Bandi v Dzomo & 76 others (Civil Appeal 16 of 2020)
[2022] KECA 584 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 584 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL 16 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

JUNE 24, 2022

BETWEEN

JAMES PETERSON KINYUGU BANDI ..... APPELLANT

AND

NGUMBAO NGONDA DZOMO ..... 1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT . 2ND RESPONDENT

CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

COMMISSIONER OF LANDS ..... 4TH RESPONDENT

ATTORNEY GENERAL ..... 5TH RESPONDENT

DISTRICT LAND REGISTRAR-KILIFI & 71 OTHERS ..... 6TH RESPONDENT

((Being an appeal from the Judgment and Decree of the Environment and Land Court at Malindi delivered by Olola, J. on 22nd November 2019inELC Case No. 65 of 2011))

JUDGMENT

1. The appellant sued the 1st respondents before the Environment and Land Court [ELC] seeking orders for vacant possession, damages for loss of use and mesne profits from the date of the quit notice until delivery of possession of the land Kilifi/Kijipwa/96, hereinafter the suit property. The appellant was aggrieved with the 1st respondents for illegally and without any colour of rightentering into the suit property and erecting structures thereon, contending that he was the registered proprietor of the suit property.

2. The 1st respondents by way of a defence and counterclaim denied that the appellant was the registered proprietor of the suit property, and asserted that they and or their parents were in continuous uninterrupted possession of the suit property for 80 years with the full knowledge of the appellant. The

1st respondents averred that the suit property was their ancestral home; that they were born and brought up there, and that in 1982 or thereabouts after the community agitated for it the Government declared the suit property the Kijipwa Settlement Scheme. That as they awaited allocation and registration of various titles, they were shocked to discover that the appellant had fraudulently been allocated the same and issued with title.

3. The 1st respondents sought that the appellant's suit be dismissed; that a declaration be issued to the effect that the suit property as part of the Kijipwa Settlement Scheme was intended to, and remains for the benefit of the respondents; that a mandatory injunction be issued against the appellant to surrender the title deed to the suit property to the 6th respondent for cancellation and rectification/amendment of the Register; that a permanent injunction be issued against the appellant restraining him from dealing with and/or interfering with the 1st respondents quiet enjoyment and occupation of the suit property.

4. On 22nd November 2019, Olola, J. in his judgment found that the 1st respondents had been on the suit property for much longer than between 2000 and 2005 as the appellant claimed; that despite the appellant having a title deed to the suit property he was not a resident or squatter when the Kijipwa Settlement Scheme was set up and could therefore not be a beneficiary; that by virtue of his office at the time as Director of Settlement in the Ministry of Lands and Settlement, he used his office, which was involved in the allocation of the suit property, to get it allocated to himself.

5. The ELC found that the suit property was part of where the residents were each allocated 2 ½ acres per household, and that the 2nd to 6th respondents enjoined in the suit by the 1st respondents, neglected to explain to the court how the appellant had ended up with 101.1 acres. The ELC inferred that the 2nd to 6th respondents had no response to the 1st respondents' counterclaim. The Court was not satisfied that the appellant had made out a case to warrant the orders sought, dismissed the appellant's claim and allowed the 1st respondents counterclaim.

6. It is against this judgment that the appellant has brought this appeal. The Memorandum of Appeal is dated 7th February, 2020, and raises 13 grounds of appeal. However, the appellant, in his written submissions reduced them to five grounds which are, that the learned ELC erred in law and fact:

    a. By failing to appreciate the effect of a first registration;

    b. By finding that the 1st respondents had proved their counterclaim and that they were entitled to the suit property;

    c. By making a finding which was adverse to the appellant on account of the failure by the 2nd to 6th respondent to file their defence;

    d. By failing to give reasons why it failed to determine the validity of the agreement to move the squatters to one side of the suit property;

    e. For making a judgment that is otiose.

7. The appellant seeks orders; setting aside of the entire judgment and decree delivered on 22nd November 2019; striking out of the entire counterclaim; directing the 6th respondent to cancel Title Number Kilifi/Kijipwa/96 with rectification/amendment of the Register be set aside; and an order allowing the appellant's case against the 1st respondents with costs.

