



REPUBLIC OF KENYA



KENYA LAW
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**Kioko & 10 others v Ngumu & 4 others (Civil Appeal 13 of 2019)
[2023] KEELC 16628 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16628 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
CIVIL APPEAL 13 OF 2019
TW MURIGI, J
MARCH 22, 2023**

BETWEEN

**HENERY NGEI KIOKO 1ST APPELLANT
JAMES MUNYALLO KIOKO 2ND APPELLANT
JOSEPH MAINGA KIOKO 3RD APPELLANT
SHADRACK MBITHI NDUNDA 4TH APPELLANT
JUSTUS WAMBUA NDUNDA 5TH APPELLANT
STEPHEN MUSYOKI NDUNDA 6TH APPELLANT
PHILIP MBATHA NDUNDA 7TH APPELLANT
LINTON MAWEU NDUNDA 8TH APPELLANT
STEPHEN MUNGUTI NDUNDA 9TH APPELLANT
JACKSON KITHAKA NDUNDA 10TH APPELLANT
AMOS KIVUTHI NYAMAI 11TH APPELLANT**

AND

**KENNEDY KOMU NGUMU 1ST RESPONDENT
LABAN MASYA 2ND RESPONDENT
GABRIEL KITHUMA 3RD RESPONDENT
DAUDI NDUNDA 4TH RESPONDENT
MATEE SUMBA, T/A TANGILA WELFARE SOCIETY (EMALI SLAUGHTER
HOUSE) 5TH RESPONDENT**



(By a Memorandum of Appeal dated 14th June, 2019, the Appellants herein appealed against the Judgment of Hon, Zachariah Joseph Nyakundi delivered on the 17th of May, 2019 in Makindu Civil Case No. 154 of 2014 and set out nineteen grounds of appeal.)

JUDGMENT

1. By a Memorandum of Appeal dated June 14, 2019, the Appellants herein appealed against the Judgment of Hon Zachariah Joseph Nyakundi delivered on the May 17, 2019 in Makindu Civil Case No 154 of 2014 and set out nineteen grounds of appeal.

Background

2. The Appellants had sued the Respondents by way of an amended Plaint dated 9th of June, 2017 seeking for the following orders:-
 - 1) A Declaration that Plots Number 1309 belongs to the 1st, 2nd and 3rd Plaintiffs, Plot number 1310 belongs to the 4th, 5th, 6th and 7th Plaintiffs and Plot number 1311 belongs to the 8th, 9th, 10th and 11th Plaintiffs all situated at Kinyoo Adjudication Section of Email Nzau District of Makueni County.
 - 2) An eviction order to remove the Defendants and any other person from the Plaintiffs property known as Plot No 1309 and 1311 situated at Kinyoo Adjudication Section of Email Nzau District of Makueni County.
 - 3) Damages for trespass.
 - 4) Costs of the suit.
 - 5) That the orders of the Honourable Court be enforced by the OCS Emali Police Station.
 - 6) Loss of Mesne profit to be assessed by this Honourable Court.
3. The Appellants averred that they are the bona fide owners of Plot numbers 1309, 1310 and 1311 situated within Kinyoo Adjudication Section of Emali Nzau District. That despite Court proceedings, the ownership of the disputed land has never changed hands. They averred that a survey done in the year 2015 confirmed that they are the owners of the disputed land.
4. They further averred that they have owned, possessed and continuously worked on the suit property. That the Defendants without any colour of right trespassed on the suit property and constructed a slaughter house without their authority and/or consent while claiming that the properties are referred to as Plot No A, B, C and E, Kinyoo Adjudication Section of Emali Nzau District of Makueni County. The Plaintiffs averred that they carried out due diligence by conducting a search at the Lands registry where they confirmed that Plots No A, B, C, D and E Kinyoo Adjudication Section do not exist.
5. The Respondents filed an amended Statement of Defence and Counter Claim dated 24th of September, 2017 and listed particulars of fraud and negligence on the part of the Plaintiffs. The Defendants essentially denied the Plaintiffs claim. In their Counter Claim, the Defendants sought for the following orders:-
 - a) A declaration that the Defendants are the legal owners of properties known as No A, B, C, D and E Kinyoo Adjudication Section also referred to as Plot No 1309, 1310 and 1311 Kinyoo Adjudication Section.



