drawn from Kilalai, Kiluli, Luluma and Rwaene villages, within Maua township, with an option of including membership from any other quarter.



2. The respondents averred that the source of the water for the project was a constructed collection chamber in a spring situated in Parcel No. 324 Amwathi Maua Adjudication Section registered in the name of the defunct county council of Nyambene succeeded by the County Government of Meru to hold in trust for the project, hereinafter the suit land.
3. The respondents averred that the project was registered with the Water Resources Management Authority in line with the [Water Act](#), to which they had paid all water levies and had obtained both an operational license and a permit.
4. The respondents averred that Maua Catholic parish and the school were members of the project pursuant to an agreement signed on 28.12.1987. It was averred that all members of the project were supposed to share in payments of the consumed water as set out by Water Resources Management Authority (WARMA). Further, the respondents averred that the policy was to supply members with water using ½ inch pipes. In blatant breach of the project rules and regulations, the respondents averred that in 2016, the 1st appellant started defaulting or declining to clear water levies, and in collusion with the 2nd & 3rd appellants, forcefully and illegally connected his referenced institutions with a 4-inch connection pipe.
5. Additionally, the respondents averred that since the main water supply pipe ran through the 1st appellant's catholic mission and the school, the appellants in the company of hired goons violently and forcefully blocked the main pipes, vandalized the gate valves and diverted all the water to the said institutions, effectively denying other members the right to water.
6. The respondents averred that they made various reports to the police, the local and national governments, who took no remedial action. As a result, the respondents averred that the appellants denied and continue to deny their members and families estimated at five thousand and livestock, the right to access water. The respondents prayed for a declaration that they and their members were bonafide owners of the project and a permanent injunction. The plaint was accompanied by a list of witness statements dated 30.11.2017 and documents dated 14.11.2017.
7. The 1st, 2nd, and 3rd appellants, as the initial defendants, opposed the suit with a statement of defense dated 20.3.2017. It was averred that the project was no longer lawfully registered since any renewals for the registration were done after the registration certificate's expiry and without jurisdiction.
8. On the allegations of ownership of the water infrastructure, the appellants averred that the project to tap water from Kamuradi Springs was started by the Diocese of Meru in 1985 and that the appellant's association was merely invited in 1987-1988 to join. While admitting the existence of the fifty membership as alleged, the appellants termed the increase of membership as illegal. They also denied that the water source was held in trust by the County Government of Meru as alleged or at all.
9. To the contrary, the appellants averred that the water intake and its infrastructure were the property of the 4th appellant, who constructed the same for the purposes of supplying water to its institutions in Maua, and it was only on humanitarian grounds that it allowed nearby institutions to access the water, subject to water availability.
10. The appellants averred that in breach of the earlier agreement, the respondents created their water intake and purportedly disconnected the 4th appellant's institutions' supply pipes, hence blocking access to the water. The appellants averred that the police who visited the scene found the respondents were to blame. Despite their attempts and willingness for an amicable solution to the issue. The appellants termed the respondents as out to unjustly acquire what did not belong to them and use the



court to confirm an illegality. Further, the appellant's statement of defense was accompanied by a list of witnesses and statements and documents dated 24.4.2017.