8. This appeal was called out for hearing virtually on the 14th March 2022. Mr. Omwenga learned counsel was present for the appellant; while Ms. Jadi learned counsel was present for the 1st respondents, who are 72 in all. Mr. Omwenga applied to withdraw the appeal against the 2nd to 6th respondents on grounds the orders sought by the appellant do not affect them directly, and further for reason they did not

participate in the case before the ELC. Consequently, the appeal against the 2nd to 6th respondents was withdrawn with no order as to costs.

9. Mr. Omwenga relied entirely on the written submissions and urged us to allow the appeal. Mwadzayo Mrima & Jadi Advocates were on record for the 1st respondents, and Ms. Jadi represented them and argued this appeal on their behalf. Ms. Jadi relied on the written submissions and highlighted them briefly before us. Counsel urged us to find that the title issued to the appellant was erroneously registered in his name, urging that the appellant was a civil servant working in the Lands Office as Director of Settlement and so was aware that the suit property was public property.

10. We have considered the appeal, the submissions of counsel to the parties as filed and as urged before us, and the cases each have relied upon. This being a first appeal, it is our duty to re-evaluate, re-assess and reanalyze the evidence on record and then determine whether the conclusions reached by the learned ELC Judge should hold. In the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2EA 212 this Court espoused that duty as follows:-

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

11. In addition to the above parameters, we are alive to the fact that this Court should only interfere with the findings of the trial court where the decision is based on no evidence or on a misapprehension of the evidence or where the trial court is demonstrably shown to have acted on wrong principles in reaching its findings. See *Mwanasokoni v Kenya Bus Services* [1985] KLR 931.

12. The issue for determination is whether the appellant's title was lawfully, regularly and procedurally obtained; and secondly, whether the 1st respondents established the counterclaim and whether they were deserving of the orders granted by the ELC.

13. We will begin with what we consider is a preliminary issue raised by the appellant, that the 1st respondents had no authority to file defence in the ELC, urging that the defence was fatally defective and bad in law for contravening Order 1 Rule 13(1) and (2) of the *Civil Procedure Rules, 2010*. The 1st respondents refuted that the counterclaim was in violation of the Civil Procedure Rules in view of the authority to file, that was filed together with the defence and counterclaim. It was added that the omission is not fatal as to go to the root of the appeal.

14. We note that the issue of the defectiveness of the defence and counter claim was never raised or argued before the ELC, and is therefore being raised for the first time on appeal. Whereas Rule 107 of the 2022 *Court of Appeal Rules*permits an appellate Court to delve into issues raised in the memorandum of appeal, this court has severally held that it cannot delve into issues that were never before the Superior Court. Raising that issue at the appeal stage is a change of tact, and an afterthought and can be said to be intended to steal a match against the 1st respondents. We decline to consider that ground as it ought to have been raised before the ELC. In the case of *Mary Kitsao Ngowa & 36 Others v Krystalline Limited* [2015] eKLR, this Court has previously dealt with such an issue and pronounced itself thus;

> " ...we must also appreciate the fact that, this is not even an issue that was canvassed before the trial court. The issue regarding the interpretation, meaning and application of section 90 of the *Employment Act* was never placed or canvassed before the trial court for determination. The jurisdiction of the appellate court is to look into issues that were presented before

the trial court. A court cannot be said to have erred on an issue that was never argued before it. This is what the appellants have sought to do in respect of this ground of appeal. Accordingly, the learned Judge cannot be faulted for not considering or appreciating the concept of continuing injury."

15. Similarly, in *George Owen Nandy v Ruth Watiri Kibe* [2016] eKLR,

this court rendered itself thus;

> " In general, a litigant is precluded from taking a completely new point of law for the first time on appeal. The jurisdiction of this Court is not to decide a point which has not been the subject of argument and decision of lower court unless the proceedings and resultant decision were illegal or made without jurisdiction. (See *Nyangau v Nyakwara* [1986] KLR 712). However, the appellant in the present appeal fully acquiesced and submitted to the jurisdiction of the High Court to decide the case on merit. His conduct can only be interpreted to mean that he understood that the interlocutory judgment had been set aside when the High Court allowed the respondent to file her defence out of time.
>
> .... To allow the appellant to now turn around and claim illegality of a trial after its conclusion and judgment despite having all the material facts could set a bad precedent. It would present a situation where a litigant would go through the rigours and motions of a trial which they have reason to believe might be illegal and only raise it on an appeal when they lose. That would result in wastage of valuable judicial time. A situation where parties raise all the issues they have in the trial for deliberation should be encouraged so that matters are dealt with expeditiously, conclusively and not in installments. Further this Court does not have the benefit of the reasoning of the High Court on the issue of the interlocutory judgment. Accordingly, we eschew all the aforementioned grounds of appeal that flow or touch on the entry of the interlocutory judgment."