- b) Alternatively, a declaration that the Defendants are the owners of the properties known as Plot No A, B, C, D and E Kinyoo Adjudication Section also referred to as Plot No 1309, 1310 and 1311 Kinyoo Adjudication Section having acquired prescriptive rights of ownership through adverse possession.
 - c) An order of this Honourable Court directing the Land Registrar Makueni to issue certificate of title in the names of the Defendants herein for the properties known as Plot No A, B, C, D and E also referred to as 1309, 1310 and 1311 Kinyoo Adjudication Section.
 - d) An order of permanent injunction be issued against the Plaintiffs restraining them either by themselves, their agents, servants, assigns, relatives and/or any other person claiming under them from interfering with the Defendants use and possession of the properties known as Plot No A, B, C, D and E Kinyoo Adjudication Section also referred to as Plot No 1309, 1310 and 1311 Kinyoo Adjudication Section.
 - e) Costs of the suit.
 - f) Any other relief that this Honourable Court may deem fit and just to grant in the circumstances.
6. In the proceedings before the lower Court, the Appellants herein were the Plaintiffs while the Respondents were the Defendants. The Plaintiffs called a total of 4 witnesses while the Defendants called one witness in support of their case. After the trial, the Learned Trial Magistrate delivered his judgment on 17th of May, 2019. In his judgment, the Learned Trial Magistrate found that the Plaintiffs had failed to prove their case on a balance of probabilities and dismissed the suit with costs to the Defendants.
7. The Appellants being dissatisfied with the judgment filed this Appeal vide the Memorandum of Appeal dated June 14, 2019 on the following grounds:-
- a) That the learned trial magistrate erred in law and in fact by failing to appreciate the impact of *Constitution of Kenya, 2010* and the National Land Policy of 2009 on property rights, the new Land statutes; the *Land Act* No 6 of 2012 and the *Land Registration Act* No 3 of 2012 which were in force during institution and determination of the suit.
 - b) That the learned trial magistrate erred in law and in fact by relying on repealed sections of the law, notably, Section 27(a) and (b) of the *Registered Land Act* cap 300 Laws of Kenya (repealed) in justifying the finding in his judgment on the evidential value of the documents produced by the Appellants as against the documents produced by the Respondents.
 - c) That the learned trial magistrate erred in law and in fact by failing to analyse and evaluate the evidence tendered before him judiciously before arriving at his finding.
 - d) That the learned trial magistrate erred in law and in fact by failing to capture and consider in his judgment, the commencement and progress of the matter from filing of the plaint, amendment of the pleadings, various court orders issued notably orders of status quo and particularly the court order issued on March 18, 2015 for the Kibwezi Land Adjudication and Settlement Officer to prepare a surveyor's report and maps on the location and ownership of the Plots No 1309, 1310 and 1311 and which plot Emali slaughter house stands on and thereby ignored the core issue that survey of the area within the suit property was done in 2007, and after the court's directive of March 18, 2015 surveyors visited the suit property and prepared a valid and unchallenged report dated July 8, 2015 on record.



