



Muriu & another v Embakasi Ranching Company Limited & another (Environment and Land Appeal E093 of 2021) [2023] KEELC 46 (KLR) (18 January 2023) (Judgment)

Neutral citation: [2023] KEELC 46 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E093 OF 2021**

**JO MBOYA, J
JANUARY 18, 2023**

BETWEEN

STEPHEN WAMBUGU MURIU 1ST APPELLANT

JAMES KAMAU WANYOIKE 2ND APPELLANT

AND

EMBAKASI RANCHING COMPANY LIMITED 1ST RESPONDENT

ELIZABETH NJANGO MBOCHE 2ND RESPONDENT

JUDGMENT

1. The Appellants herein, (who were the Plaintiffs in the Chief Magistrate’s Court) filed a Plaintiff dated the 8th March 2016 and which was thereafter amended on the 17th May 2019. For clarity, the amended Plaintiff sought various reliefs, whose details were duly enumerated at the foot of the Amended Plaintiff.
2. Upon being served with both the original Plaintiff and subsequently, the amended Plaintiff, the Respondents herein (who were the Defendants in the Subordinate court) duly entered appearance and thereafter filed their respective Statements of Defense.
3. Needless to state, that the 2nd Respondent thereafter filed an amended Statement of Defense and counterclaim. For clarity, the amended Statement of Defence and Counter-claim though undated was filed on the 5th April 2019.
4. Subsequently and upon the close of pleadings, the subject matter was listed for hearing and indeed proceeded for hearing before the Learned Chief Magistrate, sitting at Milimani.
5. Moving forward, it is important to state and underscore that the Appellants’ case revolved and gravitated upon the evidence that was tendered by the 2nd Appellant, who testified as PW1. In this



regard, it is imperative to state that PW1 testified on the 7th December 2020 and thereafter the Plaintiffs' (read the Appellants) case was closed.

6. On the other hand, the Respondents case revolved around the evidence of two witnesses, namely, the 2nd Respondents and a representative of the 1st Respondent by the name of Jack Kamau Wachira. Same testified as DW2.
7. For coherence, upon the close of the cases for the respective Parties, the designated advocates agreed to file and exchange written submissions, which were duly filed and exchanged.
8. Subsequently, the learned Chief Magistrate who heard the matter proceeded to and delivered a Judgment which was delivered on the 23rd November 2021. For clarity, the impugned Judgment is contained at pages 5 to 15 of the Record of Appeal.
9. Suffice it to point out that the learned chief magistrate found and held that the Plaintiffs case had not been established and proved to the requisite standard. Consequently, the Learned Chief Magistrate proceeded to and indeed dismissed the Plaintiffs' case.
10. On the contrary, the Learned Chief Magistrate found and held that the 2nd Defendant (read now 2nd Respondent) had established and proved her case on a balance of probabilities and was thus entitled to Judgment, on the basis of the Counter-claim.
11. Premised and based on the foregoing, the learned Chief Magistrate allowed the reliefs at the foot of the amended counterclaim filed on the 5th April 2019, save for the Claim of General damages, which was not awarded.
12. It is instructive to state and observe that upon the delivery of the impugned Judgment, the Appellants herein (sic) felt aggrieved and dissatisfied and thereby lodged the subject appeal.
13. Vide the Memorandum of Appeal dated the 1st September 2021, the Appellants (read 2nd Appellant) has raised various grounds of appeal. For clarity, the grounds of appeal are reproduced as hereunder;
 - i. The subordinate court erred in law and fact in holding that the 2nd plaintiff had not proved their case on a balance of probabilities which was a gross misdirection on given the overwhelming oral and documentary evidence submitted in court.
 - ii. The trial magistrate erred in law and fact in pegging her decision on the fact that the 1st Plaintiff had not testified in support of 2nd plaintiffs case which was a deliberate misdirection given that the 2nd plaintiffs claim was that he was the equitable owner of plot No. P 4647 having purchased it from the 1st plaintiff and which the evidence was glaringly on the record, which was a travesty of justice.
 - iii. The trial magistrate also misdirected herself in holding that the amendments of the survey map undertaken by the 1st defendant in 2012 to replace the 2nd plaintiffs' plot with that of the 2nd defendant thereby dispossessing the 2nd plaintiff were lawfully done which was a grave miscarriage of justice.
 - iv. The trial magistrate erred in law and in principle in penalizing the plaintiffs to pay costs for the suit and counterclaim for no fault of their own and which amounted to bias, double jeopardy and a gross misdirection.
 - v. The trial magistrate deliberately misdirected herself in fact and in law in holding that the 2nd plaintiffs' plot No. P4647 was nón-existent on the survey map despite the fact that the 1st defendant had already shown the 2nd plaintiff his plot on the ground and approved/



authorized him to go ahead with developments thereon way before the purported amendments of the survey map which was a miscarriage of Justice.