16. We are satisfied that this reasoning puts to rest the preliminary issue raised by the appellant.

17. We shall now proceed to the merits of the appeal.

18. The appellant faults the ELC for failing to appreciate the effect of a first registration. Mr. Omwenga for the appellant submitted that by virtue of the doctrine of first registration under Section 23 of the *repealed Registration of Titles Act*, as well as the decision in the case of *Joseph Arap Ngo'k v Justice Moijo Ole Keiwua* Nai Civil Application 60 of 1997, it was an error for the ELC to interfere with the appellant's right to the suit property. He further relied on the case of *Samuel Murimi Karanja & 2 others v. Republic* HCCC Criminal Application No. 412 of 2003 cited with approval by this Court in *Joseph Arap Ngo'k v. Justice Moijo ole Keiwa*, Nai Civil Application No. 60 of 1997 for the proposition that the title registered on 5th November 1997 vested the appellant with absolute ownership in the suit land. It was further argued that it is only when it was proved that the appellant committed a fraud in the process of acquiring the suit property that his title could be impeached. It was therefore submitted that the trial court erred when it failed to take into account the provision of section 23(1) of the Registration of Titles Act and relied on suspicions of alleged illegalities committed by other persons to impeach the appellant's title.

19. Counsel relied on the concept of presumption of regularity as was pronounced in the case of *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others (*2020) eKLR, and urged that the allocation of the suit property to the appellant ought to have been presumed as regular and lawful.

20. Ms. Jadi for the 1st respondents, in response to the appellant's submissions on indefeasibility of title cited the case of *Chimei Investments Limited v A.G & others* Petition 94 of 2005, where, inter alia, the court held that the values of integrity and the rule of law cannot be side stepped by imposing legal blinders based on indefeasibility; that registration of title to land is absolute and indefeasible to the extent that the creation of such title was in accordance to the applicable law. Counsel faulted the learned ELC for misdirecting himself on the issue of fraud and yet the same was not proved. It was added that there was no evidence that the 1st respondents' were in possession of the suit land for over 80 years as alleged.

21. The 1st respondents in their submissions challenged the manner in which the appellant's title deed was acquired, and urged that from the evidence adduced in Court, it was proved that the same was illegally acquired. It was submitted that the appellant was a Director in the Department of Settlement in the Ministry of Lands and Settlement and it was therefore clear that he was aware and ought to have known that the land was being allocated. Instead, he proceeded with impunity and in collusion with other government officials allocated himself the suit property which was public land. Hence, the 1st respondents' case was that the appellant having failed to explain how he acquired the title deed for public land, the same was illegally acquired thus justifying the cancellation of the title deed. The 1st respondent submitted that section 26 of the *Land Adjudication Act* does not apply in this case since they were waiting to be issued with respective title deeds when they were shocked to learn that the entire portion they were occupying had been allocated to the appellant when he filed the suit against them for their eviction.

22. Section 26 of the Land Registration Actis categorical that a certificate of title is prima facie evidence that the person named therein is the proprietor of the land but the same can be challenged where the Certificate of title has been acquired fraudulently, unprocedurally or through corrupt practice. See *Elijah Makeri Nyangw vs Stephen Mungai Njuguna & another* [2013] eKLR, and *Chemei Investments Limited –vs- The Attorney General & others* Nairobi Petition No. 94 of 2005.