- e) That the learned trial magistrate erred in law and in fact by failing to capture and consider in his judgment, the individual testimonies of the Appellant's witnesses on examination in chief, cross examination and re examination, the Appellant's documents and/or exhibits produced, and thereby ignored the Appellant's testimonies and evidence as against those of the Respondents showing open bias, prejudice, favouritism, partisanship, preference, discrimination and partiality.
- f) That the learned trial magistrate erred in law and in fact by failing to capture, consider and/or pronounce himself in his judgment on the Respondent's amended defence and counter-claim containing the Respondent's documents which were filed out of time on July 25, 2017 instead of June 14, 2017 and served upon the Appellants' in court after the start of the trial on November 23, 2018 at around 2.00 p.m. - 3.00 p.m. when the Appellant's PW1 was on the witness dock, the Appellants counsel's persistent objection to production of the Repondent's documents thereby conducted the trial in a casual, relaxed and/or irregular manner and raising new issues in his judgment at the detriment of the Appellant's showing open bias, prejudice, favouritism, partisanship, preference, discrimination and partiality.
- g) That the learned trial magistrate erred in law and in fact by first holding that the Appellants owned the plots No 1309, 1310 and 1311 in view of the certificates of ownership dated November 5, 2007 produced as evidence for the Appellants and later on in his final summation holding that the Appellants had not established their case on a balance of probability.
- h) That the learned trial magistrate erred in law and in fact by first holding that the Respondents had not shown how they acquired the plots the Appellants are claiming ownership and had not made the County Government of Makueni a party to the suit to assist the court understand how they acquired the plots and later on in his judgment holding that the Respondents' documents DEX 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12 Confirm the Respondents' proprietorship of the plots and that DEX 9-12 took precedence as against the documents held or produced by the Appellants.
- i) That the learned trial magistrate erred in law and in fact by relying on the Respondents' documents DEX 9 and DEX 11 the copy of lease and search whereas the said documents were obtained during the pendency of the suit after close of pleadings and pre-trial conference and were filed out of time without the express leave of the court.
- j) That the learned trial magistrate erred in law and in fact by relying on the Respondents' Title No Emali Town Block 1/336 (Certificate of Lease) (DEX 9), search of Title No Emali Town Block 1/336 (DEX 11) letters of allotment dated 15/01/1998 (DEX 4) whereas the said documents were invalid, null and void.
- k) That the learned trial magistrate erred in law and in fact by noting that the suit property is situated in Kinyoo Adjudication Section which was declared an adjudication section from 19/10/2006 and relied on the Respondents' Title No Emali Town Block1/336 (Certificate of Lease) (DEX 9), search of Title No Emali Town Block1/336 (DEX 11) letters of allotment dated 15/01/1998 (DEX 4) whereas the said Respondents' documents refer to a property within Emali Township that are distinct in law and fact.
- l) That the learned trial magistrate erred in law and in fact by relying on the Respondents' documents DEX 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12 whereas it was clear and undisputed that the suit property is situated in Kinyoo Adjudication Section and not in any town particularly Emali Town, the suit property is agricultural land situated between the old Nairobi - Mombasa



Railway line, the main Nairobi - Mombasa road on the far end and part of it borders the road to Emali Town and title deed for Kinyoo Adjudication Section are yet to be issued.

- m) That the learned trial magistrate erred in law and in fact by giving great reliance on the testimony of the Respondent's sole witness whereas the same was not supported or sufficiently corroborated by the testimony of any other witness.
 - n) That the learned trial magistrate erred in law and in fact by failing to appreciate the totality of evidence produced and on record in support of and against the Appellant's suit while summing up his findings in his judgment and thereby relied on extrinsic factors in dismissing the suit.
 - o) That the learned trial magistrate erred in law and in fact by failing to appreciate the hardship and the dilemma experienced by the Appellants both in fact and in law surrounding the suit before dismissing the suit before him.
 - p) That the learned trial magistrate erred in law and in fact by failing to evaluate the Appellant's interest in the subject land, the Respondents' open contempt of court of the status quo orders in place thereby legalizing the periodical injustice suffered by the Appellant's at the hands of the Respondents.
 - q) That the learned trial magistrate erred in law and in fact in failing to appreciate the Appellant's evidence adduced before him, disregarding and misinterpreting the testimony and evidence of the Appellant's witnesses.
 - r) That the learned trial magistrate erred in law and in fact by failing to address the prayers sought in the amended plaint dated June 5, 2017 and filed in court on June 6, 2017, erroneously recorded in his judgment as dated May 31, 2017, in a clear and concise manner in his judgment.
 - s) That the learned trial magistrate failed to appreciate the written submissions and case law tendered by the learned counsel for the Appellants in his judgment.
8. The Appellants prayers are that:-
- 1) The Appeal herein be allowed.
 - 2) The trial Subordinate Court's finding in Senior Principal Magistrate's Court at Makindu by Honourable Zachariah Joseph Nyakundi (Mr) Senior Principal Magistrate on May 17, 2019 be set aside, overturned and/or varied and substituted with a finding of this Court allowing the Amended Plaint dated June 5, 2017 and filed in Court on June 6, 2017.
 - 3) That this Honourable Court be pleased to assess the quantum of damages for trespass and loss of mesne profits.
 - 4) That the Respondents do pay the costs of this Appeal and the costs in the lower Court.
 - 5) That such further relief as may appear just to the Honourable Court.
9. The Appeal was canvassed by way of written submissions which were duly filed by both parties herein.

The Appellants Submissions

- 10. The Appellants' submissions were filed in court on June 23, 2022. Counsel for the Appellants submitted that the trial court did not evaluate the evidence before arriving at its decision.
- 11. Counsel further submitted that the judgment of the trial court contains glaring errors/mistakes, contradictions and misrepresentation of facts and the law applicable and is not reasoned at all.



