



**Maina v Waweru & 2 others (Environment and Land Appeal
10 of 2023) [2025] KEELC 791 (KLR) (19 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 791 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL 10 OF 2023**

CK NZILI, J

FEBRUARY 19, 2025

BETWEEN

JOHN MAINA APPELLANT

AND

EVANS WAWERU 1ST RESPONDENT

SILA YEGO 2ND RESPONDENT

DORINE MBATHI 3RD RESPONDENT

*(Being an appeal against the Judgment of Hon. S.N. Makila (PM) read on
01/03/2023 in the Chief Magistrates Court at Kitale, Land Case No. 89 of 2020)*

JUDGMENT

1. The appellant, who was the plaintiff at the lower court, had sued the respondents vide a plaint dated 7/12/2020 seeking an eviction order from his parcel LR No. Kitale Municipality Block 8/91, measuring 0.1001 Hectares, and general damages for trespass.
2. At the trial, the appellant relied on a witness statement dated 7/12/2020; certificate of lease dated 19/3/2015, accompanied by memorandum of registration of transfer of land dated 11/3/2015; letter of allotment dated 29/9/1992; receipt for payments dated 14/1/1993; certificate of clearance receipt dated 21/9/2021; PDP plan; property rates payments request and receipts and an official search certificate dated 11/1/2021 as P. Exhibit No. 1-8 respectively.
3. The appellant, as PW1, told the court that the respondents who were occupying his plot when he acquired it in 1993, hoping to build a retirement home. He denied that his suit was time-barred, otherwise he was losing at least Kshs. 40,000/= per month as rental income.
4. In cross-examination, PW1 told the court that efforts to involve the local and national government administration and the police to resolve the issue in 1992 were in vain since the respondents had refused



to vacate his land. PW1 further stated that he learned of the trespass by the respondents in 2000, from the area chief, but could not tell the date of their entry into his land, who are conducting some business therein. He denied that the respondents were legal owners of the suit land.

5. The respondents opposed the suit through a joint statement of defense dated 19/1/2021. It was pleaded that they temporarily applied for and were allocated the plots at the Kibomet area before the survey was done, immediately took possession or occupation, and commenced construction of shop premises. Further, the respondents averred that after the survey was done, they were allocated new plot numbers Kitale Municipality Block 8/91, hence the certificate of lease held by the appellant was unprocedurally obtained. The respondents denied the alleged trespass, which lacked particulars of the duration and the extent.
6. The respondents reiterated that they were legally allocated the suit property and have been in open, lawful, and actual occupation or possession of the land since 1990 with the knowledge of the appellant, who, due to its proximity to the highway, was estopped by his conduct from claiming ownership. The respondents termed the suit as misplaced, incompetent, and defective in law. Further, the respondents pleaded that the claim by the appellant was time-barred. In support of their defense, the respondents relied on witness statements dated 19/1/2021. The respondents produced a photo of the waterpoint, the temporary allocation license, and some receipts.
7. In cross-examination, Evans Waweru, DW1, told the court that his plot was No. 91 as per D. Exhibit No. 1, which he has been occupying after he temporarily leased the land. DW1 admitted that he had not complained about the alleged unprocedural allocation of the plot to the appellant. Silas Yego, as DW2, reiterated the contents of the testimony of DW1. Dorine Asman Mbatia testified as DW3. She told the court that as per P. Exhibit No. (3) payment for the allotment letter was made on 14/1/1993, while she was allocated to occupy the land in 1990 after she had made her application dated 29/3/1990, which land DW3 claimed was part of the municipality market plot, housing a water point.
8. At the close of the respondents' testimony, by consent of parties, the County Surveyor Trans Nzoia was directed to visit the land and ascertain who was in occupation of the plot. Equally, the trial court visited the locus on 25/2/2023 in the absence of the County Surveyor. There is no record of any trial notes taken by the court at the site.
9. Protus Muindi, a County Surveyor, produced the report as P. Exhibit No. (8). He referred to earlier reports before court dated 4/5/2021 and 20/9/2022. He confirmed, as per the reports, that the suit land had been encroached on by the respondents. He said that the plot is surveyed and owned by an owner. By a judgment dated 1/3/2023, the trial court dismissed the suit.
10. By a memorandum of appeal dated 21/3/2023, the trial court is faulted for:
 - (1) Concluding that the appellant had failed to prove his claim on a balance of probabilities.
 - (2) Not appreciating that temporary occupation licenses, issued to the respondents were for temporary occupation rights, could not confer any allocation of the land by the Commissioner of Lands.
 - (3) Not appreciating that the respondents had no valid title out of an allocation as owners and further that there was no counterclaim, seeking for ownership of the land or cancellation of the title, based on validly pleaded particulars of how the appellant had allegedly unprocedurally obtained title to the land.
 - (4) Erred, by relying on the decision of James Muigai Thungu -vs.- County Government of Trans Nzoia & Others [2022] eKLR, whose facts were distinguishable from the case before the court.