23. Both parties in their pleadings averred that the suit property was Plot No. 96 in the Kilifi/Kijipwa Settlement Scheme. The evidence adduced before the ELC by the appellant's witness was that the appellant acquired the suit property as a first registration in 1997, through due process. Page 42 of the record of appeal is the title bearing testimony that indeed the title was issued to the appellant on 29th October, 1997. The witness stated that the appellant was a Director of Settlement in the National office, that he was allocated 102 acres of land, the suit property, and that it was vacant land until 1994 when squatters started moving in, as a result of which the appellant filed the suit in the ELC in 2011. The witness admitted that the appellant has been unable to utilize the land, and that he has never lived there. The witness testified that the appellant had entered into some agreements with some of the squatters for them to move to one side of the suit property, but that the effort was abandoned when more persons invaded the land. Indeed, the appellant adduced documents at pages 65 to 68 titled "agreement to move to one side of Plot No. 96", undated, while at pages 69 to 71 is titled "Squatters in Plot No. 96 Kilifi/Kijipwa" dated 3rd December 2010, as proof. The documents comprise lists of names, some with identity card numbers, some with names and signatures and some showing acreage against the names. The documents were not substantiated and it is not clear what they were intended to mean or prove.

24. The 1st respondents case was that they have lived on the land, themselves and their parents before them for over 80 years; that it was declared a Settlement Scheme after they agitated for that through various communications through correspondence adduced in Court as the respondents exhibits, addressed to the Head of State, His Excellency Moi then, dated 26th March 1982 (page 101 of the record), various

officials of Local and National Government, and much later to the National Land Commission; spanning a long period of time since 1980. One letter in particular, at page 109 of the record is from the Kijipwa Settlement Scheme Select Committee addressed to Minister of Lands and Settlement. It is dated 4th April 2003. It reads in part:

> "Due to irregularities made during the allocation exercise in 1982, the locals raised their disappointment and unsatisfactory voices to the past KANU- Government for all those years but everything fell on deaf years. In 1997 a Select Committee was formed... to visit the whole scheme to pinpoint the wrongs done by the land officials at the last exercise in the scheme... Something very worse and also an insult to the local mwananchi there are about 500 acres given out to non- residents as individuals as from 50 acres per person to 120 acres while locals were given 2 ½ acres each and a handful were left out without being considered – at all."

25. The evidence and the exhibits adduced before the ELC tell a story. One, that the land was occupied as early as before 1977, as per letter to His Excellency the President Moi of 1982, and that as of that time, the same was allotted to the then occupants. Two, that those in occupation were locals of that area. Three, that these occupants agitated to have the land declared a Settlement Scheme in order to secure their interest, to which they succeeded in early 80's. Four, that there was re-allocation of the land, with large chunks falling into hands of outsiders/non-residents, while locals got 2 ½ acres each. Lastly, as evidenced from the letters on record, allocation process was ongoing and could have been completed were it not for the illegal acts by the appellant herein.

26. The appellant's title was challenged and the court found merit in the 1st respondents' argument that the impugned title was not properly obtained. The appellant had the evidential burden to show that he acquired the title to the suit property in a regular and law compliant fashion. The appellant conveniently did not adduce any evidence to show how he acquired the suit property, how it was allocated to him, and through which process. He did not testify in this matter but sent his son with a Power of Attorney to testify on his behalf as his sole witness.

27. Being a settlement scheme, the operative law is the Land Act, No. 6 of 2012 that sets out how settlement schemes are to be created by the National Land Commission, and how and who is entitled to the land in these schemes. Section 134(2) of the Land Act, No. 6 of 2012 states that settlement programmes shall include the provisions of access to land to squatters, persons displaced by natural causes, development projects, conversation, internal conflicts or such other causes that may lead to movement and displacements. Section 134(4) sets out the person responsible for identifying the beneficiaries of the people to access land in the settlement schemes, while sub-section 134(c) provides that the National Land Commission shall reserve public land for the establishment of settlement programmes and where the public land is not available purchase private land subject to the *Public Procurement and Disposal Act*.

28. Before the enactment of the Land Act, No. 12 of 2012, there was in existence the Agriculture Act, and at section 167 it established a body corporate known as a Settlement Fund Trustees; Section 168 established the Agricultural Settlement Fund which is vested in the Settlement Fund Trustees. The Settlement Fund Trustees, using the fund, were empowered to purchase any land for resale. It means that settlement schemes could be created either by purchase of private land or by utilizing public land (unalienated Government land). In the instant case the establishment of the Kijipwa settlement scheme has not been disputed therefore we will not belabour the matter.