12. Counsel submitted that the Appellants are the owners of parcels of land Plot No 1309, 1310 and 1311 Kinyoo Adjudication Section of Emali Nzau District of Makueni County. Counsel argued that the judgment referred that the Plaintiffs are the owners of the suit property.
13. Counsel further submitted that neither the Government of Kenya nor the County Government of Makueni held any land within Kinyoo Adjudication Scheme capable of allocation to third parties. That the Respondents invaded the Appellants' land while claiming ownership vide separate letters of allotment for Plot Nos. A, B, C, D and E which were different from the said plots.
14. Counsel further submitted that when the matter came up for hearing on November 23, 2018, four years after the filing of the Plaint, the Respondents served while in Court an amended defence and counterclaim after the matter was confirmed for hearing on the same day. In addition to the late service of the amended defence and counterclaim, the Respondents also served a further list of documents without the leave of Court. Counsel argued that the said deliberate action by the Respondents is against the tenets of a fair hearing and the principles of natural justice.
15. Counsel reiterated that it is the duty of this Court to re-evaluate the evidence on record and come to its own conclusions on both fact and the law. Counsel cited the case of *Samuel Kamere v Lands Registrar Kajiado* Civil Appeal No 28 of 2008 in support of his submissions.
16. Counsel further submitted that the original record of the trial court indicates that on March 18, 2015, the trial Court ordered that the Kibwezi Land Adjudication and Settlement Officer to prepare a surveyor's report and maps of the location and ownership of Plot No 1309, 1310 and 1311 and the officer to state on which plot Emali Slaughter House stands.
17. Counsel proceeded to argue that the Surveyor's report confirmed that Plot Nos. 1309, 1310 and 1311 are owned by the Appellants and it was produced before the trial Court as the Appellants' Exhibit 4. Counsel further argued that the survey map of the disputed area shows that the suit property is in Kinyoo Adjudication Section and not Emali Town.
18. In addition, Counsel submitted that the Respondents trespassed into the Appellants' land and illegally constructed a slaughter house, dug a borehole and conducted major excavation. For that, Counsel seeks an award of Kshs. 5,000,000/= as damages for trespass to land. To buttress his submissions, Counsel relied on the case of *Milkah Muthoni Wagoco v County Council of Kirinyaga & 2 others* [2017] eKLR.
19. Counsel further submitted that Title No Emali Town Block 1/336 was issued in contravention of a valid Court order and its issuance was therefore fraudulent, irregular and illegal. He argued that the Respondents did not lead any evidence or testimony to show that the Appellants' allocation of Plot No 1309, 1310 and 1311 was fraudulent, irregular or illegal.
20. Moreover, Counsel submitted that the trial Court having confirmed that the Appellants owned Plot No 1309, 1310 and 1311 in view of the certificates of ownership dated November 5, 2007, the Court was estopped from holding that the Appellants had not established their case on a balance of probabilities.
21. It was further submitted that the trial court did not capture and consider the commencement and progress of the matter from filing of the plaint, amendment of pleadings and various court orders. Counsel added that the trial court overlooked the fact that the Respondents' amended defence and counterclaim containing the Respondents' documents and witness statements were filed out of time on July 25, 2017 instead of June 14, 2017 and served upon the Appellants in Court on November 23, 2018 after the start of the trial.



22. Counsel went on to submit that the trial court relied on repealed Sections of the law most notably Section 27 (a) and (b) of the *Registered Land Act* Cap 300 Laws of Kenya (repealed) when justifying the finding in its judgment on the evidential value of the documents produced by the Appellants as against the Respondents' documents.
23. Counsel urged the Court to allow both the appeal and the suit before the subordinate court with costs. To buttress his submissions, counsel relied on the following authorities:-
 1. [*Dominion Outdoor Advertising \[2006\] Limited v Patrick Wachira Muranga*](#) [2021] eKLR.
 2. [*Zacharia Onsongo Momanyi v Evans Omurwa Onchagwa*](#) [2014] eKLR.
 3. [*Milkah Muthoni Wagoco v County Council of Kirinyaga & 2 others*](#) [2017] eKLR.