11. On 4.3.2021, the trial court ordered the district land registrar, the land surveyor, and the (DLASO) to visit L.R No's. Amwathi/Maua/3343 and 3241 to ascertain where the water source was located. After the parties were unable to agree on the record, the trial court on 20.5.2021 ordered a second site visit. It never took place by the time the matter commenced hearing on 26.1.2022.
12. By an application dated 19.5.2022, the 4th appellant was joined as a 4th defendant in the suit. In a statement of defense dated 31.5.2022, the 4th appellant averred that the respondents had misapprehended the Kamurani springs water project (hereinafter the water project) with the Rwaene water project, given the two were separate and distinct entities with different operations and commencement dates.
13. The 4th appellant averred that the respondents' group came into operation in 2006 with the sole purpose of coordinating the maintenance of the pipes and uptake of water drawn from its water project past its institutions. The 4th appellant averred that the water project came into existence in 1985 and had never been transferred or relinquished to the respondents' group. It denied the alleged registration of the respondent's group or ownership of the water project.
14. Again, the 4th appellant averred that the water project, as initiated, was fully funded by it in 1985 for the water needs of all its institutions. Further, it was averred that upon developing the water pipeline up to St. Paul Primary School, the 4th appellant allowed some members of the public to use the water on condition that they cater for the costs of pipes installation to their homesteads past its institutions, as long as the water was available and sufficient hence the limited number of the membership of fifty people.
15. Unfortunately, the 4th appellant averred that the respondents, in breach of the earlier agreement, unilaterally increased the membership of its group, causing constant water shortages.
16. Moreover, the 4th appellant averred that the water project was situated on L.R No. Igembe/Amwathi/Maua/3343, owned by Elizabeth Kathao M'Imwendwa, the 3rd appellant and was not situated on L.R No Amwathi/Maua/3241, or allegedly owned by the County Government of Meru.
17. To this end, the 4th appellant averred that it had an agreement with the 3rd appellant to carry on the water project on her land, which the respondents were not privy to; otherwise, the water project was privately owned, with the respondents as mere licensees, who unfortunately were ungrateful and were in breach of the license terms and conditions.
18. The 4th appellant averred that there existed another public water intake/project on an adjacent land less than 100 meters from the suit land, belonging to the County Government of Meru, capable of providing water in the area, unlike before 1986 when none was serving the community; hence the respondents' suit was frivolous, malicious and an abuse of the court process, based on blatant falsehoods, misrepresentation, raising no known cause of action, a fishing expedition and brought by the respondents solely to unjustly enrich themselves.
19. Moreso, the 4th appellant averred that the respondents were a mischievous group who were against an amicable solution to the issue. The 4th appellant prayed for a declaration that Kamurani water springs belonged to it and was situated on private property L.R No. Igembe/Amwathi/Maua/3343 owned by the 3rd appellant and for a permanent injunction. A list of documents dated 31.5.2022 accompanied the 4th appellant's statement of defense.



20. By a ruling dated 13.10.2022, the application dated 14.11.2017, though initially withdrawn, was allowed to amend the plaint. The trial court directed that the amended plaint to include the 5th intended defendant and served within seven days. It is not clear from the court file or the record of appeal dated 31.5.2024 if an amended plaint was filed by the respondents as directed or at all.
21. Be that as it may, the 5th defendant came on board through the Hon. Attorney General on 20.3.2023 and filed a statement of defense dated 17.3.2023, presumably to an amended plaint filed on 15.11.2017, whose paragraph 17(a) alleged that the DLASO had fraudulently colluded with the 1st – 3rd appellants, to change the ground map for L.R No. Amwathi/Maua/3241, from where the spring was bordering L.R No. 3343 to its current dry land bordering L.R No. 7289 and 5368, with a view of grabbing public land and denying over 5,000 members of the public and their animals the right to water.
22. In its response, the 5th defendant averred that though the suit had progressed to the defense stage before its joinder as a party, it had not been served with any pleadings by the respondents.
23. The 5th defendant averred that the Amwathi/Maua Adjudication Section, now registered land, was declared an adjudication section in 1966 under the Land Consolidation Act (Cap 283). It denied the alleged fraud or collusion with the 1st – 3rd appellants to grab public land by altering the maps. It averred parcels No. 3343 & 3241 were lawfully demarcated on the map and placed on the ground during adjudication as per the current Registry Index Map Sheet No. 413, in the custody of the Director of Surveys otherwise non-service of the pleadings to it was a deliberate and a choreographed move to mislead the court and condemn it unheard.
24. Similarly, the 5th defendant averred that parcel No. 3241, according to the adjudication record, was registered under the County Government of Meru and reserved for the Project and being public land, the custodian of public land, the County Government of Meru and the National Land Commission were proper parties to lodge a claim if any, over the said parcel of land.
25. The 5th defendant averred that the respondents were deliberately avoiding involving the bonafide legal owners of the suit land and further seeking to convert public land into private land and, at the same time, seeking illegal orders from the court for the parcel of land to be re-demarcated in a registered section. The statement of defense was accompanied by a list of documents dated 17th and 22nd March 2023. From the lower court record, there is no evidence that the respondents or the appellants herein filed any replies to the defense by the opposite parties following the statement of defense by the 4th appellant and the 5th defendant.
26. At the trial, the respondents called Zachary Mutisya Makau, Samuel Kaumbuthu, Benjamin Mugambi, Nelly Nkirote, Kaberia Titus Mutuma and Joseph Mbai as PW 1, 2, 3, 4, 5, and 6 respectively. PW 1, 2, 3 & 4 adopted their witness statement dated 30.11.2017 and produced a list of documents dated 14.7.2017, namely; a certificate of registration of a self-help group/project NYB/CD/92/88/2006 issued on 10.11.2017 by sub-county social development officer in the name of Rwaene water project unsigned minutes for Rwaene water association project members; letters dated 16.9.2016 by DLASO, WARMA letter and water user payment dated 15.4.2015; WARMA official receipts dated 13.1.2016, 13.3.2015, water permits and its applications, agreement with the 4th appellant, demand note for payments to the 4th appellant as P. Exh No's. 1-14 respectively.
27. PW 1 told the court the group was started in 1986 to get water for domestic use with a committee to regulate it among its members being the 1st appellant number 30 until 2005 when he became uncooperative and joined hands with the 2nd to 3rd appellants to grab the land and declined to pay water charges contrary to the constitution by-laws.