- (5) For finding that the payment of Kshs. 19,360/= by the appellant on 14/1/1993 was outside the 30 days set in the letter of allotment.
 - (6) Basing the judgment solely on the issue of payment, yet it had not been pleaded or raised in court.
 - (7) Ruling against the available evidence.
11. The appellant relies on written submissions dated 28/6/2024. It was submitted that the appellant's lease certificate was binding and should be taken as prima facie evidence that the person named is the absolute proprietor of the land subject to any encumbrance, easements, restrictions, and conditions contained or endorsed thereof, except on an element of fraud, misrepresentation or where the same was obtained illegally or through a corrupt scheme under Section 26(1) of the [Land Registration Act](#), 2012.
 12. In this case, the applicant submitted that the respondents had no allocation letters issued by the issuing authority on behalf of the government. Further, it was submitted that temporary occupation licenses did not offer any ownership rights to the respondents. Reliance was placed on *Satrya Investments Ltd -vs- J.K. Mbugua* [2013] eKLR, *Faraj Maharus -vs- J.B. Martin Glass Industries & Others* [CA No. 130 of 2003](#), *Wreck Motors Enterprises -vs- Commissioner of Lands & Others* Civil Appeal No. 71 of 1997.
 13. The appellant submitted that after the issuance of a certificate of lease on 19/3/2015, the limitation of time could only start running from the said date. The appellant submitted that the question of the suit property being a public utility did not arise at all in the pleadings. In any event, the surveyor's report indicated the water point was on plot No. 91. Regarding the late payment for the letter of allotment, the appellant submitted that the issue had not been pleaded, the evidence was not tested, or produced by the respondents.
 14. Relying on Order 2 Rule 10 of the Civil Procedure Rules, the appellant submitted that the respondents did not plead the particulars of illegality or fraud to challenge his certificate of lease under Section 26 (1)(a) and (b) of the [Land Registration Act](#), and what was pleaded in paragraph 3(b) and (e) of the joint statement of defendants fell short of the law. Reliance was placed on *Richard Oduol Opole -vs- Commissioner of Lands & Others* Civil Appeal No. 285 of 2007, *Nephat Muchiri Wagachau -vs- Margaret Kariuki & Others* Nyeri HC Civil Case No. 165 of 1993.
 15. The appellant submitted that the evidence tendered by the respondents did not meet the threshold of any proof of fraud or unprocedural acquisition of a certificate of lease. Unfortunately, the appellant submitted that the trial court condemned him through an ambush and denied him a fair hearing for relying on alleged evidence and illegal acquisition of the plot, which he termed as an abuse of the court process for relying on evidence not addressed at the hearing based on pleaded facts. Reliance was placed on *Peter Muriuki Solomon -vs- Peter Midimo Agalo & Others* [2013] eKLR, *Pacific Frontier Seas Ltd -vs- Kyengo & Another* [2022] KECA 396 [KLR].
 16. As to reliance on *James Muigai Thungu -vs- County Government of Trans Nzoia & Others* [2022] eKLR, the appellant termed the facts in the instant suit as distinguishable from those in the cited case law, since there is no double allocation for the same land, nor has the Commissioner of Lands laid any claim against the appellant's land.
 17. The 1st, 2nd, and 3rd respondents relied on written submissions dated 3/7/2024. The respondents submitted that P. Exhibit No. (5) in the record of appeal is not legible; it offends Gazette Notice No. 189, Practice Directions No. 11(b) of the High Court (Organization and Administration Act 2015).
 18. The respondents submitted that the appeal was based on generalized grounds (2) contrary to Order 42 Rule 1(2) of the Civil Procedure Rules and the holding in *Attorney General -vs- Florence Baliraine*