The Respondents Submissions

24. The Respondents' submissions were filed in court on 16th January, 2023.
25. On their behalf, Counsel submitted that the Appellants presented their claim for Plot Nos. 1309, 1310 and 1311 Kinyoo Adjudication Section which was declared as such vide the Notice dated October 19, 2006. That having so claimed, none of the documents presented by the Appellants in their evidence before the trial court speak of a consent to institute proceedings under section 30 of the [*Land Adjudication Act*](#) Cap 284.
26. Counsel asserted that the Respondents' case vide the amended defence and counterclaim dated July 24, 2017, is that they are the allottees of the suit property having been issued with allotment letters by the Government and having continuously paid land rates and licenses to the Government. That on May 3, 2015, Counsel for the Respondents was granted leave to amend the Defence and the claim was changed to that of land Parcel No Emali Town Block 1/331.
27. It was further argued that Counsel for the Appellants had no problem with the amendment and production of the certificate of lease during cross-examination of DW1. There was also no suggestion of fraudulent acquisition of the same or any other impropriety. Counsel argued that the process of acquiring the certificate of lease had never been stopped by the Plaintiffs and since the Defendants were still paying rates as required, the lease certificate was issued.
28. Counsel argued that despite the trial Court's errant reliance on the repealed Registered Land Act Cap 300, the trial Court finds safe landing in Section 26 of the [*Land Registration Act, 2012*](#). Counsel argued that the Plaintiffs' case in the lower Court was that they had ownership of land in an adjudication area while the Defendants' case was totally different.
29. Counsel argued that the Appellants did not seek to have the documents that were allegedly served out of time expunged from the record and that by raising the issue at this stage is an afterthought. It was further submitted that the Appellants had an opportunity to challenge the authenticity of the Certificate of lease held by the Respondents at the trial court but they failed to do so. Finally counsel submitted that this Court must uphold the certificate of lease since after the Appellants failed to vitiate the title held by the Respondents.
30. Counsel urged the Court to find no merit in the Appeal and to proceed and dismiss it with costs.

Analysis And Determination

31. I have considered the entire material on the record of appeal and the submissions by the parties. Although the Appellants raised nineteen (19) grounds of appeal in the Memorandum of Appeal, the



Court is of the opinion that the Appeal may conclusively be determined on the following four (4) grounds: -

- a) Whether the Learned Trial Magistrate considered the evidence of the parties before arriving at his decision.
 - b) Whether the Learned Trial Magistrate erred by relying on a repealed statute.
 - c) Whether the Appeal is merited.
 - d) Who should bear the costs of the Appeal.
32. This being a first Appeal, this Court has a duty to evaluate, assess and analyse the evidence on record and make its own decision.
33. The principles which guide a first Appellate Court were discussed in the case of *Selle & another v Associated Motor Boat Company and others* [1968] 1 EA 123 where the Court of Appeal set out the duty of Appellate Courts as follows;
- “An appeal to this court from a trial court by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate itself and drive 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 this respect. In particular, this court is not bound necessarily to follow the trial judge finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanour of a witness is inconsistent with the evidence in the case generally.”
34. In the trial of the suit before the lower Court, both parties were claiming ownership over the same parcel of land where Emali slaughter house is constructed.
35. It was the Plaintiffs testimony that Plot No 1309 belongs to the 1st, 2nd and 3rd Plaintiffs, Plot No 1310 belongs to the 4th, 5th, 6th and 7th Plaintiffs and Plot No 1311 belongs to the 8th, 9th, 10th and 11th Plaintiffs. In this regard, the Plaintiffs produced certificates of ownership with regards to Plot No 1309, 1310 and 1311 Kinyoo Adjudication Section.
36. According to the Certificate of ownership dated July 5, 2007 and May 11, 2007 issued by the Ministry of Lands through the District Land Adjudication & Settlement Officer, Makueni/Kibwezi District, Plot No 1309 situated within Kinyoo Adjudication Section of Emali Division of Nzauzi District belongs to Henry Ngei Kioko, James Munyalo Kioko and Joseph Mainga Kioko the 1st, 2nd and 3rd Plaintiffs herein, Plot No 1310 belongs to Shadrack M Ndunda, Musyoki Ndunda, Wambua Ndunda and Mbatha Ndunda the 4th, 5th, 6th and 7th Plaintiffs and Plot No 1311 belongs to Linton M Maweu, Stephen Munguti, Jackson Kithaika and Amos Nyamai the 8th, 9th, 10th and 11th Plaintiffs. It was the Plaintiffs testimony that the suit properties are situated within Kinyoo area and not Emali Town.
37. PW1 testified that they were allocated the suit property by their Sacco. It was his testimony that Makueni County Council did not at any one time own the suit property nor did it acquire the same from them. He further testified that the Court in Machakos had previously determined that they were the owners of suit property.
38. The Defendants called one witness in support of their case. DW1 testified that their group Emali slaughter house is comprised of 23 members. It was his testimony that Plot No A, B, C, D and E Kinyoo