28. PW 1, 2 & 3 told the court that from 2015, they were unable to access water, yet they had used the water alongside the catholic mission for 31 years before the blockage. They denied that it was the mission that had financed or owed the project. Nevertheless, the respondents admitted it was a joint venture where the local county provided labor and also participated in acquiring the land.
29. PW 3 confirmed that he was hired to construct the project in 1988 but was not aware of who owned the land. Again, PW 4 admitted that there was no official search certificate to establish ownership of L.R No. 3241 by the County Government of Meru, which was next to the 2nd appellant's homestead.
30. The court record indicates that after the 4th appellant came on board, PW 1, 2, 3 & 4 were not recalled to testify. PW 6, as the senior land adjudication and settlement officer Igembe adjudication area, produced two records for parcels No. 3343 and 3241. He told the court that L.R. No. Amwathi/Maua/3241 was a public land at Kamuradi two project, the same as Turune, that was demarcated on 17.6.1980. He said that the map should reflect the said report. In the cross-examination, PW 6 told the court that the plot was designated as a water point and could not be on dry land. He told the court that all that he had was the report but not the area Map Sheet No. 413. Asked about the scene visit and the report, PW 6 said that he did not sign the report for it had failed to factor in his adjudication office record.
31. Fr Joseph Kaberia Kumare testified as DW 1. As in charge of Maua Catholic Parish since 2006, he relied on his written statement dated 22.4.2017 and produced a list of documents dated 24.4.2017 and 31.5.2022. He told the court that the water intake was on L.R No. Amwathi/Maua/3343, which the 3rd appellant gave the parish. DW1 said that even though the parish had authorized the respondents to use its water, the same was subject to regulation of the number of water users and the availability of the water.
32. D.W. 1 said that in 2017, the respondents breached the existing agreement on the water use and threatened the 3rd appellant. He said that even though the parish had authorized the respondents to use its water, the same was subject to regulations regarding the number of water users and the availability of the water. DW 1 said that in 2017, the respondents breached the existing agreement on use, threatened the 3rd appellant, put new pipes at the intake and chased away the 3rd appellant and her son from the suit land.
33. DW 1 said that the appellants were unable to resolve the issue, for they did not want peace or to resort to the former source. DW 1 said that as long as the initial agreement was honored, the appellants had no problem with the respondents; otherwise, they had an alternative source of water owned and managed jointly by the County Government of Meru and the National Government. DW 1 tendered as exhibits the survey map, minutes dated 15.6.1985, delivery notes for materials, an agreement between the 4th and 3rd appellants, survey map, records for expenditure in erecting the project, agreement with the respondent's title deed as D. Exh No's. 1-11 respectively.
34. In cross-examination DW 1 told the court that the 4th appellant supported the project drawing water from the 3rd appellant's land. He said that the applicants were part of the Rwaene Water Association until 2018. As to the arrangement with the 3rd appellant, DW 1 said that it was for the Kaurani water project, and one church had an agreement with the 3rd appellant, but the respondents were not party to it.
35. Similarly, DW 1 said that after expanding the church school in 2018, the institutions were not getting enough water; hence, the church replaced the water pipe with a bigger one. DW1 denied that the water project was owned and managed by the respondents, given that the church, as a charitable organization, was merely helping the community. DW1 was emphatic that the water source was from privately