CA No. 79 of 2003, Ng'ang'a Wangui & Another -vs- Civil Appeal; 18 of 2020 [2022] KEHC 10228 [KLR] (14th June 2022) (Judgment).

19. The respondents submitted that the appellant had the duty but failed to discharge the burden on how he acquired the certificate of lease. Reliance was placed on *Bandi -vs- Dzomo & Others* (Civil Appeal No. 16 of 2020 [2022] KECA 584 [KLR], *Ali Mohamed Dagane* (Granted Power of Attorney by Abdullah Muhumed Dagane (Suing on behalf of the Estate of Mohamed Haji Dagane -vs- Hakar Abshir & Others [2021 eKLR, Merriam Webster Dictionary and Section 112 of the *Evidence Act*).
20. The respondents submitted that P. Exhibit Nos. (1), (2), and (3) fell short of discharging the burden of acquiring the certificate of lease for the land, as per the requirements in the repealed Government *Land Act*, Registration of Titles Act, and the Registered *Land Act*. In particular, the respondents submitted that P. Exhibit No. (3) were payments made contrary to P. Exhibit No. (2). Similarly, the respondents submitted that a Part Development Plan was not produced, on top of a written acceptance of the conditions in P. Exhibit No. (2) or a waiver of the conditions set therein by the Commissioner of Lands.
21. The respondents submitted the nexus between the letter of allotment, the clearance receipts or certificates, and the certificate of lease. In relation to plot 2116/unsurveyed, Plot No. 34 Section V11 in Kitale Municipality was not established or proved, more so in view of the glaring inconsistencies or overwritings on P. Exhibit No. (2). In view of the foregoing, the respondents submitted that the trial court could not be faulted for the conclusion that it reached after the appellant failed to discharge the legal and evidential burden to prove his case on a balance of probabilities.
22. The respondents submitted that the appellant failed to prove or plead that he met the conditions in the letter of allotment. Reliance was placed on *Wreck Motors Enterprises -vs- Commissioner of Lands and Others* (Supra), *Funzi Development Ltd & Others -vs- County Council of Kwale* [2014] eKLR, *Dina Management Ltd -vs- County Government of Mombasa & Others* (Petition 8 (E010) of 2021 [2013] KESC 30 [KLR] (21st April 2023) (Judgment).
23. As to whether the certificate of lease held by the appellant was challenged, the respondents relying on Black's Law Dictionary 2nd Edition on the definition of the word "challenge", submitted that in their pleadings, questioned or raised objections to the existence of the appellant's certificate of lease and led evidence of their leasehold on Kitale Municipality Block 8/91, which evidence was sufficient to challenge or cast doubts on the appellant's title to the land. The respondents submitted that there is a presumption of continuance and an uninterrupted occupation of the land since 1992, without the permission and consent of the appellant, which the appellant failed to rebut as held in *Munyu Maina -vs- Hiram Gathiha Maina* [2013] eKLR, to dislodge the respondents' testimony that the suit property was a public utility belonging to the defunct Municipal Council of Kitale, who put them in to possession and occupation, hence a title deed could not be issued to the appellant for a public utility land.
24. The respondents submitted that it was within the appellant's knowledge how he acquired the certificate of lease, while aware that it was not only a public utility plot, but also under occupation or possession of the respondents, since 1992, yet, he failed to prove or explain, under Section 116 of the *Evidence Act*, how the respondents came to be in possession for that long, without. Reliance was placed on *Ann Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another Nyeri Civil Appeal No. 345 of 2000*.
25. The respondents submitted that the appellant failed to go an extra mile as required of him to rebut the respondents' testimony and show that the process of title acquisition was legal, formal, and free of any encumbrances, including any or all other interests which need not be noted on the register.