Adjudication Section also referred to as Plot No 1309, 1310 and 1311 Kinyoo Adjudication Section belongs to their group.

39. He further testified that the group has been in occupation of the land since 1995. It was his evidence that they were allocated the land in 1998 by the County Council of Makueni. In this regard he produced a letter of allotment dated February 8, 2002 issued to Tangila Welfare Society by Makueni County Council. The letter indicates that that they were allocated Plot No A, B, C, D and E measuring 2.34 hectares at Emali Market in Emali. He also produced a letter of allotment dated January 15, 1998 issued to Emali Corner Slaughter House by the Commissioner of Lands and receipts to the County Council of Makueni to demonstrate that they have been paying rent for Plot No A, B, C, D and E Emali Market to the County Council of Makueni.
40. In his judgment, the Learned Trial Magistrate identified one of the issues for determination and stated as follows:-

“The issue for determination is as to the ownership of a parcel of land where Emali slaughter house is built”.
41. It was the Plaintiffs testimony that the Slaughter House is constructed on Plot No 1309 Kinyoo Adjudication Section. DW1 testified that Emali slaughter house is situated within Plot No A, B, C, D and E Kinyoo Adjudication Section also referred to as Plot No 1309, 1310 and 1311 Kinyoo Adjudication.
42. From the proceedings, it is clear that Emali Slaughter House is constructed on the property being claimed by both the Plaintiffs and the Defendants. It was the Plaintiffs testimony that they carried out a search at the Lands registry and established that Plot No A, B, C, D and E Kinyoo Adjudication Section are non existent.
43. It was the Plaintiffs testimony that the County Council of Makueni does not own the suit property. In his pleadings, statement and testimony, DW1 stated that Plot No A, B, C, D and E Kinyoo Adjudication Section are also referred to as Plot No 1309, 1310 and 1311 Kinyoo Adjudication Section. It was his testimony that the plots were allocated to them by the County Council of Makueni.
44. At this juncture the Learned Trial Magistrate ought to have analysed and evaluated the evidence tendered by the parties so as to determine who is the lawful owner of the plots where the slaughter house is situated.
45. To achieve this, the Learned Trial Magistrate ought to have analysed and evaluated the evidence to determine whether Plot No 1309, 1310 and 1311 Kinyoo Adjudication Section is also referred to as Plot No A, B, C, D and E Kinyoo Adjudication Section or whether the plots refer to one and the same thing.
46. The Learned Trial Magistrate failed to determine the issue whether of Plot No 1309, 1310 and 1311 Kinyoo Adjudication Section are also referred to as Plot No A, B, C, D and E Kinyoo or whether they are one and the same thing.
47. It was the Plaintiffs evidence that they were allocated the suit property which is ancestral land by their Sacco. In this regard, they produced certificates of ownership in support of their evidence. The



Defendants on the other hand testified that the land was allocated to the group by the Makueni County Council. In his judgment the learned Trial Magistrate stated as follows;

“It is clear that as at the dates of the above stated letters plot no 1309, 1310 and 1311 were owned by the Plaintiffs.”

48. The Plaintiffs vide their amended Plaint sought for a declaration that they are owners of Plot No 1309, 1310 and 1311 Kinyoo Adjudication Area amongst other orders. Equally, the Defendants vide their Counter claim sought for a declaration that they are the legal owners of Plot No A, B, C, D and E Kinyoo Adjudication Section also referred to as Plot No 1309, 1310 and 1311 Kinyoo Adjudication Section. After making a finding that the Plaintiffs are the owners of Plot No 1309, 1310 and 1311, the Trial magistrate failed to determine whether a declaration should issue that they are the owners of the said plots and instead held that they had failed to prove their case on a balance of probabilities. The learned trial magistrate went on to state as follows:-

“where corner slaughter house is constructed is the proposed site for industrial plots in Emali Town and therefore under the county government of Makueni to whom rates and rent have been paid and therefore the county government of Makueni should have been made a party to assist the court to understand how they acquired the plots in question which the plaintiff claim to belong to them.”

49. From the judgment it is clear that the learned trial magistrate did not make a finding on whether the Defendants are the owners of the property which the Plaintiffs claim or how they acquired the plots. The Defendants filed a defence and counter claim and sought for the orders therein. It is clear from the judgment that the trial magistrate did not make a finding on the counter claim.

50. The Plaintiff testified that at no time did Makueni County Council own the suit property nor did it acquire the same from the Plaintiffs. The Plaintiff testified that Kinyoo was declared an Adjudication Section on October 19, 2006. The learned magistrate failed to analyse the evidence to establish whether the County Council of Makueni had the authority to allocate land which was undergoing the adjudication process.

51. From the proceedings before the lower Court it is clear that an issue arose as to whether Plot No 1309, 1310 and 1311 are situated within Emali Town or in Kinyoo area. The Plaintiffs alleged that the Defendants had encroached and constructed the slaughter House on Plot No 1309. It was their evidence that the suit property is situated within Kinyoo Area and not in Emali Town. The Defendants on the other hand testified that the slaughter house was on their parcel of land in Mbitini area within Emali Town.

52. The Learned Trial Magistrate failed to analyse and evaluate the evidence to determine whether Emali Slaughter House is located within Emali Town or in Kinyoo Area as alleged by the Plaintiffs.

53. The Defendants produced a certificate of lease for Emali Town Block 1/336 . It is trite law that a certificate of title is conclusive evidence of proprietorship. From the proceedings it is clear that the certificate of lease was issued to the Defendants on November 2, 2017 when the proceedings herein were ongoing before the trial court. It is not clear whether the Defendants were issued with the certificate of lease on the basis of the letter of allotment dated February 8, 2002 issued by Makueni County Council or on the strength of the letter of allotment dated January 15, 1998 issued by the Commissioner for Lands.



On Whether The Appeal Is Merited

54. Based on the materials that were placed before the Court, I find that the Learned Trial Magistrate failed to consider the evidence in respect to the ownership of the land where Emali slaughter house is situated, whether parcels of land known as Plot No 1309, 1310 and 1311 Kinyoo Adjudication Section are also referred as Plot No A, B, C, D and E Kinyoo Adjudication Section and how the Defendant acquired the property claimed by the Plaintiffs.
55. From the foregoing, I find that the Learned Trial Magistrate erred in law and in fact by failing to analyse and evaluate the evidence tendered before him before arriving at his decision.
56. The Appellants argued that the learned trial magistrate erred in law and in fact by justifying his judgment on the evidential documents produced as against the documents produced by the Respondents based on a repealed statute. In his judgment the Learned Trial Magistrate stated as follows:-
- “The court is alive to the provisions of the *Registered Land Act* Cap 300 Laws of Kenya.
- a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
 - b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities incidents of the lease.”
57. The Certificate of lease dated November 2, 2017 was issued to the Defendants under the provisions of *Registered Land Act* Cap 300 (now repealed). The import of Section 27 (a) and (b) of the repealed *Registered Land Act* is similar to Section 26 of the [Land Registration Act](#) which provides as follows:-
- The certificate of title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except-
- a. on the ground of fraud or misrepresentation to which the person is proved to be a party or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
58. In my view, although the Learned Trial Magistrate erred in relying on the provisions of Sections 27(a) and (b) of the *Registered Land Act* now repealed, the error, does not affect the substance of the judgment.
59. On the issue of costs, I direct that each party bears its own costs.
60. The upshot of the fore going is that the Court finds merit in the appeal and the same is allowed in the following terms: -
1. The judgment and decree of Hon Zachariah Joseph Nyakundi (SPM) dated May 17, 2019 is hereby set aside.



2. A new trial is ordered at Makindu law courts to be presided over by a magistrate other than Hon Zachariah Joseph Nyakundi.
3. Each party shall bear its own costs of the appeal.

JUDGMENT SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF MARCH, 2023.

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HON. T. MURIGI

JUDGE

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Kiluva for the Appellants

Ms Nzilani holding brief for Makundi for the Respondents.