- owned land by the 3rd appellant, namely, L.R No. 3343, who had an agreement with the 4th appellant as per D. Exh No. (6).
36. Following cross-examination of D.W. 1, the trial court declined and expunged from the record a list of documents dated 2.2.2023 and filed on 6.2.2023 by the 4th appellant. Charles Gitonga M'Imwendwa testified as DW 2. He told the court that he started cultivating crops on L.R No. Amwathi/Maua/3343 in 1990, which has a water collection point as the intake point for the 1st & 4th appellants. He told the court that his mother had permitted the church to use alongside other users such as Ituna and Kiao water projects. He said that the land belonged to his mother, Elizabeth Kathao M'Imwendwa.
 37. Further, DW 2 confirmed that the water intake by the 1st and 4th appellants was constructed in 1987 and his mother was being paid a little money for its use. Initially, DW 2 said that the suit land was approximately 7 acres, but the intake portion was approximately 0.40 acres. He denied that the respondents were part of the intakes for the agreement that the 1st & 4th appellants had with his mother since 1987 were for the Kamurandi water project and not the Rwaene water association.
 38. Ibrahim Baariu testified as D.W. 3. He told the court that the 3rd appellant had willingly permitted Fr. Soldatti to enter her land and erect a water uptake pipe. Joseph Mutura testified as DW 4. As an elder from the Njuri Ncheke council of elders; he told the court that the 3rd appellant summoned him to visit her land where a priest had set up a water tank on her land.
 39. Elizabeth Kathao testified as DW 5. She told the court that she allowed Fr. Soldatti to sue her land as a water uptake point so that her children could go to school, which initially belonged to her husband. She denied giving the permit to use her land to anyone else, at least of all Rwaene water projects.
 40. Lumeri Thurnaira Misheck, a principal land surveyor, testified as DW 6. He told the court that following an order dated 4.3.2021, he visited L.R No's. 3343 and 3241 Amwathi Maua Adjudication Section on 18.1.2021 in the presence of the parties. D.W. 6 said that the two parcels of land were on a provisional Registry Index Map Sheet No. 413. He said that the water intake was on L.R No. 3343 while L.R No. 3241 was approximately 250 meters southeast of the water intake point. D.W. 6 said that the official map was eventually published by the director of land surveys in March 2022 and issued to him on 24.3.2022 as per the copies before the court.
 41. In cross-examination, DW 6 said that Parcel No. 3241 was registered as a water point, a public land as per the demarcation record, which ideally would inform the registrations and eventually be reflected in the published registry index map. DW 6 was unable to explain why there was a variance between the demarcation records for the parcel on 17.6.1980 and the map. Shown the two maps, DW 6 said that one showed the two parcels of land bordering each other, while in the published map, the two parcels of land were 250 meters apart.
 42. DW 6 told the trial court that in case there were errors or variances on the ground and the register or maps, parties would either consent or a court order would be issued to amend the maps. DW 6 said that what he had before the court was a provisional map and not a published map as per Section 21 of the Surveys Act.
 43. Following objections on the two contested maps from the same office, the trial court made a ruling that it was not necessary to avail the map or in order to rule on the issue before the court. In re-examination, DW 6 told the court that he relied on a map from the Director of Surveys.
 44. With leave of court and an application by the appellants' counsel, the trial court directed that there was going to be a second site visit before the last witness by the appellants could testify. The trial court



record shows that on 21.6.2023 and 8.8.2023, the second site visit took place in the presence of the parties, DLASO and a land surveyor.

45. John Muchiri, a land adjudication officer, testified as DW 7. He relied on a list of documents dated 17.3.2023 and 22.2.2023. D.W. 7 told the court that he was unable to ascertain if the tow parcels of land were in existence on the ground. According to him, Parcel No. 3241 was demarcated as set aside for Kamurani and as per adjudication records. However, he said that the maps used to produce the title deed had described the title as belonging to the County Government of Meru reserved for the Rwaene water project, a public land. In cross-examination, DW 7 was unable to explain why his officers had not signed the initial site visit report.
46. The appellants fault the trial court decision based on a memorandum of appeal dated 4.1.2024 for:
- i. Not thoroughly analyzing and evaluating the evidence on record.
 - ii. Abdicating its statutory duty in addressing all the issues raised, hence occasioning a miscarriage of justice.
 - iii. Finding there was the existence of the Rwaene water project owned by the respondents despite overwhelming evidence to the contrary.
 - iv. Disregarding expert evidence on the source of the water as on Parcel No. 3241.
 - v. Finding that there was an alteration of the map to give an advantage to the appellants contrary to the adjudication record.
 - vi. Treating their evidence superficially and without weight.
 - vii. Using the wrong principles and arriving at the wrong conclusion hence depriving the 3rd appellant of the land she had occupied since 1960 and declaring it public land.
 - viii. Dismissing expert testimony and relying on his findings on-site visit without giving parties a chance to submit them.
 - ix. Not appreciating that the scene visit had discredited all the evidence by the respondents.
 - x. Not appreciating that the respondents were guilty of forum shopping.
 - xi. For delivering an undated judgment that was bad in law.
47. The appellants urged the court to:
- a. Declare the water project in question the property of the 4th appellant.
 - b. Declare L.R No. Igembe/Amwathi/3343 as private property of the 3rd appellant.
 - c. Permanent injunction, in the alternative.
 - d. Order a retrial.
48. With leave of court, parties were directed to canvass this appeal by way of written submissions due by 4.7.2024. The appellants relied on written submissions dated 19.6.2024. It was submitted that the 4th appellant had a valid agreement with the 3rd appellant to tap water from her water spring through a