- vi. The trial magistrate. was wholly wrong in fact and principle to have dismissed the plaintiffs' case and allowed the counterclaim notwithstanding the overwhelming evidence adduced/ submitted in court which was in error and a travesty of justice.
14. Subsequently, the Appeal herein came up for directions and the advocates for the respective Parties agreed to canvass and dispose of the appeal by way of written submissions.
15. Consequently and based on the agreement by the respective advocates, the court proceeded to and circumscribed timelines for the filing and exchange of the written submissions.
16. In this regard, it is imperative to note and acknowledge that the advocates for the respective Parties thereafter proceeded to and filed their respective submissions. For completeness, the Appellants filed two set of written submissions, the first of which was dated the 2nd November 2022, whilst the latter was dated the 21st November 2022.
17. On the other hand, the 1st Respondent filed written submissions dated the 14th November 2022, whilst the 2nd Respondent filed written submission dated the 15th November 2022.
18. Suffice it to point out that the various sets of written submissions filed by and on behalf of the Parties form part and parcel of the record of the court.

Submissions By The Parties:

a. Appellants' Submissions:

19. Whilst highlighting grounds 1, 2, 3 and 5 of the Memorandum of appeal, counsel for the Appellants submitted that the Appellants' herein had tendered and placed before the learned Chief Magistrate, sufficient and credible evidence (both oral and documentary) to show and establish that indeed the 2nd Appellant was the legitimate owner of Plot No. 4647 situated within the 1st Respondent's larger parcel of land.
20. Further, counsel added that the Appellants also placed before the court Evidence that indeed the 1st Appellant herein had hitherto been allocated plot numbers 4646 and 4647, respectively by the 1st Respondent.
21. Additionally, counsel for the Appellants submitted that subsequent to the allocation of the two named plots to the 1st Appellant, which was evident vide Share Certificate number 12994, the 1st Appellant herein thereafter sold to and in favor of the 2nd Appellant Plot number 4647.
22. In any event, counsel added that upon the sale of Plot number 4647 to and in favor of the 2nd Appellant, the 2nd Appellant herein was thereafter issued with a share certificate by the 1st Respondent, denoting that the 2nd Appellant was now the owner of the named Plot. For clarity, counsel invited the court to take cognizance of share certificate number 0018 dated the 12th October 1994.
23. Other than the foregoing, counsel for the Appellant also submitted that the Appellant herein also presented before the court copies of receipts which were issued by the 1st Respondent to and in favor of the 2nd Appellant, which essentially confirmed that the 2nd Appellant was the owner of Plot number 4647.



24. Moving forward, counsel for the Appellant also added that on or about the 28th September 2006, the 1st Respondent herein issued an approval for development in favor of the 2nd Appellant, pertaining to and concerning Plot number 4647.
25. In view of the foregoing, Learned counsel for the Appellants submitted that the learned Chief Magistrate was therefore in error in finding and holding that the Appellants herein had not placed before the honourable court cogent and credible evidence to confirm that indeed the 2nd Appellant was the legitimate owner and proprietor of Plot number 4647.
26. Secondly, learned counsel submitted that though the 2nd Appellant was the lawful owner and proprietor of plot number 4647, the Respondents herein proceeded to and amended the Original map and thereafter removed the 2nd Appellant's plot from the designated ground location and substituted same with Plots numbers 4421 and 4422, belonging to the 2nd Respondent.
27. Be that as it may, counsel added that the impugned amendment of the original map which affected Plot number 4647, belonging to the 2nd Appellant, was carried out and undertaken without notice to and involvement of the 2nd Appellant.
28. Premised on the foregoing contention, counsel for the Appellants has submitted that the amendment of the original map, which affected the ground location and position of plot number 4647, was carried out and undertaken in a fraudulent manner.
29. Fourthly, counsel for the Appellant has contended that prior to and before the hearing of the matter in the lower court, the Appellants herein took out and issued a Notice to Produce against the Respondents, but despite the issuance and service of the Notice to produce, the Respondents and more particularly, the 1st Respondent failed to avail and to produce the original map before the impugned amendments.
30. In view of the failure to avail and to produce the original map, counsel submitted that the honourable court should proceed and hold that such failure was tantamount to concealment of material evidence that was within the custody and possession of the 1st Respondent.
31. Premised on the foregoing, counsel has further invited the Honourable court to make an adverse inference as against the 1st Respondent, based on the failure to produce, inter-alia the original map before the impugned amendments.
32. Fifthly, counsel for the Appellant has submitted that the learned Chief Magistrate misdirected herself in finding and holding that the Appellants' herein had neither proved nor established their claim on a balance of probabilities.
33. In any event, counsel has added that the impugned findings and holding by the learned Chief Magistrate were based on a misapprehension of the totality of the evidence that was tendered and adduced before the honourable court.
34. Other than the foregoing, counsel has also submitted that the learned Chief Magistrate also took a slanted approach, whilst evaluating and assessing the evidence tendered by and on behalf of the Appellants and hence same failed to appreciate the true import of the documentary evidence that was tendered.
35. To amplify the foregoing submissions, learned counsel for the Appellants invited the honourable court to take cognizance of the Responses/answers rendered by the 1st Respondent's witness whilst under



- cross examination. For clarity, counsel alluded to lines 11, 12, 13 and 15 on page 54 and lines 4, 6, 7, 8, 9 and 10 on page 60 of the Record of Appeal.
36. Owing to the foregoing submissions, counsel for the Appellants has therefore contended and submitted that indeed the Appellants established and proved their case on a balance of probabilities, contrary to the findings of the Learned Chief Magistrate.
 37. Sixthly, counsel for the Appellant has submitted that it was also erroneous on the part of the learned Chief Magistrate to dismiss the Appellants case, whilst on the other hand allowing the 2nd Respondent's counterclaim, despite the glaring and numerous irregularities that bedeviled the 2nd Respondent's claim pertaining to and concerning the disputed ground, which the 2nd Respondent claimed on the basis of being plot number 4421.
 38. In this regard, learned counsel for the Appellants has proceeded to and contended that had the learned Chief Magistrate addressed her judicial mind to the totality of the evidence, same would no doubt have found and held that the impugned amendment of the map in favor of the 2nd Respondent was fraudulent.
 39. The seventh complaint/ grievance which has been addressed by counsel for the Appellants relates to the contention that the learned Chief Magistrate erred in fact and in law in finding and holding that the Appellants did not prove the claim/allegation based on fraud to the requisite standard.
 40. In this regard, counsel added that the amendment of the original map and the removal of the 2nd Appellant's plot from the designated ground, by itself constituted and was sufficient evidence of fraud.
 41. Additionally, counsel added that the impugned amendment was being carried out and undertaken after 18 years, from the date when the 2nd Appellant became the lawful owner of Plot number 4647. In this regard, counsel pointed out that the impugned amendment was statute barred.
 42. Furthermore, counsel also submitted that it was also erroneous on the part of the learned Chief Magistrate to find and hold that the 2nd Respondent herein had proved and established her case at the foot of the Counter-claim yet the 2nd Respondent had neither produced nor adduced before the court any credible evidence to vindicate her claim.
 43. Besides, counsel also contended that the 2nd Respondent failed to produce credible documents, inter-alia, letter of allotment and share certificate.
 44. However, Counsel contended that despite the failure to produce and tender before the court the critical documents, the learned Chief Magistrate still found and held that the 2nd Respondent had proved her case (read Counter-claim) to the requisite standard, which finding has been contended to be erroneous.
 45. To vindicate the various submissions which were mounted on behalf of the Appellants, counsel has cited and relied on various decision, inter-alia, *Eastern produce Kenya Ltd v Bontas Shoya* [2018]eKLR, *Alice Wanjiru Kibui v Messaic Assembly of Yawe* [2021]eKLR and *Demutilla Nanyama Purumu v Salim Mohamed Salim* ([2021]eKLR.
 46. In a nutshell, counsel for the Appellants has therefore implored the court to find and hold that the learned Chief Magistrate grossly misdirected herself and thus arrived at an erroneous conclusion in the matter.

b. The 1st Respondent's Submissions

47. On behalf of the 1st Respondent, learned counsel addressed, highlighted and canvassed four pertinent issues for consideration.



48. Firstly, learned counsel for the 1st Respondent contended that the 2nd Appellant herein did not produce and tender before the court credible evidence to show and prove that same was indeed a bona-fide purchaser for value in respect of Plot number P4647, namely, the suit property.
49. In any event, counsel further added that the 2nd Appellant herein also failed to procure the attendance of the 1st Appellant, who is said to be the one, who sold the suit plot to and in favor of the 2nd Appellant.
50. Secondly, counsel for the 1st Respondent submitted that the 1st Respondent herein was the allocating authority/company as pertains to the various properties, including the suit property herein. Consequently and by virtue that the 1st Respondent was the allocating authority, counsel added that the 1st Respondent was therefore better placed in confirming and determining the legitimate owners over and in respect of various properties.
51. In this regard, counsel added that according to the records held by the 1st Respondent, the disputed ground, which is being claimed herein, constitutes Plot number 4221, belonging to and registered in the name of the 2nd Respondent.
52. The third issue that was raised by counsel for the 1st Respondent is that the Map which was produced by the 1st Respondent's witness showed and established that the disputed ground belongs to the 2nd Respondent.
53. Fourthly, counsel submitted that the impugned amendment of the survey map was indeed recommended by the Director of Survey and Planning.

c. Submissions By The 2nd Respondent

54. Vide written submission dated the 15th November 2022, the 2nd Respondent herein has raised and highlighted three salient and pertinent issues.
55. First and foremost, counsel has submitted that though the 1st Appellant had filed the suit before the Chief Magistrate alongside the 2nd Appellant herein, however, the 1st Appellant neither appeared nor adduced any evidence before the subordinate court.
56. In the premises, counsel for the 2nd Respondent has submitted that the 1st Appellant's suit before the Chief Magistrate's court was neither established nor proven. In this regard, counsel added that the 1st Appellant's case was therefore rightly dismissed.
57. Additionally counsel for the 2nd Respondent has also submitted that though the current appeal bears the name of the 1st Appellant, the Memorandum of Appeal is however, slanted and skewed in favor of the 2nd Appellant and not otherwise.
58. Essentially, counsel for the 2nd Respondent has therefore contended that the 1st Appellant herein has no legitimate appeal before this Honourable court and hence the purported appeal on behalf of (sic) the 1st Appellant ought to be dismissed.
59. Secondly, counsel for the 2nd Respondent has submitted that even though the 2nd Appellant contended to have purchased the suit plot from the 1st Appellant, same however failed to procure the evidence of the 1st Appellant before the court. For clarity, it was contended that it was only the 1st Appellant, who could confirm and authenticate the sale of the suit Plot.
60. Based on the failure by the 1st Appellant to appear and tender evidence, pertaining to allocation and subsequent sale of the suit property to the 2nd Appellant, counsel for the 2nd Respondent invited the court to draw an adverse inference against the Appellants herein.



61. In support of the invitation to draw an adverse inference against the Appellants and particularly arising from the failure of the 1st Appellant to testify, counsel invited the court to take cognizance of the decision in the case of *Kenya Akiba Micro Finance Ltd v Ezekiel Chebii & 14 Others* [2012]eKLR.
62. Thirdly, counsel for the 2nd Respondent submitted that the Appellants and more particularly, the 2nd Appellant had failed to prove his claim to the suit property, either in accordance with the law or at all.
63. Having failed to prove and establish his claim on a balance of probabilities, counsel therefore contended that the Appellants' case, was therefore rightly dismissed by the learned Chief Magistrate.
64. To vindicate the submissions that the Appellants have neither proved nor established their claim before the Honourable court, counsel invited the court to take cognizance of the decision in the case of *Tabitha Mubia v Beatrice Nyambura Kariuki & Another* (2019)eKLR and *Christopher Irungu Ngugi v Paul Murioki & Another* [2019]eKLR, respectively.
65. Additionally, counsel for the 2nd Respondent also submitted that the 2nd Respondent herein was able to tender before the court credible and believable evidence to show ownership in respect of Plot number 4221, including the ultimate certificate of lease, which was issued in favor of the 2nd Respondent.
66. Finally, counsel for the 2nd Respondent submitted that even though the Appellant's case and claim before the Chief Magistrate's court was anchored and premised on the fraudulent amendment of the original map and consequential removal of plot number 4647, the Appellants' herein did not plead the claim based on fraud in the manner stipulated under the law or at all.
67. Other than the foregoing, counsel also added that the appellants herein also failed to tender and adduced before the court credible evidence in proof of the alleged fraudulent amendment of the map. For clarity, counsel added that a plea of fraud ought to be proved to the satisfaction of the court and in any event, to a standard beyond balance of probabilities.
68. In a nutshell, learned counsel for the 2nd Respondent submitted that the Appellants herein have neither laid nor established any credible basis to warrant the impeachment of the Judgment and decree of the learned Chief Magistrate. Consequently, Learned Counsel invited the Court to affirm the Judgment of the Chief Magistrate.
69. In the premises, counsel for the 2nd Respondent has contended that the Appeal before hand is therefore devoid of merits and hence same, ought to be dismissed with costs.

Issues For Determination:

70. Having reviewed the Memorandum of Appeal, the Record of Appeal and the written submissions filed by and on behalf of the Parties, I find and hold that the determination of the subject appeal revolves around four salient and pertinent issues.
71. For coherence, the issues for determination are as hereunder;
 - i. Whether the 1st Appellant herein has filed or mounted any appeal and if at all, whether such appeal is legally tenable.
 - ii. Whether the Appellants herein and in particular the 2nd Appellant duly pleaded the claim founded on fraud and if at all, whether sufficient evidence was tendered to prove (sic) the claim based and founded on Fraud.



- iii. Whether the finding and holding by the Learned Chief Magistrate that the Appellants had not proved and established their claim, was erroneous or otherwise
- iv. Whether the order by the Learned Chief Magistrate that the Appellant do bear the cost, was biased, erroneous and premised on gross misdirection.

Analysis And Determination

Issue Number 1

Whether the 1st Appellant herein has filed or mounted any appeal and if at all, whether such Appeal is Legally tenable.

72. The subject appeal is contended to have been filed and lodged by and on behalf of the two named Appellants. Indeed, at the foot of the Memorandum of appeal, it is signed as hereunder;
M/s Muchangi Nduati & Company
Advocates for the Appellants
73. Looking at it from the foregoing perspective, it would appear that indeed the Memorandum of appeal relates to and concerns both Appellants.
74. However, a look at the Memorandum of Appeal, which has been filed gives a different impression. For clarity, the body of the memorandum of appeal suggest/connotes that indeed the appeal is filed by the 2nd Appellant only and not otherwise.
75. For the avoidance of doubt, it is the 2nd Appellant who is (sic) stated to be aggrieved and dissatisfied with the impugned Judgment rendered on the 23rd November 2021 and not the 1st Appellant, or at all.
76. To be able to understand the foregoing observation, it is imperative to reproduce the preamble of the Memorandum of appeal, which sets out the person who is said to be aggrieved.
77. For convenience and ease of reference, the preamble is reproduced as hereunder;

Memorandum of Appeal

“The 2nd Appellant being dissatisfied with the Judgment of the Honourable A.M Obura made on 23rd November 2021 in CMCC No.1359 of 2016 appeals to this Honourable Court and sets for the following grounds of appeal.”

78. My understanding of the foregoing preambular statement, (details in terms of the preceding paragraph), shows that indeed the only grievant/ Appellant and who has laid before the Court a Memorandum of Appeal, is the 2nd Appellant and not otherwise.
79. Other than the foregoing, the other curious portion of the Memorandum of appeal relates to the reliefs sought. In this regard, it is again important to reproduce the reliefs' segment at the foot of the memorandum of appeal.
80. For completeness, same are reproduced as hereunder;
 - a). The appeal be allowed.
 - b). The lower courts' judgment be set aside and all the consequential orders.



- c). The court be pleased to enter Judgment in favour of the 2nd plaintiff as prayed in the suit.
- d). Costs be awarded to the appellants in both the lower court and in the appeal.
81. Needless to state, the subject appeal appears to have been filed and mounted by the 2nd Appellant only. For clarity, the name of the 1st Appellant has merely been reflected in the title of the proceedings, but there is no specific appeal and claim touching on and concerning the said 1st Appellant.
 82. Consequently and in the premises, I come to the conclusion that indeed the 1st appellant herein has no legitimate and tenable appeal (Memorandum of appeal), whatsoever and howsoever.
 83. Despite the foregoing findings and holdings, there is yet another important aspect touching on and concerning (sic) the appeal on behalf of the 1st Appellant.
 84. From the evidence on record, the 2nd Appellant herein testified that the 1st Appellant was duly allocated plots numbers P4646 and P4647, respectively by the 1st Respondent. In this regard, the 2nd Appellant added that the 1st Appellant was thereafter issued with a Share Certificate denoting the allotment of the two named plots.
 85. Moving forward, the 2nd Appellant testified that the 1st Appellant sold Plot number P4647 unto him (2nd Appellant) in 1993 and thereafter the 2nd Appellant was issued with a Share certificate number 0018 by the 1st Respondent in respect of Plot number P4647.
 86. Other than the foregoing, the 2nd Appellant also testified that upon the sale of Plot Number P4647 by the 1st Appellant unto him same became the lawful/beneficial owners thereof. For clarity, the 2nd Appellant tendered in evidence (sic) documents to vindicate his claim to ownership of the named Plot.
 87. Be that as it may, it is not lost on the court that the 1st Appellant herein neither attended court nor tendered any evidence pertaining to the initial allocation of the named Plot and subsequent sale and disposal of the named plot in favor of the 2nd Appellant.
 88. Given the position taken by the 2nd Appellant, namely, that same bought plot 4647 from the 1st Appellant and thereafter the plot was transferred unto him (2nd Appellant), it then means that the 1st Appellant was divested of ownership rights or claims, if at all, pertaining to and concerning the suit property.
 89. In my humble view, the dispute before hand touched on and concerned ownership and ground location of plot number P4647, which the 1st Appellant is said to have sold. In this regard, the 1st Appellant therefore had no standing before the subordinate court.
 90. By extension, having sold and (sic) been divested of ownership rights of the suit property and coupled with failure to tender any evidence before the Chief Magistrate court, clearly the 1st Appellant herein would have no legitimate complaint against the impugned Judgment and decree.
 91. In view of the foregoing consideration and having reviewed the findings of the Learned Chief Magistrate, I also come to the conclusion that the purported appeal (albeit in the absence of any memorandum of appeal) is not meritorious.
 92. In a nutshell, my answer to the 1st issue herein is twofold, firstly and most importantly, there is no legitimate Memorandum of appeal that was ever filed by and on behalf of the 1st Appellant.
 93. Secondly, if the first aspect herein is mistaken, then the second limb relates whether the 1st Appellant herein had any legitimate claim (sic) to the suit property long after the sale thereof, which is certainly in the negative.



Issue Number 2

Whether the Appellants herein and in particular the 2nd Appellant, duly pleaded the claim founded on fraud and if at all whether sufficient evidence was tendered to prove (sic) the claim based and founded on Fraud.

94. The crux/ gravamen of the Appellants' claim vide the amended Plaint dated the 17th May 2019, is contained in paragraph 10 of the said of amended Plaint.
95. Given that the said paragraph contains the substratum and hence the gist of the claim beforehand, it is therefore imperative that same be reproduced.
96. For convenience, the contents of paragraph 10 of the amended Plaint is reproduced as hereunder;

10. In the early January 2016 the 2nd defendant started laying claims to the property but declined to show me, the 2nd plaintiff or the 1st defendant the documents upon which she was laying claims on the property But the plaintiffs were to later learn that the defendants had conspired and allegedly caused and amendment to be done on the survey map on or around 2012 reflecting that 2nd defendants plot number P4421 had been relocated onto where plot No.P4647(2nd plaintiff's) originally was thereby extinguishing the existence of the 2nd Plaintiff's plot and also taking or acquiring the parcel and/or Deed plan number LR Nairobi/Block 105/8657 for P4647 (2nd Plaintiff's Plot) for which she has now fraudulently acquired a title alleging it to be for her plot No-P4421 and to the 2nd plaintiffs prejudice as he now does not own a Plot according to the alleged Amended survey map.

97. From the forgoing paragraph, it is evident and apparent that the Appellants claim is founded on (sic) conspiracy and fraud (fraudulent acquisition of title) by the 2nd Respondent herein.
98. Given that the Appellants and in particular, the 2nd Appellant is alluding conspiracy and fraud, it was incumbent upon the 2nd Appellant to comply with the provisions of Order 2 Rule 10 (1) of the [*Civil Procedure Rules* 2010](#).
99. For ease of reference the provisions of Order 2 Rule 10 (1) of the [*Civil Procedure Rules* 2010](#), are reproduced as hereunder;

10. Particulars of pleading [Order 2, rule 10.]

- (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
 - (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
 - (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.



(2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.

100. To my mind, it was incumbent upon the 2nd Appellant to indeed supply and plead the particulars of fraud and the fraudulent activities, which are attributed to the Respondents, either jointly or severally.
101. Be that as it may, no such particulars were pleaded or contained in the body of the Amended Pleat. In this regard, it is therefore imperative to state and underscore that the Appellants herein would therefore not have been at liberty to tender and adduce any evidence in respect of the plea of conspiracy or fraud. See Order 2 Rule 6 of the Civil Procedure Rules, 2010.
102. To underscore the importance and significance of pleading and supplying particulars of fraud, it is imperative to take cognizance of the holding of the Court of Appeal in the case of Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd [2004] eKLR, where the court stated and observed as hereunder;

Firstly, there is no denying that there were no particulars supplied in the defence pleading under Order VI rule 8(1) which requires in mandatory terms that:

“every pleading shall contain the necessary particulars of any claim defence or other matter pleaded including, without prejudice to the generality of the foregoing: –

- (a) particulars of anyfraud on which the party relies.
- (b) Where a party pleading allegesfraudulent intention..... particulars of the facts on which the party relies.”

In the absence of such pleading, the insurer is not at liberty to agitate the allegation of fraud or fraudulent intention. Fraud is a serious quasi – criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt. Sufficient notice and particulars must therefore be supplied to the party charged for rebuttal of such allegation.

103. Other than the failure to particularly and specifically implead fraud and fraudulent activities, there is also no gainsaying that the 2nd Appellant herein neither tendered nor adduced any credible evidence to anchor the allegations of fraud.
104. It is common knowledge that he who asserts fraud must tender and produce cogent and credible evidence, pertaining to and concerning the plea of fraud. For clarity the evidence of fraud must be explicit and clear, (read cogent). In any event, same must not be left for inference.
105. To underscore the foregoing observation, it is appropriate to restate and reiterate the holding of the Court of Appeal in the case of Kuria Kiarie v Sammy Magera [2018]eKLR where the court held as hereunder;
25. The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria v Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to



be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the *Civil Procedure Rules*.

26. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR expressed itself as follows;-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008] 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

27. We have examined the appellants' amended defence for any pleading on particulars of fraud or illegality but there is none. The claims were therefore stillborn and no evidence could be tendered.

106. Clearly, it was the 2nd Appellant who had raised the plea of conspiracy and fraud on the part of the Respondents. In this regard, same bore the burden and obligation of proving (sic) the alleged fraud which was claimed.
107. Unfortunately, the 2nd Appellant herein failed to discharge the burden cast upon him and in my humble view, the learned Chief Magistrate arrived at the correct finding that the claim based on fraud had neither been established nor proved by the Appellants.

Issue Number 3

Whether the finding and holding by the Learned Chief Magistrate that the Appellants had neither proved nor established their claim, was Erroneous or otherwise

108. Other than the finding and holding that the Appellants herein and in particular, the 2nd Appellant had no properly impleaded fraud, there is the other complaint which was also mounted against the findings of the Learned Chief Magistrate.
109. To this end, the 2nd Appellant contended that the Learned Chief Magistrate failed to properly appreciate the import and tenor of the evidence (oral and documentary), which was tendered before her and thus same arrived at an erroneous conclusion.
110. Be that as it may, it is worthy to recall that the Appellant herein had at the onset and upon the filing of the suit contemporaneously filed an application wherein same annexed a copy of the share certificate which had hitherto been issued in favor of the 1st Appellant. For clarity, the said certificate was number 12994 and same had been annexed as annexure SWM1.



111. It was stated that the said share certificate only showed that the 1st Appellant had been allocated one Plot and not otherwise. However, the Appellants herein subsequently filed another share certificate bearing the same number, but which was at variance with the initial share certificate.
112. Indeed, during cross examination of PW1 (read 2nd Appellant) same stated as hereunder;
- “This is the same certificate number 12994. It now shows 2 shares and not one. The share certificate is the same but reads differently. It seems there is an alteration on the annexure SWM1 on the reverse side.
- Page 15 on the back; there is no alteration on this one”.
113. Being aware of the foregoing admission and acknowledgement by the 2nd Appellant that indeed there appear to have been an alteration on the share certificate, the learned Chief Magistrate correctly in my humble view found and held that the claim by the 2nd Appellant herein was indeed tainted.
114. In any event, the learned Chief Magistrate proceeded to and correctly held that the impugned alteration on the important document read the share certificate, which was relied upon by the 2nd Appellant, could only be explained by the 1st Appellant, who was (sic) the initial allottee.
115. Nevertheless, it must be remembered that the 1st Appellant herein neither attended court nor tendered any evidence. In this regard, the origin and source of the impugned alteration of the share certificate, remained a mystery and hence a blemish on the Appellant’s case.
116. Other than the foregoing aspect that I have addressed, it is also important to recall that the Appellant’s case was premised and anchored on a fraudulent amendment of the original map. In this regard (other than the failure to correctly implead fraud) the 2nd Appellant had intended to impress upon the court to find and hold that indeed the map was amended and as a result of the impugned amendment other properties were imposed on his (2nd Appellant’s property).
117. However, during cross examination by counsel for the 1st Respondent, the 2nd Appellant testified as hereunder;
- “The directors of Embakasi Ranching took us to the ground. I may not recall their names. They were pointed by the 1st Defendant. I believe the map was amended and other proprietors imposed on my property. I don’t have the original map. I know they showed the two plots were adjacent to one another”.
118. From the foregoing excerpt, what becomes evident and apparent is that without the production of the original map, how then would the 2nd Appellant have convinced the learned Chief Magistrate that indeed plot number 4647, ever existed in the original map, before same was allegedly removed vide amendment.
119. In my humble view the Appellants herein bore the burden of proving the claims and allegations that were alluded to. Indeed the evidential burden first laid upon the Appellants and same was not discharged.



120. In this regard, it is appropriate to adopt and restate the elaborate holding of the Supreme Court Of Kenya in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR, where the Supreme Court observed as hereunder;

(49) Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This Court in *Raila Odinga & Others v Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

121. In a nutshell, I come to the conclusion that the learned Chief Magistrate correctly appreciated the import and tenor of the evidence that was tendered before her and indeed same undertook appropriate analysis thereof, before coming to the conclusion that the Appellants had not proved their case.

122. In view of the foregoing consideration, I find and hold that the learned Chief Magistrate arrived at and reached the correct conclusion when same held that the Appellant’s case was not proved.

Issue Number 4.

Whether the order by the Learned Chief Magistrate that the Appellant do bear the cost was biased, erroneous and premised on gross misdirection.

123. Before venturing to address and deal with the issue herein, it is appropriate to reproduce ground four of the Memorandum of appeal. For ease of reference, ground four is reproduced as hereunder;

iv. The trial magistrate erred in law and in principle in penalizing the Plaintiffs’ to pay costs for the suit and counterclaim for no fault of their own and which amounted to bias, double jeopardy and a gross misdirection.

124. In my humble view, the Appellants’ herein are complaining that the learned Chief Magistrate erred in awarding costs of the proceedings to the Respondents.

125. Additionally, the Appellants herein have also contended that the award of costs to the Respondents by the learned Chief Magistrate constituted and amounted to bias, double jeopardy and hence same was a gross misdirection on the part of the learned Chief Magistrate.



126. Be that as it may, it is appropriate to state and underscore that the award of cost in any matter, is an exercise of discretion of the concerned court. In this regard, the provisions of Section 27 of the Civil Procedure Act, Chapter 21, Laws of Kenya, are relevant and apt.
127. To be able to understand the import of the foregoing statement, it is important to reproduce the provisions of Section 27 of the Act.
128. For clarity, the said provisions are reproduced as hereunder;

27. Costs

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
 - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, an
129. Other than the foregoing, the jurisprudence pertaining to and concerning the award of costs is now settled. In this regard, case law abound.
 130. However, it suffices to cite and quote just one. To this end, the Court of appeal decision in the case of Farah Awadh v CMC Motors Ltd [2018]eKLR, is succinct and spot-on.
 131. For coherence, the Honourable court stated and observed as hereunder;

Our construction of this Rule is that as a general rule, an award of costs on appeal follows the event, and a successful litigant will be awarded costs so as to recoup the costs he has undergone in the course of the litigation. In *John Kamunya and another v John Ngunyi Muchiri & 3 others* [2015] eKLR, the Court reviewed a number of its own decisions on the subject which we find prudent to reflect here in as well. In *Supermarine Handling Services Ltd v Kenya Revenue Authority* [2010] eKLR (Civil Appeal 85 of 2006) the Court stated inter alia, that:

“Costs of any action, cause or other matter or issue shall follow the event unless the Court of Judge shall for good reason otherwise order ... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule”.



In that appeal, the Court drew inspiration from the pronouncements of the Court in *Devram Dattan v Dawda* [1949] EACA 35 where it was held that:

“It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so, its exercise must be based on facts ... if, however, there be, in fact some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance”.

In the light of all the above, we agree with the position held by the Court in the above pronouncements that an award of costs is therefore an exercise of the Court’s discretion, and as has been alluded to above, the Court of Appeal, in interfering with the exercise of discretion of the trial Judge appealed from, ought to satisfy itself that the exercise of that discretion either way was improper and therefore warrants interference.

In *James Koskei Chirchir v Chairman Board of Governors Eldoret Polytechnic* [2011] eKLR (Civil Appeal No. 211 of 2005), the Court held inter alia, that:

“Notwithstanding the provisions of section 27, above costs is generally a matter within the discretion of the Court. The Court did not, however, explain why it denied the appellant his costs before the trial Court. In absence of any explanation in that regard we think that the learned Judge of the Superior Court erred in denying the appellant the costs of the suit before the trial Court”.

Where there is sufficient reason why a trial Court awarded costs, then the appellate Court will not interfere with that award as was the case in *S.K. Njuguna & another v John Kiarie Waweru & another* [2009] eKLR (Civil Appeal No. 219 of 2008) where the Court stated that:

“We reiterate that the issue of costs is in the discretion of the Court and in this appeal, we are satisfied that there were justifiable reasons why the appellants herein were ordered to pay the costs although the Election Petition against them was dismissed.”

See also *Margret Ncekei Thurania v Mary Mpinda & another* [2015] eKLR where the principles on the discretion to award or withhold costs were summarized as follows:

“22. On the issue of costs, rule 31 of the Rules of this Court enjoins us at the end of our determination to make any necessary, incidental or consequential order including orders as to costs. In *Devran Dattan v Dawda* [1949] EACA 35, it was held that the decision as to whether the successful litigant has a right to recover his costs should be left to the discretion of the Judge who tried the case, a position reiterated in *James Koskei Chirchir v Chairman Board of Governors Eldoret Polytechnic* [2011] eKLR (Civil Appeal No. 211 of 2005) when this Court ruled that notwithstanding, the provision of section 27 of *Civil Procedure Act*, costs are generally a matter within the discretion of the Court. See also the decision in the case of *Super Marine Handling Services Limited v Kenya Revenue*



Authority [2010] eKLR (Civil Appeal No. 85 of 2006) for the proposition that costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for good reason otherwise order. Herein, the learned trial Judge properly exercised his discretion in awarding costs to the respondents. We find no good reason to interfere with the exercise of that discretion as the costs therein had followed the event considering that the respondents were the victorious party”.

Applying the above threshold to the rival arguments herein on the issue of costs, it is our finding that jurisdiction exists for us to intervene and either affirm or interfere with the award of costs made by the trial court, save on condition that the threshold for such interferences as laid by the case law assessed above is satisfied.

In *Edward Sargent v Chotabha Jhaverbhat Patel* [1949] 16 EACA 63, it was held that an appeal does lie to an Appellate Court against an order made in the exercise of judicial discretion, but the Appeal Court will interfere only if it be shown that the discretion was exercised injudiciously. The principles that guide the appellate court in the exercise of this mandate were set by the predecessor of the Court in *Mbogo & Another v Shab* [1968] EA 93, where it was held at page 96 that:-

“An appellate Court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice”

In the light of the above principles, the factors we are enjoined to consider when deciding whether to interfere or otherwise with the award of costs made by the trial court resulting in this appeal are not limited to the conduct of the parties in the actual litigation, but also to matters which triggered the litigation, and the contribution of the party in whose favour the order of costs was withheld, to the causation of those factors. In the instant appeal, the matter that triggered the litigation was the respondent’s failure to avail the registration items for the suit tractor within a reasonable time.

132. Duly nourished and guided by the elaborate holding by the Court of Appeal, it is common ground that costs follow the event, unless otherwise directed by the court.
133. In the premises, the learned Chief Magistrate having come to the conclusion that the Appellants’ suit was not meritorious and having dismissed same, the court was no doubt, bound to award costs to the Respondents, who were the successful Parties.
134. By parity of reasoning, having found and held that the 2nd Respondent had proved the counterclaim, the learned Chief Magistrate again correctly decreed costs of the counterclaim.
135. Consequently and in the premises, I do not discern any improper exercise of discretion on the part of the learned chief magistrate. Suffice it to note, that the Learned Chief Magistrate addressed her Judicial mind to the import and tenor of the Provisions of Section 27 of the *Civil Procedure Act*.
136. In short, I am not disposed to interfere with the award of costs, either in the manner contended or at all.



Final Disposition:

137. Having addressed the various nuances/perspectives that arose from the Memorandum and the Record of Appeal, it is now appropriate to terminate the subject Judgment by making the final and dispositive orders.
138. Be that as it may, I must point out that while addressing the various grounds/ issues, I made observations and hence, it must have become evident and apparent that the subject appeal is devoid and bereft of merits.
139. Consequently and in the premises, the Appeal be and is hereby Dismissed its entirety, with costs to the Respondents. For completeness, the Judgment of the Chief Magistrate be and is hereby affirmed.
140. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JANUARY 2023.

OGUTTU MBOYA

JUDGE

In the presence of;

Benson - Court Assistant.

Mr. Muchangi Nduati for the Appellants.

N/A for the 1st Respondent.

N/A for the 2nd Respondent