29. It would be expected that the 2nd respondent ought to have attended court to bring to light the allotment process of the suit land. In the absence of such evidence, the court is just left guessing.

Even without considering the omission by the 2nd to 6th respondents' to file any defence or adduce any evidence, by virtue of their role in the adjudication, allocation, registration and issuance of title, it was incumbent upon the appellant to prove the genuineness of his title considering that it had been challenged. It therefore is clear that the appellant obtained the title to the suit property in an opaque manner. In that regard, Section 23 of the RTA does not come to the aid of the appellant.

30. Indeed this court held as much in the case of *Embakasi Properties Limited & anther v Commissioner of Lands & anor* [2019] eKLR as follows:

> "Although it has been held time without end that the certificate of title is: ". conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof", it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the Land Registration Act, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired "illegally, unprocedurally or through a corrupt scheme".

31. The appellant faulted the ELC for making a finding which was adverse to the appellant on account of the failure by the 2nd to 6th respondent to file their defence. It was argued that it was an error to draw an adverse inference against the appellant for failure of the 2nd to 6th respondents' to file defence and resultantly awarding the 1st respondents' counterclaim without them meeting their burden of proof as dictated by Sections 107 to 109 of the *Evidence Act*. Reliance was placed on the case of *Margaret Wanjiru Ndirangu & 4 others v A.G* (2020) eKLR, which we have considered.

32. Section 107 to 109 of the *Evidence Act* provides:

> Burden of proof
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> 107
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> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
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> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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> 108. Incidence of burden
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> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
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> 109. Proof of particular fact
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> 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."

33. These provisions apply to all, including the appellant, that anyone who wishes the Court to believe in the existence of any fact, or who would fail if no evidence were adduced by either side, has the burden to prove its existence.

34. This was the wisdom of this court in Munyu Maina v Hiram Gathiha Maina[2013]eKLR where it was stated that:-

> "…..when a registered proprietor's root of the title is under challenge, it is not sufficient to dangle the instruments of title has proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.

35. The learned ELC judge made an adverse inference not against the appellant, but against the 2nd to 6th respondents as having no defence to the 1st respondents' counter claim. The ELC noted correctly that the 1st respondents had enjoined them to the counter claim, and the least that was expected of them was to explain how the appellant had been issued the title. That finding notwithstanding, the appellant had the burden of proof and the incidence to prove that indeed he had a good title to the suit property beyond dangling the instruments of title as proof of ownership. The learned ELC judge cannot be faulted for the conclusions he made, as the appellant, who had the burden of proof failed to meet that legal obligation.

36. As to the appellant's dissatisfaction with the ELC finding that the 1st respondents had proved their counterclaim and that they were entitled to the suit property. Counsel pointed out that the 1st respondent's gravamen was the land adjudication that was done in the year 1990; to counsel, the appropriate forum as per Section 26 of the *Land Adjudication Act* was an objection before the 2nd respondent. Cited was the case of Kaduiwo A. Marisin & 7 Others v Samuel Kipsige Arap Soi (1997) eKLR in urging that the 1st respondents' had no right to allege irregularities in the allocation process without filing an objection, therefore it was an error by the court to entertain their claim.

37. As we have stated herein above, the allocation process was on going, thus the 1st respondents right to invoke Section 26 of the *Land Adjudication Act* was in the circumstances still open and available. The 1st respondents were sued by the appellant, they could not have abandoned or ignored the suit to pursue other avenues as that could have been detrimental to them.

38. The appellant has challenged the ELC for failing to give reasons why it failed to determine the validity of the agreement to move the squatters to one side of the suit property; Counsel took issue with the learned judge ignoring the agreement by 39 of the respondents (page 51, 65 to 68) to vacate the suit property; that the court gave no reasons for ignoring the said agreement. Cited was the case of Kiarie Wamutu v Mungai Kiarie & Another (1982) eKLR. It was concluded that the order issued by the court directing the 6th respondents to issue titles to the 1st respondents' would cause chaos as it is not possible to establish which respondent occupies which portion of land.