- collection chamber they erected on L.R No. Amwathi/Maua/3343 as per pages 109 – 114, 117 and 250 – 253 and 450 of the record of appeal, which the trial court failed to consider, yet the respondents did not challenge it.
49. On ground 2, the appellants submitted that the trial court conducted the proceedings in a procedurally and substantially flawed manner, occasioning a miscarriage of justice. In particular, the appellants faulted the trial court for directing an already withdrawn application to be reinstated and proceeding to allow it, contrary to the known ground of review under Section 80 of the *Civil Procedure Act*. Reliance was placed on Constantine Joseph Advocates LLP vs. AG (2022) eKLR and Republic vs Public Procurement Administrative Review Board and others (2018) eKLR.
 50. On ground 3, the appellants submitted that the trial court failed to consider survey maps, the minutes for the meetings held on 15.6.1985 by the 3rd and 4th appellants and the report on expenditure produced as D. Exh No's. 1-6, yet the respondents had nothing to substantiate their claim on ownership of the water project except P. Exh No. (1), more so on what expenditure they used in putting up the water infrastructure.
 51. On grounds 4, 5, 6, 7, 8 & 9, the appellants submitted that even if the amendment was regular, still the respondents were unable to prove fraud, misrepresentation, and conspiracy with cogent and tangible evidence, especially on the identity and locality of the water source. Reliance was placed on Bwire vs Wayo & Sailoki (Civil Appeal E032 of 2021 (2022) KEHC 7 (KLR) (24th January 2022) (Judgment), *Opiyo & another vs Olunje (Civil Appeal no. 148 of 2018* (20230 KECA 1539 (KLR) (8th December 2023) (Judgment), Fanikiwa Ltd & others vs Sirikwa Squatters Group & others (Petition 32 (E036) 35 (E038) & (36 (E039) of (2022) (Consolidated) (2023) KESC 105 (KLR).
 52. The appellants submitted that the trial court was wrong to find alterations of record to change the ground position of the water point in favor of the 3rd appellant without attributing any wrongdoing to any party or evidence to that effect.
 53. As to the ouster of the 3rd appellant's title deed, the appellants submitted that the issue of alteration of the map was a mere creation of the trial court to subvert justice, yet there was no evidence to sustain it, given the land surveyor under Section 21 of (cap 299) testified as DW 6 and produced the registry index map as per page 106 of the record of appeal similar to the number in the 3rd appellant tile deed produced as D. Exh No. (8).
 54. The appellants submitted that it was erroneous for the trial court to refer to two conflicting maps, yet only one was produced as D. Exh No. (8), a clear indication of open bias in favor of the respondents. The appellants submitted that the respondents never challenged the site visit report, the validity of the published maps and a title deed, which were enough proof of the location and ownership L.R No. Amwathi/Maua/3343.
 55. Regarding departing from the general rule in *Griffins vs TUI UK Ltd* (2023) UKSC 48, the appellants submitted that the evidence of DLASO and the Land surveyor as custodians of government documents was not challenged and hence it was erroneous for the trial court to hold otherwise.
 56. The appellants submitted that the trial court also failed to consider their written submissions set between pages 314 – 330, hence misdirected itself on the evidence and the applicable legal principles.
 57. On ground 10, the appellants submitted that there was no basis to apply for the recusal of the initial court handling the matter and that a suit should not be transferred at the whims of a party. Reliance was placed on *Executive Super Riders Ltd vs Albert Joacquinne Osumba* (2022) eKLR *JGK vs. FWK* (2019) eKLR.



58. The appellants submitted that the judgment was also not signed as per page 40 of the record of appeal contrary to Order 21 Rule 23 (1) of the Civil Procedure Rules, rendering it a nullity. Reliance was placed on *William Kinyanyi Onyango vs IEBC & others* (2013) eKLR. The appellants urged the court to allow the appeal as prayed in the memorandum of appeal.
59. The respondents relied on written submissions dated 1.7.2024 that their evidence and exhibits corroborated their legal claims and pleadings going by P. Exh No's (1) – (14). The respondents submitted jointly on ground numbers 2-9 of the appeal that the trial court conducted the proceedings procedurally and arrived at a just and fair finding.
60. On the amendment to the plaint, the respondents submitted that the application dated 14.11.2017 was regularly reinstated and allowed, following which directions were issued to serve the amended plaint as per page 365 of the record of appeal; hence, the amendment was procedural.
61. The respondents submitted that they were the rightful owners of the project where the 4th appellant was a member as per D. Exh No. (6) and P. Exh No. (9), contrary to the appellant's evidence.
62. The respondents submitted that the appellants acted in cohorts to grab public land and manipulate the maps so as to claim ownership of the property.
63. Similarly, the respondents submitted that the purpose of the scene visit was to establish the locality of the water point on the ground, only to find it in a dry place instead of the actual water spring, begging the question of whether it was improbable for the adjudication committee to have made such a grave mistake.
64. Further, the respondents urged the court to take into account the documents relied upon by the 1st & 4th appellants on the history, ownership, constitution and operation of the water project since 1985, as per the list of documents dated 31.5.2022 and 2.2.2023, which corroborated the fact that prior to 2017, there existed no registered water project by the 4th appellant, otherwise, they related to a completely different issue – Muura river water project for Kangeta parish and not Kamurani springs.
65. Moreso, the respondents submitted that the evidence showed that they enjoyed a water supply peacefully between 1986 and 2015, only for fallout to arise when the 1st appellant took over.
66. On fraud, the respondents submitted that the evidence by the 5th defendant confirmed or conceded their claim of the suit land being public land and left doubts as to how it could be placed on dry land in the registry index map.
67. The respondents submitted that the court site visit findings left no doubts on interference with not only the registry index map but also the constructed intake project as by the appellants together with the 5th defendant. Reliance was placed on *Kenya Anti-Corruption Commission vs Lima Ltd and others* (2019) eKLR, *KACC vs Frann Investments Ltd and others* (2020) eKLR. *Jacob Nyakwa Ojwang vs Nathwalal Narishidas Ghelani & others* (2021) eKLR.
68. The mandate of the appellate court of the first instance is to re-look or re-appraise the trial court record with an open mind and come up with independent findings as to facts and the law while giving credit to the trial court which saw and heard the witnesses testify. See *Selle & another vs. Associated Motor Boat Company Limited & others* (1968) E.A 123, *Gitobu Imanyara & others vs Republic & others Attorney General* (2016) eKLR.



69. Having rehearsed the entire lower court record, pleadings, evidence tendered, record of appeal, memorandum of appeal, written submissions, and the law, the following issues call for my determination:
- i. If the respondents' capacity could sue the appellants.
 - ii. Whether there was a validly amended plaint and summons to enter appearance duly filed, extracted, signed and served against the 4th appellant and the 5th defendant.
 - iii. If the claim against the 3rd appellant and the 5th defendant was time-barred.
 - iv. If the respondents pleaded and proved their claim on ownership, breach of rights, fraud or illegality against the appellants and the 5th defendant.
 - v. If the trial court's conduct of the proceedings prejudiced and infringed on the appellants' rights to a fair hearing.
 - vi. If the appellants filed nay cross suit or counter claims to be entitled.
 - vii. If the appeal has merits.
70. It is trite law that parties are bound by their pleadings, and issues flow therefore. In *Raila Odinga Amolo & others vs. IEBC & others* (2017) eKLR, the court observed that in an adversarial system, it is the parties who determine the issues for the court's determination through their pleadings and that before a court of law, there is no other business except the issues arising from the pleadings and or those framed by the parties for the court's determination.
71. In this appeal, the respondents filed a plaint dated 22.2.2017 describing themselves as the chairman, secretary, and treasurer of the Rwaene Water project that had commenced in 1986 to provide clean water to the residents of Kilalai Kiluli, Luluma and Rwaene villages in Maua township. In support of the said descriptions, the respondents relied on P. Exh No. (1) a certificate of registration with the Ministry of Gender youth and Culture.
72. In *Mirara & 2 others vs Romano K Migu* (2013) eKLR, the court observed that suits by unincorporated bodies can only be brought by or against in the names of or against all the members of the body. In *Voi Jua Kali Association vs. Sange & others* (2002) 2 KLR 474 and *Kipsiwo Community Self-Help Group vs A.G. & others* (2013) eKLR, the court held that self-help group could not institute proceedings and only persons recognized in law could sue on behalf of the members of the group. The court said that the person(s) had to be named and identified with precision so that orders are not issued in favor or against people who cannot be precisely identified since, in litigation, rights, and duties will be imposed on the litigants, which can be enforceable against them.
73. In this appeal, the respondents described themselves as officials of a registered self-help group. The verifying affidavit sworn on 22.2.2017 by the three officials is not in respect to an amended plaint introduced after the 4th appellant and 5th defendant were brought on board minutes showing that the respondents were bonafide members, duly elected and endorsed officials by the project membership were not filed with the pleadings and or produced at the hearing. Similarly, other than the signature of Rose Eunice Wambugi, the Sub-county social development officer Igembe South, indicating that the certificate had been renewed between 18.5.2017 and 18.5.2018.
74. There were no accompanying certified minutes and endorsements by the said office that the returns held by the said office showed that the respondents were a chairman, secretary and treasurer of Rwaene



Water Project. P. Exh No. 2 refers to Rwaene Water Association, which is different from P. Exh No. 3, 4, 5, 9 & 10.

75. Legal capacity to sue goes to the jurisdiction of the court. The respondents derives their mandate from the membership of the project. The appellants, in their statement of defense, had raised the same in paragraph 3 of the 4th appellants' defense dated 20.3.2017 and 31.5.2022. P. Exh No. (1) was issued on 10.11.2017. Consequently, my finding is that as of 22.2.2017, when the suit was filed, the respondents could not legally bring the suit. The issuance of a renewal certificate on 10.11.2017 could not act retrospectively and validate an already defective suit.
76. Even if the respondents filed an amended plaintiff, still P. Exh No. (1) was never renewed or evidence produced at the time of amending the plaintiff to confirm its validity or fresh mandate given to the respondents to continue acting as officials of the group for the subsequent years.
77. The discrepancies in the description of the respondents as to whether it was an association or a project and who its bonafide registered officials were as per any of the returns made to the issuing authority of the certificate were not clarified before the trial court, nor were they addressed before this court.
78. In my considered view, the capacity to sue or sustain the suit was critical and went to the jurisdiction of the court, given that the respondents could not arrogate themselves the power to sue, enforce and litigant for the rights or claims owed to the project or association or group when they had no legal mandate to represent its membership in the first instance.
79. The next issue is whether there was a valid amended plaintiff before the trial court. By an application dated 14.11.2017, the respondents sought to amend the plaintiff as per an attached proposed copy to the supporting affidavit by Zachary Mutisya sworn on 14.11.2017. In paragraph 2, the deponent averred that they had discovered fraud in the alteration of the registration maps and change of ground position of land Parcel No. Amwathi/Maua/3241, where the water springs used by their members had been since 1986 and instead positioned it in a dry land to deny over 5,000 people water.
80. From the court record, the application was withdrawn on 14.11.2018 with costs. Subsequently, PW 1, 2, 3, 4 & 5 testified in support of the initial plaintiff. There is no evidence of a filing of an application for review or to vacate the orders withdrawing the application and its reinstatement by consent of the parties. The record shows that on 2.6.2022, Mr. Mutembei, advocate for the respondents, orally sought a ruling date on the application dated 14.11.2017. Counsel knew did not file a fresh application or apply for its reinstatement, so he was flagging a dead horse.
81. By a ruling dated 13.10.2022, the trial court allowed the already withdrawn application for amendment and ordered that an amended plaintiff be served within seven days. It is important to note that the 4th appellant had already come on board and so was the 5th defendant. The lower court records contain no amended plaintiff with a verifying affidavit filed after 13.10.2022. The proposed amended plaintiff was to introduce a claim based on fraud against the appellants jointly with the 5th defendant.
82. In an affidavit of Zachary Mutisya, the respondents on 14.11.2017 had admitted the discovery of the fraud. So, time to lodge a claim based on fraud began to run from 14.11.2017 as per section 4 (4) of the *Limitation of Actions Act*. Their years would have expired on 14.11.2020. So, any amended plaintiff introducing the claim against the 5th defendant and the appellants after 14.11.2020, and in particular, 13.10.2022, was time-barred by dint of Section 4 (4) of the *Limitation of Actions Act*.
83. There is also no evidence of any extracted and duly signed summons to enter an appearance against the 4th appellant and the 5th defendant since the alleged fraud was against them. Alongside this was



- whether the 1st appellant was also duly sued or could be sued on behalf of the Maua Catholic Parish and Maua primary school.
84. It is a trite law that a society under the *Societies Act* can only be sued through registered trustees. The respondents did not sue the registered trustees of the Diocese of Meru, the owners of the Maua catholic church, and the school. See Trustees of Kenya Redeemed Church & another vs. Samuel M' Obiya & others (2011) eKLR. In Registered Trustees of Catholic Diocese of Muringa & others vs James Mwangi and others (2019) eKLR, the court cited Halsburys Laws of England 3rd Edition Vol. 18 paragraph 239, that only trustees may bring or defend actual or legal proceedings with respect to any property right or claim of the society or the branch.
 85. Without the capacity to sue and the capacity of the 1st appellant to be sued, as well as the claim being barred, the trial court's proceedings and conduct of the hearing of the suit were tainted with legal, procedural and jurisdictional missteps. Even after new parties were brought on board, the hearing continued without PW 1, 2, 3, 4 & 5 being recalled to give the appellants and the 5th defendant an opportunity to be heard. The 5th defendant had raised issues on fair hearing and non-service with the summons to enter an appearance in its pleadings. There was no amended plaint filed capturing all the parties as of 13.10.2022 and defining their capacities to sue or be sued. The 5th defendant had raised the issue that the respondents were litigating over public land without joining the County Government of Meru and the National Land Commission, who were the custodians of public land.
 86. The site visit reports had been undertaken without the participation of all the parties, yet drastic findings were made against them based on the site visits reports and evidence tendered in their absence. For instance, the issue of whether there was a provisional or published map had been raised by the appellants. Instead of addressing all these issues through pleadings, the respondents continued to brush them aside and or overlooked them. The evidence tendered by the respondents had no backing or input from the custodian of public land, namely the County Government of Meru, the National Land Commission, the Water Department and the Water Resources Management Authority.
 87. Additionally, the respondents had not invoked the jurisdiction of the water appeals board, who have the jurisdiction to determine water users' rights, licenses and permits. The respondents lacked the capacity also to advance the rights of the custodian of public land if at all the suit land formed part of public land.
 88. As to whether the claim on fraud or illegality was proved, fraud or illegality cannot be inferred or assumed. It has to be strictly pleaded and proved with cogent and tangible evidence on a balance higher than in ordinary suits. See Arthi Highway Developers Limited vs West End Butchery Limited and others (2015) eKLR and Virjay Morjaria vs Nansigh Madhusingh Darbar (2000) eKLR.
 89. Evidence of tampering with the survey maps was not tendered by any expert having assessed the verified and authenticated demarcation map vis a vis provisional and published survey maps. The 5th defendant relied on the demarcation record and demarcation book dated 3.4.1997 as per the list dated 22.3.2023. The respondents did not tender forensic reports to impeach the government records tendered before the trial court.
 90. There was no reply to the defense to the 5th defendant's statement of defense dated 17.3.2023, to lay the basis for impeaching the said contents and the accompanying evidence. The respondents did not produce any duly published survey maps demonstrating that there was tampering and movement of Parcel No. 3241 from its original place as the initial records of adjudication and swapping it with Parcel No. 3343.



91. There was no evidence tendered to support any conclusions or findings that the 1st, 2nd, 3rd, and 4th appellants conspired with the 5th defendant to tamper with any adjudication, registration and survey maps between 1966, 1997 and 2018. There were no rival survey reports by experts apart from the documents held in the custody of the 5th defendant tendered before the trial court. Similarly, there were no independent technical water engineers, County Water Department, WARMA, or National Land Commission reports indicating any tampering with the land registration, survey maps, water intake system, or pipeline in which the trial court could make a finding that the appellants had interfered with the land records, and the water project to the detriment of the respondents. The findings and conclusions by the trial court that the appellants had interfered with public land and or public water systems erected on a public water source remained unsubstantiated.
92. The 1st, 2nd, 3rd, and 4th appellants had not filed any competent counterclaim or cross-suit against the respondents for this court to determine or issue any reliefs in their favor. The upshot is that I find the appeal meritorious. The respondents' suit at the lower court was not only brought by parties lacking capacity, the cause of action was statute-barred and was also lacking merits. It is as a result of this dismissed with costs to the appellants. The costs of this appeal go to the appellants.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 17TH DAY OF JULY, 2024

In presence of

C.A Kananu/Mukami

Mr. Ireri for the appellant

Miss Asuma for Mutembei for the respondent

HON. C K NZILI

JUDGE