26. As to the Temporary Occupation Licence, the respondents submitted that the appellant had not given any evidence that the Temporary Occupation Licence was temporary and that the land was still available for re-allocation by the Commissioner of Lands, more so when there is evidence that it was a public utility plot. Reliance was placed on Dorice Atieno Rajoru & Others vs- Mjahid Sub-chairman Harambee Maweni Committee SHG & Others [2016] eKLR, Kipsirgoi Investments Ltd -vs- Kenya Anti-Corruption Commission [CA No. 288 of 2010](#), Republic -vs- Commissioner of Lands & Others Exparte Associated Steel Mill [2014] eKLR, Kenya National Highway Authority -vs- Shalien Masood Mughal & Others [2017] eKLR, James Joram Nyaga & Another -vs- Hon. Attorney General [2007] eKLR.
27. The respondents submitted that ground No. 3 of the Memorandum of Appeal was not pleaded, evidence-led and made an issue before the trial court, hence was an afterthought. Regarding ground No. 4, the respondents submitted that the issue of lack of particulars of illegal or unprocedural acquisition of the land was not raised or made an issue at the trial court and, therefore, cannot be raised on appeal. Reliance was placed on Juletabi African Adventure Ltd & Another -vs- Christopher Michael Lockley [2017] eKLR, Domsalla -vs- Barr [1969] 1 WLR 630, Nyangau -vs- Nyakwara [1985] eKLR, Kenya Hotels Ltd -vs- Oriental Commercial Bank Ltd [2018] eKLR, Chalicha Farmers Co-operative Society Ltd -vs- George Odhiambo & Others [1987] eKLR.
28. As to Order 2 Rule 10(2) of the Civil Procedure Rules, the respondents submitted that the appellant waived this right, and the court should look at the broader interest of justice as per Article 10(2) of [the Constitution](#). Reliance was placed on Banning -vs- Wright [1972]2 ALLER 987, Swamy Atmandanda & Others -vs- Sri Ramakrishna Tapovanam & Others and delivered on 13th April 2015, Nedunuri Kameswaramma -vs- Sampati Subba Rae [AIR] 1963, SC 884, Bharti Sharma -vs- Surinder Kumar Sharma registered on 7th May 2003, County Government of Migori -vs- Hope Self Help Group [2020] eKLR, Mary Kitsao Ngowsa & Others -vs- Krystalline Ltd [2015] eKLR. In sum the respondents submitted that failure to give particulars of the unprocedurality was not fatal.
29. As to ground No. (5) the respondents submitted that P. Exhibit (2) dated 29/9/1992 was not complied with in terms of payments made on 14/1/1993 as per P. Exhibit (3), without an acceptance letter or an extension of the period to comply, after the lapse of the letter of offer. On ground No. (6) the respondents submitted that the appellant failed to tender evidence of payment of stamp duty or efforts of making payment after the letter of offer had expired. On ground No. (7), the respondents urged the court to rely on Patrick Kirimi M'Nganabu -vs.- Njeru Muchai, Chuka ELC Appeal No. E002 of 2021, that the trial court was correct to hold that the suit property was a public utility, incapable of allocation to a private individual and that if it was ever allocated, the allocation and registration were obtained irregularly and unlawfully, to get any protection by the court. Reliance was placed on Pacific Frontier Seas Ltd -vs- Kyengo & Another [2022] KECA (396) [KLR] (4th March 2022) (Judgment), on the proposition that, where parties lead evidence and address unpleaded issues and leave it for the court to decide, the court can determine them.
30. In this case, the respondents submitted that it was the appellant who introduced the unpleaded issue of payment of the allotment letter through P. Exhibit No. (3) cross-examined the 3rd respondent on it, followed by written submissions on the issue; hence cannot be allowed to change course on appeal. Reliance was placed on Herman P. Steyn -vs- Charles Thys [1997] EA 476.
31. On ground No. (8), the respondents submitted that the weight of testimony before the trial court, especially against the appellant, was consistent with the findings of the trial court that the appellant did not own the suit land for it was a waterpoint, a public utility land, belonging to the County, incapable of allocation for private use and that a certificate of title was not enough proof as observed



- in *Dina Management Ltd -vs- County Government of Mombasa & Others (Supra)* and *Kenya Power & Lighting Company Ltd -vs- Nathan Karanja Gachoka & Another* [2016] eKLR.
32. The role of an appellant court of the first instance is to re-evaluate the evidence, assess it, draw independent conclusions on the facts and law, and reach a conclusion while mindful that the trial court had occasion to see and hear the witnesses testify. See *Gitobu Imanyara & 2 Others -vs- Republic* [2016] eKLR, *Peter -vs- Sunday Post Ltd* [1958 EA 429].
33. The court has carefully perused the record of appeal, the authorities cited, and the law. I discern the issues for determination to be:
- (1) Whether the appellant pleaded and proved trespass to his parcel LR No. Kitale Municipality Block 8/91, measuring 0.1001 Ha against the respondents herein.
 - (2) If the respondents were justified in encroaching into and erecting temporary business structures on the land.
 - (3) If the respondents impeached the certificate of a lease held by the appellant by dint of Sections 24, 25, and 26 of the [Land Registration Act](#) 2012.
 - (4) If the appellant was entitled to the reliefs sought in the plaint.
 - (5) If the appellant's suit was time-barred.
 - (6) Whether the appeal has merits.
 - (7) What is the order of costs?
34. It is a trite law that parties are bound by their pleading. In *IEBC & Another -vs- Stephen Mutinda Mule & Others* [2014] eKLR, the court cited with approval Supreme Court of Nigeria in *Adetonu Ndabeji (Nia) -vs- Nigeria Breweries PLC SC 91/2002*, that any evidence led by any party which does not support the averments in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded. Further, the court observed that parties are not allowed to divert from their pleadings.
35. In *Raila Odinga & Another -vs- IEBC & Others* [2017] eKLR, the apex court went on to say that in the absence of pleadings, any evidence if produced, cannot be considered; a party should not be allowed to travel beyond its pleadings and that issues only arise when a material proposition of facts or law is affirmed by one party and denied by the other party, and that a court should not frame an issue not arising from the pleadings. The cause of action by the appellant, as pleaded and on the tendered evidence, was based on trespass to his land by the respondents.
36. In *Kenya Power & Lighting Co. Ltd -vs- Ringera & Others (Civil Appeal E247 and E248 of 2020 (Consolidated))* [2022] KECA 104 [KLR] (4th February 2022 (Judgment)), the court observed that trespass, as corrected, submitted by the appellant is governed by Section 5(1) of the [Trespass Act](#), where a person who enters into or upon property in the possession or occupation of another with an intention to commit an offense or intimidate, insult or annoy any person lawfully in possession or occupation of such property, commits a tort of trespass. The court cited *M'Mukanya -vs- M'Mbijiwe* [1984] eKLR that trespass is a violation of the right to possession, and a plaintiff must prove that he has the right to immediate and exclusive possession of the land, which is different from ownership.
37. In *M'Ikiara M'Mukanya & Another -vs- M'Mbijiwe (Supra)*, the court observed that the appellants were liable for trespass if the respondent had a right to possess and they intentionally entered his plot



even though they honestly believed the land was their own and they had a right of entry on it, or they did so under an inevitable mistake of law or fact.

38. In *Margaret Iminza Luyayi -vs.- Moses Opudo Mudaka* [2014] eKLR, the court observed that there was no wrongful entry or violation of the plaintiff's right of possession since it was the plaintiff who had invited the respondent to the suit property as her man-friend. In *Ochako Obinchi vs Zachary Oyoti Nyamongo* (2018) eKLR, the court cited Clark & Lindsell on Torts, 18th Edition page 923 that the onus was on the plaintiff to prove that he was the owner of the suit property and that the defendant had invaded and occupied the same without any justifiable cause.
39. In *Mwangi -vs.- Njaria* (Civil Suit E015 of 2021)[2022] KEELC 13564 [KLR] (19th October 2022) (Judgment), the court observed that what underlies the issue of trespass is ownership of the land. The court cited Winfield & Jolowicz on Tort Sweet & Maxwell 19th Edition page 428, that trespass to land constituted interference with possession, and that mere presence on the land does not necessarily amount to possession sufficient to bring an act for trespass and that the claimant should have some legal interests in the land, and that in the absence of evidence to the contrary, the owner of land with the proper title is deemed to be in possession of the land. The court held that the owner must consent, without which one will be found to have trespassed on the land.
40. Applying the foregoing case law, the appellant produced a letter of allotment dated 29/9/1992, a certificate of lease dated 19/3/2015, and an official search certificate dated 11/1/2021. A certificate of title under Section 26 of the *Land Registration Act* is to be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to encumbrances, easements, restrictions, and conditions contained or endorsed in the certificate and that the title of that land shall not be subject to challenge except on grounds of fraud, misrepresentation, illegality or was acquired through unprocedural or corrupt scheme.
41. In *Bandi -vs.- Dzomo & Others* Civil Appeal 16 of 2020 [2022] KECA 584 [KLR] (24th June 2022) (Judgment), the issue was trespass to land. The respondents had counterclaimed on alleged ownership rights and long occupation of the land for 80 years, as an ancestral home, not as part of a settlement scheme. They had termed the appellant's title deed as fraudulently obtained.
42. On appeal, the court emphasized that the appellant had the evidential burden to show that he acquired the title to the land in a regular, law-compliant fashion and not in an opaque manner. The court cited *Embakasi Properties Ltd & Another -vs- Commissioner of Lands & Another* [2019] eKLR, that although a certificate of title is conclusive evidence that the person named there is the absolute owner, there is no guarantee for the same if acquired corruptly, fraudulently, illegally, or unprocedurally. The court cited *Munyu Maina -vs- Hiram Gathiha Maina* [2023] eKLR that where a root of the title is under challenge, it was not enough to dangle the instrument of the title without evidence beyond the instrument that the acquisition was legal, formal and free from any encumbrances and interests, that would not necessarily be noted in the register.
43. In this appeal, the respondents did not specifically plead any particulars of illegality, fraud, acquisition through unprocedural means, or corrupt scheme in their statement of defense. The respondents did not plead that they held superior title to that of the appellant. Further, the respondents did not plead that the suit land was a public utility plot, incapable of re-allocation to the appellant.
44. In *Elijah Makeri Nyangwara -vs- Stephen Mungai Njugujna & Another* [2013] eKLR, the court observed that the law is protective of a title and that the burden was on the defendant to prove that the title was obtained illegally, unprocedurally, or through a corrupt scheme. Fraud, illegality and unprocedurally acquired must be specifically pleaded and proved on a balance higher than in a balance of probabilities. See *Arithi Highway Developers Ltd -vs- West End Butchery* [2015] eKLR.



- In *Muthiora -vs.- Marion Muthama Kiara* (Suing on behalf of the estate of Erastus Muthamia Kiara (deceased) Civil Appeal 43 of 2017 [2022] KEED 28 [KLR] (4th February 2022)(Judgment), the court observed that trespass could be a continuing tort. The court, guided by *Dr. Joseph Arap Ng'ok -vs- Moijjo Ole Keiwua NRB Civil Appl. No. 60 of 1997*, observed law takes precedence over all alleged equitable rights of title.
45. Further, the court cited *Faraj Maharus -vs.- J.B. Martin Glass Industries & Others Mombasa Civil Appeal No. 130 of 2003*, that a temporary occupation license issued in 1926 could not oust the certificate of title granted under the Registration of Titles Act and that a temporary occupation license to occupy government land was not sufficient to create or transfer title to the grantee or his legal representative.
 46. The court said that the title held by the respondent's late husband could only be impeached if it was demonstrated that the deceased's registration as the owner was fraudulent and the deceased was party to the fraud. The court reaffirmed *Vijay Morjaria -vs- Nansigh Madhusing Darbar & Another [2000] eKLR*, that fraud must be specifically pleaded and that particulars of the alleged fraud must be stated on the face of the pleading.
 47. On limitation of action, whereas a cause of action based on tort must be brought within 3 years after accrual, the court said in case of continuing trespass, a trespass consists of a series of acts done on consecutive days that are exact and that are renewed or continued from day to day, aggregate from one indivisible harm. The court cited the *Jowitts Dictionary of English Law 2nd Edition* that a continuing trespass is permanent in its nature, as where a person builds on his land so that part of the building overhangs his neighbor's land and in *Clerk & Lindsell on Torts 16th Edition*, that every continuance of a trespass was a fresh trespass, raising a new cause of action from day to day as long as the trespass continues.
 48. The court held that any unauthorized entry, whether present or continuous, was trespass; in the instant case, there was no dispute that the appellant entered into and had remained in continuous occupation from the first day of entry without authorization; hence, it was a trespasser, which acts of trespass could not be time-barred.
 49. Applying the foregoing case law to the instant appeal, the respondents have urged this court to find that the failure to specifically plead fraud, illegality, corrupt scheme, or unprocedural manner of acquisition of title by the appellant was not fatal and, therefore, curable under the law. Court infer illegality, fraud, on the unprocedural manner of obtaining title. Parties must specifically plead and prove the particulars of impeaching a title deed. See *Westmont Power (K) Ltd -vs- Westmost Power (K) Ltd [2003] eKLR*, *Arithi Highway Developers vs West End Butchery Ltd & others (2015) eKLR*.
 50. Section 98(1) of the *Evidence Act* provides that evidence can be adduced to invalidate any document. Other than alleging unprocedural means, the respondents did not call independent evidence to demonstrate that the paper title held by the appellant towards obtaining a certificate of lease was unprocedural, illegal, informal, and invalid. It is the respondents who were alleging that the title documents held by the appellant were unprocedurally or illegally obtained for land that was public utility. No evidence was tendered from the County Government of Trans Nzoia or the National Land Commission to show that the title deed held by the appellant was irregularly or unprocedurally obtained. No single complaint letter was availed by the respondents, terming the title documents held by the appellants as irregular or unlawful.
 51. Similarly, the respondents failed to call or produce any authentic documents to show that plot No. 8/91 was public utility land, DW1, 2, and 3 failed to produce superior documents to the certificate of lease



- held by the appellant. A temporary occupation license cannot supersede a certificate of lease. DMFI No. 6, dated 29/3/1990, was not produced as an exhibit. A document marked for identification does not form part of the court record. See Ken Nyaga Mwigie -vs- Austine Kaguta & Others [2015] eKLR.
52. The evidence tendered by the County Surveyor based on P. Exhibit No. 8 confirmed that the respondents had trespassed into the appellant's land, which is registered under his name. The County Surveyor was emphatic in cross-examination that occupying and owning a plot were two different things. He reiterated that the respondents had encroached on the appellant's land. Trespass under Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition para 18-01 is defined as an unjustifiable entry by one person upon the land in possession of another.
53. Sections 48 -54 of the *Evidence Act* provides for reliance on expert reports or opinions. A court of law is at liberty to adopt or reject such a report depending on the facts and circumstances of the case before it. In Kagina -vs- Kagina & Others Civil Appeal No. 21 of 2017 (2021) KECA 242 [KLR] (3rd December 2021 (judgment), the court guided by Stephen Kinini Wangonde -vs- The Ark Ltd [2016] eKLR, held that a court may reject an opinion if it is speculative, manifestly illogical, contradictory, unreliable, worthless or based on no substantive or facts.
54. In this appeal, the respondents have been silent on the issue of trespass and justification for the entry and occupation of the land to the exclusion of the appellant, who possesses superior title which they did not impeach. A case is won on the strength of the party's pleadings and not the weakness of the opponent's case. See Samuel Otieno -vs- Municipal Council of Malindi & Another [2015] eKLR. In Challo -vs- City Chicken & Eggs Dealers Co-operative Society Ltd & Another (Civil Appeal No. 117 of 2018 [2023] KECA 244 [KLR] (3rd March 2023) (Judgment), the court observed that a continuing trespass arises from an unauthorized entry and occupation of property without authority or consent and which occupation continues unabated.
55. The respondents had the burden to justify entry into and continuing occupation of the appellant's land. Once the appellant produced ownership documents for the land, which the respondents had not impeach, he discharged the legal burden.
56. The evidential burden as held in Raila Odinga & Others -vs.- IEBC & Others (Supra) shifted to the respondents to justify the trespass under Sections 107 and 108 of the *Evidence Act*. The existence of temporary occupation rights, amounting to a legal allocation by the defunct Municipal Council of Kitale, and the issuance of new numbers, as pleaded in paragraph 3 of the statement of defense, was not proved by way of documentary evidence. Entries of the names of the respondents as legal allottees of the suit property, as pleaded in paragraph 4 of the statement of defense by any issuing authority, were not substantiated at all.
57. In Carogot Investments Ltd -vs- Aster Holdings Ltd & Others [2019] eKLR, the court observed that where two parties are asserting competing proprietary interests over one parcel of land, each must produce evidence in support of his claim. In James Henry Mundiari T/A Kabarak Development Services vs Tradewheel (K) Ltd (1987) eKLR, the court observed that the plaintiff could not attack the relative weakness of the defendant's title by pleading justifiably that the "council owns the land" without the strength of the title.
58. The onus was on the respondents to demonstrate a justification for trespass based on tangible and cogent evidence that the suit land is a public utility. Authentic and valid documents from the defunct Municipal Council of Kitale were not availed to support any superior, legal or equitable rights enabling the respondents to trespass on the land. Equally, evidence to sustain the attack that the appellant's title to the land was improperly or unprocedurally acquired and registered was based on speculations,



conjectures, assumptions, and suppositions. Material evidence is what the respondents should have brought before the trial court to impeach the certificate of title held by the appellant. Calling independent witnesses from the allocating authority to substantiate that there were irregularities in allocating land to private individuals, which is otherwise a public utility land, is all that the respondents ought to have done if at all their suspicion had any weight.

59. From the record of appeal, it is apparent that the trial court did not address its mind on the cause of action as pleaded based on trespass, despite early expert evidence dated 20/9/2022 to support encroachment to the appellant's land. The respondents did not tender evidence that the title held by the appellant must have been obtained unprocedurally.
60. There were no pleadings on particulars of any fraud, irregularity, or unprocedural obtaining of a title deed supported by concrete evidence, that the appellant perpetuated or was a party to any such illegal conduct. The letters dated 21/1/2012, 1/6/1990, and 29/3/1990 to DW1, 2, and 3 had no relation with the appellant's certificate of title. They did not contain any parcel number or plot number. Evidence that the water point was on the appellant's land was not substantiated through documentary evidence.
61. The upshot is that the appeal succeeds. It is allowed. The appellant's suit at the lower court is allowed in terms of prayers (a) and (b), that is:
 - (a) Eviction order against the 1st, 2nd, and 3rd defendants, their agents, servants, and/or all those claiming under them from the said parcel of land known as Kitale Municipality Block 8/91 measuring 0.1001 Hectares is hereby issued to take effect after three months from the date hereof.
 - (b) A permanent injunction restraining the 1st, 2nd, and 3rd defendants from trespassing upon and/or committing any acts upon the plaintiff's said parcel of land known as Kitale Municipality Block 8/91 measuring 0.1001 Hectares.
 - (c) Damages of Kshs. Two Million for trespass are awarded to the appellant guided by the caselaw of Kenya Power Lighting Company vs Ringera & 2 others (2022) KECA 104 (KLR).
 - (d) Costs of the appeal to the appellant.

**JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT
AT KITALE ON THIS 19TH DAY OF FEBRUARY 2025.**

In the presence of:

Court Assistant - Chemutai

Bikundo for the Respondent present

Ndarwa for Kiarie for Appellant present

HON. C.K. NZILI

JUDGE, ELC KITALE.