39. This argument is indicative of approbation and reprobation; whereas on the one hand the appellant argues that the 1st respondents are entitled to part of the suit land because they agreed to move from where the appellant claims an interest, on the other hand they are claiming that the 1st respondents are squatters who are not entitled to the suit land and ought to be evicted and left with nothing. In fact if anything, this goes to prove that the respondents were in occupation of the suit land and it was not vacant as the appellants would like us to believe. As indicated in paragraph 23 above, we are at pains to

put any meaning to the agreements, and the trial court cannot be faulted for not making a finding on what it was not called upon to make. Yet again we wonder, has the cause of action mutated to breach of contract on the part of the 1st respondents? It was upon the appellant to answer this question and he has not done so.

40. Most importantly, this ground is not in the memorandum of appeal appearing on page 2 to 4 of the record and by dint of Rule 107 of the Rules of this Court, the court cannot entertain the same. See also Kibic Star Electro Limited & 2 others v Southern Credit Banking Group (Civil Appeal 305 of 2015) [2022] KECA 71 [KLR] (Civ) (4 February 2022) (Judgment) There is therefore no merit in this ground raised by the appellant in his submissions.

41. The appellant urged that on the basis of the Court's finding in the case of Lazaro Kabebe v. Ndege Makau & another (2017) eKLR an applicant is only entitled to a portion which he possessed; that the 1st respondents were entitled to 50 acres in the suit property and it was for them to prove ownership in the portion. It was submitted that the 1st respondent never proved that they possess any portion of the suit property and that they had been disinherited of the suit property. As such, it was the appellant's

submission, the trial court granted the counterclaim on the basis of correspondences complaining about the adjudication exercise and the 1st respondents claim that they had an ancestral right to the property and not on the basis that the 1st respondents were in possession of the entire suit property or a portion of the same, which in the appellant's, view was a misdirection on both law and fact.

42. It is without a doubt that the appellant is the registered owner of the suit property and produced a title deed to that effect. It is also not disputed that the 1st respondents had always been in occupation albeit on a portion of the suit property within the knowledge of the appellant even before the suit property was registered in his favour. No evidence was tendered during trial and from the record challenging the authenticity of correspondences relied on by the 1st respondents as proof of their allotment.

43. This court in the case of Pankajkumar Hemraj Shah & another v Abbas Lali Ahmed & 5 others [2019] eKLR made the following observation;

> " This was obviously untrue as the evidence was clear that 2nd and 3rd respondents have never been in possession of the suit property, and that as at that date the suit property was in the possession of Roberto who subsequently transferred the property to the appellants who have remained in possession.
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> 29. We reiterate what this Court stated in Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, that:
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> > " It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in Ghana of Wuta-Ofei -v-Danquah [1961] All ER 596 at 600, the slightest amount of possession would be sufficient."
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> 30. In addition section 116 of the *Evidence Act* states that:
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> > " When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that

he is not the owner is on the person who affirms that he is not the owner."

44. It is apparent that the trial court did not arrive at its findings based purely on the failure of the 2nd to 6th respondents to file their defence. The 2nd to 6th respondents' response would have been essential in shedding light on the appellant's allegations regarding the allocation process but they failed to do so. It is not clear how the defence from the 2nd to 6th respondents would have been fatal to the suit or contribute to the outcome of the case. In addition, the judgment of the trial court does not show that it was entered pursuant to Order 10 of Civil Procedure Rules, 2010 on the consequences of non- appearance, default of defence and/or failure to serve. Hence the factors the trial court took into account are undoubtedly relevant in arriving at its conclusion under par. 27;

> " As it were, the Plaintiff did not deny the Defendants' contention that he was not a resident or squatter in the area when the Kijipwa Settlement Scheme was set up and that he could not therefore have been a beneficiary thereof absent collusion with other officials of the Ministry of Lands where he worked as a senior official. Nor did he contest the fact that while other residents were being allocated a mere 2.5 acres per household, he had ended up with a whopping101.1 acres."

45. The final issue for our consideration was the one raised by the appellant, where he contended that the impugned judgment, the subject of this appeal was otiose. We can only categorize this ground as comprising of fanciful words with no legal or factual backing. We have already analyzed the appeal and have found it as lacking merit and this ground adds no value to the appeal.

46. In the premises we find no merit in the appeal and proceed to dismiss the same with costs. The judgment of the ELC dated 22nd November, 2019 is confirmed.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JUNE, 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR