Muthami v Mutsongi & 2 others (Environment and Land Appeal 38 of 2019) [2023] KEELC 20807 (KLR) (24 May 2023) (Judgment)

Neutral citation: [2023] KEELC 20807 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 38 OF 2019

LL NAIKUNI, J

MAY 24, 2023

BETWEEN

DANIEL KYUSYA MUTHAMI ..... APPELLANT

AND

MOHAMED MUTSONGI ..... 1ST RESPONDENT

BIBI KARISA ..... 2ND RESPONDENT

MARIAM BILALI HASSAN ALSO KNOWN AS MARIAM MOHAMMED SHOMARI ..... 3RD RESPONDENT

(Being an Appeal from Judgment of the Principal Magistrate A.S Lessotia delivered on 30{{^th}} July 2019)

JUDGMENT

I. Preliminaries

1. The Judgement herein is in respect with the Appeal instituted through a Memorandum of Appeal dated 8th August 2019 and the 136 Pages Record of Appeal dated 21st April, 2022 before this Honorable Court. The appeal was filed by the Appellant herein, Mr. Daniel Kyusya Muthami.

2. As indicated the appeal was filed pursuant to the Appellant being aggrieved by the Judgment delivered on 30th July 2019 by the trial Court by the Principal Magistrate in the Civil Case number 2314 of 2015.

3. On 11th October, 2022 the Appeal through the Memorandum of Appeal dated 8th August, 2019 and the compiled Records of Appeal was admitted and directions taken in the presence of all parties pursuant to the provisions of Sections 79B and G of the *Civil Procedure Act*, Cap. 21 and Order 42 Rules 16, 17 and 18 of the Civil Procedure Rules, 2010. It was directed that the Appeal be disposed off by way of written submissions and Judgement be rendered thereafter.

4. It is instructive to note that the Appeal was opposed in its entirety by the 1st Respondent vide the sixteen (16) Paragraphed Replying Affidavit of Mohammed Mutsongi dated 21st February 2020. The Honorable Court will be deciphering indepth on this at a later stage of this Judgement.

II. The Appellant's case

5. The Appellant herein sought that the appeal be allowed with costs and that the orders dismissing the Appellant suit with costs to 1st Respondent be set aside. From the filed Memorandum of Appeal and the Records of Appeal, the Appellant set forth the following grounds of appeal reproduced herein verbatim:-

    a. That the Learned Principal Magistrate erred in both in law and facts by failing to appreciate that the Appellant had proved his case on a balance of probabilities.

    b. That the Learned Principal Magistrate erred in law and in fact by failing to appreciate what was in the issue was the size of the plot purchased by the Appellant and not the issue in occupation.

    c. That the Learned Principal Magistrate erred in law and in fact by failing to appreciate that the sale of the subject plot in dispute by one Mbarak Hamadi was not disputed.

    d. That the Learned Principal Magistrate erred in law and in fact by failing to appreciate that the parcel of land number 2074 was part and parcel of the land purchased by the Appellant viz plot number 823.

    e. That the Learned Principal Magistrate on the face of clear evidence failed to appreciate that the sale of plot number 2074 to the Respondents was an afterthought since it was done 10 years after the sale to the Appellant.

    f. That the Learned Principal Magistrate on the face of clear evidence failed to appreciate that the survey to sub - divide the Appellants plot was done 10 years after the Appellant purchased the same and was done conveniently to alienate the Appellant right to the plot.

    g. That the Learned Principal Magistrate based his Judgement on conjectures and fanciful speculation that the Appellant build on the wrong plot.

III. The 2nd and 3rd Respondent's case

6. On its part, while opposing the appeal, the 1st, 2nd and 3rd Respondents herein held that they owned Plot No. 2074 being a portion of Plot No. 830/II/MN (original No. 1xx/II/MN measuring 64ft by 72 ft by 74ft by 50ft. According to them the portion was owned jointly by them sharing 25%; 25% and 50% respectively. Their portion is the one that had a foundation constructed on it.

7. They held that Plot No. 8xx was sold to them by one Shehi Murisa Karubi who sold a half of it to Suleiman Ali Dumbo. Mr. Dumbo sold that portion to Mr. Mbarak Ali Hamadi and who developed the foundation and sold the portion to the Appellant. According to them, instead of the Appellant taking the portion which had the foundation Plot No. 8xx he took the other portion which belonged to Shehi Murisa Karubi being Plot No. 2074. While assessing the dispute, the Concordia Committee that was in charge of land matters here concurred with this position as set out here by the Respondents herein.

8. However, the Appellant being aggrieved by the said decision instituted the suit at the Sub – ordinate court. However, the Trial Court upon hearing the case, in its Judgment it upheld the decision as arrived

at by a Committee in charge of land matters within this area known as the Concordia Development Group hence the gist of this Appeal instituted by the Appellant.

VI. The Submissions

9. On 21st July, 2022, while all the parties were in Court, the appeal was admitted and it was directed pursuant to the provisions of Section 79B and G of the *Civil Procedure Act*, Cap. 21 and Order 42 Rules 11 and 13 of the Civil Procedure Rules, 2010 that the parties being satisfied with the Records of Appeal as filed the appeal be admitted as filed and the same be disposed off by way of written submissions. Pursuant to that all parties compiled accordingly. Thereafter, on 8th November, 2022, the Honourable Court undertook to deliver its Judgement on notice.

A. The Written Submission of the Appellants.

10. On 1st November, 2022 the Learned Counsel for the Appellant vide his Advocates the Law firm of Messrs. B.W Kenzi & Company filed submissions dated 31st October 2022. Mr. B. W Kenzi Advocate commenced his submission by providing a brief background of the matter. The Learned Counsel submitted the Appeal under the following grounds.

Under Ground No. 1

11. The Learned Counsel submitted that the Learned Magistrate erred both in Law and facts in failing to appreciate that the Appellant had proved his case on a balance of probabilities. He averred that the Appellant had stated having purchased the subject plot measuring 120 ft by 60ft from Hamadi Mbarak Ali in the year 2005. He produced evidence as per his list of documents filed together with the Plaint. According to the Learned Counsel this was at Pages 13 and 14 of the Main Record of Appeal. The Appellant tendered his evidence which was corroborated by the evidence of Maalim Said Fundi Lewa who was a father in Law of Hamid Ali Mbarak, the seller of the land herein. He confirmed the sale and said he was the one who received the purchase price on behalf of the seller.

Under Ground No. 2.

12. The Learned Counsel under this ground to wit that the Learned Counsel Magistrate erred in Law and fact by failing to appreciate what was in issue was the size of the Plot purchased by the Appellant and not the issue of occupation. Accordingly, the Appellant purchased his land in the year 2005 and the agreements clearly stated it was 120 ft by 60ft. He built part of the plot and left the other one vacant. It was in the year 2015 ten years thereafter that the Respondent purported to have bought the undeveloped plot from the original owner one Shehi Murisa Kumbi. It was held that the Appellant developed his portion and none of the Respondents raised any objection. To him the sub – division was done in the year 2005 without involving the Appellant and his land was sold to the Respondents. Thus, taking that no complaint had been raised for all that period it was erroneous for the Court to hold that the Appellant was only entitled to Plot he had build on. Plot no. 20xx was conveniently excised from the Appellant's Plot No. 8xx without involving the Appellant. This was stated by DW – 5 who was a Clerk to the Surveyor when the survey of land took place in February 2014.

Under Ground No. 3

13. Under this ground to wit that the Magistrate erred in Law and fact by failing to appreciate that the sale of the subject plot in dispute by one Mbarak Hamadi was not in dispute. The Learned Counsel argued that under Paragraph 3 of the Defence, the Respondent admitted that the Appellant was the owner of Plot No. 8xx on the parcel of land No. 8xx/I/MN . Further this was admitted by the testimony of

one Darious Tole Manaji a witness for the Respondent. To support his case, the Learned Counsel cited the case of Presidential Petition No.1 of 2017, "Raila Amolo Odinga & Stephen Kalonzo Musyoka – Versus – IEBC & Others" where the Court held":-

> " In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the Court for its consideration".

Under Ground No 4.

14. The Learned Counsel asserted that the Magistrate erred in law and in fact by failing to appreciate that the parcel of land number 20xx was part and parcel of land purchased by the Appellant being parcel number 8xx.

Under Grounds Numbers 5, 6 and 7.

15. The Learned Counsel held that the Magistrate based his Judgement on conjecture and fanciful speculation that the Appellant build on the wrong Plot. The Magistrate made the conclusion in his Judgement this matter was deliberated upon by the locally constituted committee and which the Court relied on yet the said Committee had no legal basis and reasons therefore that the appeal ought to be allowed with costs.

B. The Written Submissions by the 1st Respondent in response to the Written Submissions to the Appeal.

16. On 21st November, 2022 the Learned Counsel for the 1st Respondent the Law firm of Messrs. Mercy Wanjiru Ngugi & Associates Advocates filed their Written Submissions dated 18th November, 2022.

17. M/s. Ngugi Advocate commenced her Written Submissions by providing a brief history of the matter. The 1st Respondent asserted that he was the lawful owner of Plot No. 20xx on land parcel No. 8xx/II/MN (Original 1xx/II/MN measuring 64ft by 72ft which he bought jointly with Mrs. Zana Karisa and Shehi Murisa Shomari the 2nd and 3rd Respondents respectively from the Plaintiff (Appellants) was his immediate neighbours and they shared a common boundary and that he had never entered upon the Plaintiff's (appellants) plot as claimed or at all. In the course of the proceedings in the Trial Court, the 2nd and 3rd Respondents who were not initially sued by the Appellant sought to be joined in the Suit as Defendants and vide an order/ decree of the Court were joined.

18. While responding on the 1st ground of the appeal, the Learned Counsel stated that the Learned Magistrate could not be faulted for failing to appreciate that the Appellant had proved his case on a balance of probabilities because going by the evidence adduced the Appellant had indeed not proved his case as by law required.

19. The Learned Counsel asserted that the Plaintiff took the Witness stand on 29th May, 2018 and testified that he bought the Suit Property in the year 2005 from one Mbaraka Ali Hamadi but that he transacted with Maalim Fundi Lewa the father-in-law of Mbarak as Mbarak Ali Hamadi had relocated. It was on 8th April, 2005. The agreement was reduced into writing and he and Maalim Fundi Lewa signed it. He stated that the plot he bought was within the Plot No. 8xx/ORG/1xx/MN. He informed Court that there had been a Committee called Concordia Development Group tasked with following up a case

that was in Court relating to Plot No. 8xx and ensuring that titles were issued. He said that he was assigned Plot No. 8xx as the one that he was occupying.

20. According to the Counsel, the Plaintiff stated that he received a call informing him that there was a person digging a foundation on his plot. The 1st Respondent was summoned by the committee and then he decided to institute the Suit in Court.

21. The Plaintiff denied having any knowledge of Plot No. 20xx but he stated that Plot No. 8xx covered Plot No. 20xx. He stated that for the ten (10) years he had occupied the Plot 8xx from the time of purchasing it no one had ever claimed it. The committee never involved him in its sub-division. He prayed for it vacant possession.

22. On Cross-Examination the Appellant admitted that Mbarak Ali was not present on 8th April, 2005 when the Sale Agreement was made. Further, he admitted that there was no written authority from Mbarak Ali Hamadi on the sale of the Suit Property and that he was shown the parcel that was being sold to him by Maalim Fundi whilst he got the Plot No. 8xx from the Committee but he was not involved in the sub-division which gave rise to that number. He also admitted he had no title to the Suit Property, no documents to prove that the plot belonged to Mbarak Ali Hamadi and that he relied on what the neighbours told him. He also admitted upon Cross- Examination that there was no sale agreement entered on 4th February, 2005 and that the measurement indicated in the sale agreement were inserted by him.

23. The Counsel informed Court that the Appellant summoned Mr. Said Fundi Lewa as his witness. He testified having sold him 120ft by 60ft Plot on behalf of his son Mbarak Ali Hamadi who was unwell and could not see. On Cross Examination the Witness admitted that at the time of the sale Mbarak Ali Hamadi was in Dar Salaam and that the purchase price was Kenya Shillings One Fifty Thousand (Kshs. 150,000.00).

24. From the evidence adduced the 1st Respondent never purchased the Suit land alone. It was jointly purchased with 2nd and 3rd Respondents who were not sued by the Appellant in the first instance but who through an application to Court sought to be joined as Defendants. The Learned Counsel submitted that the plot in issue was one without a title or any other document to prove ownership.

25. Further, there was no written sale agreement between the Appellant and Mbarak Ali Hamadi for the sale of the Suit Property. What the Appellant was terming as a sale agreement dated 8th April, 2005 could only be called an acknowledgment and/or confirmation of the monies paid on 4th February, 2005, 5th March, 2005 and 8th April, 2005 respectively. The acknowledgment stated in part: -

> " This is to confirm that the above purchase payment was paid to Mr. Maalim Saidi Fundi Lewa on behalf of the seller Mr. Mbarak Ali Mohammed as per agreement between the seller and buyer as follows....."

26. The Counsel argued that a mere reading and understanding of the document one got the impression that there was an initial agreement between the seller and the buyer so that the said document was in furtherance to what was agreed upon in the earlier agreement. The Trial Court was not told of an earlier agreement between the Appellant and Mbarak Ali Hamadi prior to the document dated 8th April, 2005 despite there being some part payment on 4th February, 2005 so that it was not clear as to when the Appellant purchased the Suit Property. The Document was signed by Maalim Fundi Lewa and the Appellant. The evidence adduced by Maalim Fundi Lewa was clear that he had no legal authority to sell the Suit Property on behalf of Mbarak Ali Hamadi. No Power of Attorney was produced. The attempt to produce a letter of Authority but which was dated 30th November, 2015. During the Trial

Court, the only person who could have shed light to the Court as to what portion of land was sold to the Appellant and when was Mbarak Ali Hamadi. The Appellant never called Mbarak Ali Hamadi as a Witness despite there being evidence that he had come to Kenya in the year 2018. He was the key witness in this case.

27. While responding the issue under the 2nd ground, what was in issue was the size of the plot purchased by the Appellant and not the issue of occupation. The Appellant in his pleadings failed to state that a portion of his plot had been encroached upon.

The Appellant only prayed for injunction orders to restrain the 1st Respondent from dealing with the plot No. 8xx. He also sought for the vacant possession and not for a portion of the Suit Property but the entire Suit Property.

28. On the 3rd ground to the effect that the Trial Court erred as it failed to appreciate that the sale of the subject plot in dispute by one Mbarak Ali Hamadi was not disputed. The Leraned Counsel stated that the 1st Respondent never disputed ownership of the Suit Property by the Appellant but went to say that he had not trespassed on it. The 1st Respondent stated that what happened was that the Appellant built on the portion of land that was not sold to him instead of the one that was sold to him which was Plot No. 20xx and to this extent the Trial Magistrate fully appreciated this fact in its Judgment.

29. On the 4th Ground, the Learned Counsel submitted that there was no evidence led by the Appellant to this effect. In his pleadings, the Appellant expressly defined the Suit Property to be Plot No. 8xx on Plot No. 8/ORG/1xx/MN/11 measuring 120ft by 60 ft. If indeed the parcel of land No. 20xx was part and parcel of the land the Appellant purchased then he ought to have pleaded that in his Plaint in the Trial Court to enable the 1st Respondent adequately address the same in the Trial Court. This was not done. These issues were never raised then until now and indeed the issue of Plot No. 20xx was only brought out during the Cross-Examination.

30. On the issue raised from Ground Nos. 5 and 6 of the Appeal, the Learned Counsel asserted that the evidence that came from the 1st , 2nd and 3rd Respondents as well as their Witness was to the effect that the sub-division of the Suit Property was carried out by Concordia Development Group and it gave rise to Plot No. 8xx and Plot No. 20xx respectively. According to the Learned Counsel, the Appellant took up Plot No. 8xx where he had constructed his house though the portion that had been sold to him was Plot No. 20xx and which had a foundation. On re - examination the Appellant admitted that on the ground, he could not tell which plot was which between Plots Numbers 20xx and 8xx respectively.

31. The Counsel informed Court that the Respondent called the officials from Concordia Development Group who testified and stated how Plot No. 8xx and 20xx came to be. They also confirmed that both plots neighboured each other. Hence, according to the Counsel clearly this was not an ownership issue but a boundary dispute. They confirmed the Appellant built his house on Plot No. 8xx though what was sold to him was Plot No. 20xx.

32. The Learned Counsel observed that the Appellant failed to join the Concordia Development Group to the Suit if indeed he was of the view that their act of sub-division was an afterthought. To the Counsel, it was only them who could answer to those allegations as opposed to the 1st Respondent. Indeed, the Counsel further stated that, in any case, the Concordia Development Group had indicated that when the dispute arose they decided to suggest to the Appellant and the Respondent to swop the plots so that the Appellant remained with Plot No. 8xx where he had already built his house and the Respondent to take up Plot No. 20xx. Hence, it could not be an afterthought at all.

33. In conclusion, the Learned Counsel held that the Judgment by the Trial Court was not based on fanciful speculations nor conjectures that the Appellant built on the wrong plot as alleged. On the

contrary, the Counsel submitted that the Judgment was based on evidence adduced and correctly arrived at his verdict. Indeed, according to the Counsel, no evidence or legal principle had been placed before the Court by the Appellant to fault the Judgment of the Trial Court. In the long run, the Counsel urged Court to find that the appeal by the Appellant lacked merit and hence should be dismissed with costs to the 1st Respondents.

B. The Written Submissions by the 2nd and 3rd Respondents

34. On 1st December, 2022, the Learned Counsel for the 2nd and 3rd Respondents through the Law firm of Messrs. Njoroge & Katisya Advocates filed their Written Submissions dated 25th November, 2022. Mr. Njoroge Advocate commenced the Submissions by providing a detailed introduction and background of the facts leading to the institution of the Appeal before this Honourable Court. He rehashed the facts as that the Appellant's case at the Trial Court being that the Appellant owned the entire suit premises described as Plot No. 8xx on Plot No. 830/ORG/1xx/MN/II measuring 120ft by 60ft at the Concordia area of Vikwatani having bought it from Mbaraka Ali Hamadi sometimes on 8th April, 2005.

35. The Learned Counsel informed Court that the Appellant admitted that he never dealt directly with Mr. Hamadi but instead dealt with Mr. Malim Fundi Lewa. By this time, within this area, it was a huge land measuring 1000 acres. It was known as Plot 8xx/11/MN. The Concordia Development Group in charge of the land matters within this area carried out an informal survey and apportioned owners of the Plots their plots and numbers.

36. The Leraned Counsel stated that by the time the Appellant got land it had been unsurveyed. It was still informal settlement. He commenced development of a Swahili House on an empty and/or unoccupied portion of land but retained another portion for future use.

37. The portion was identifiable as it had a foundation. However, later on he took action when the 1st Respondent started building on the portion where the foundation was. He lodged a complaint with Concordia Development Group where he was a member. Acording to the Counsel, in a bid to resolve the land dispute, the Group applied the Alternative Dispute Resolution (ADR) and decided that they swop the plots but the Appellant was dissatisfied. He decided to institute a Civil Suit before the Trial Court but only against the 1st Respondent. He never sued the 2nd and 3rd Respondents nor the Concordia Development Group. It's later on that the 2nd and 3rd Respondents in their own initiative decided to apply to be joined in the Suit and their application was allowed.

38. According to the Learned Counsel, from the sale agreement by the Appellant it showed Plot No. 8xx and not Plot Nos. 8xx nor Plot No. 20xx. He added that the measurement on it was 120ft & 60ft which clearly was done by hand. The sale agreement was not signed by the Vendor Ali Mbarak Hamadi who was not even present in Kenya during the sale. From available evidence which was not disputed, he was in Tanzania. It was not established how the Vendor had been authorized by his father-in-law Mr. Lewa to sell the Plot on his behalf. It was only Ali Mbarak Hamadi who could identify the portion sold but for reasons not clear he was never called as a witness.

39. The Learned Counsel extensively and elaborately argued that the burden of proof was on the Appellant to have summoned the Vendor but he failed. He was of the view that so long as the Trial Court which heard the evidence on oath and applied its mind and reasoning, the Appellate Court should not interfere with its decision based on facts and evidence.

40. To buttress his point, he cited several decisions which included: - "Kyalo Elly Joy – Versus - Samuel Gitahi Kanyeri [2021] eKLR ; In Coghlan v. Cumberland (1898) 1 Ch. 704; Peters –Versus- Sunday

Post Ltd(1958) EA 424 & Ephantus Mwangi & Another - Versus-Duncan Mwangi; Civil Appeal No. 77 of 1982 (1982-1988) 1 KAR 278.

The Learned Counsel held that taking that the land had been unsurveyed and that the Concordia Development Group decided the Appellant and the 1st Respondent swop the Plots No. 8xx and 20xx respectively, it was the best decision ever. In any case the Appellant had already developed a Swahili house on Plot No. 20xx and left Plot No. 8xx where the foundation was and should retain it as the measurement of these plots and boundaries remained intact. In conclusion, the Learned Counsel urged Court to dismiss the appeal and compensate the 2nd and 3rd Respondents who were never being factored in at all by the Appellant.

VI. Analysis and Determination

41. I have keenly read and considered all the pleadings in these appeal being the Memorandum of Appeal dated 8th August, 2019, the 136 pages of the Record of Appeal dated 21st April, 2022 by the Appellant, the replies by the Respondents, the elaborate written submissions and myriad of authorities cited by all the parties, the relevant provision of *the Constitution* of Kenya, 2010 and the statures.

42. For the Honourable Court to arrive at an informed, fair, reasonable, equitable and just decision, it has condensed the subject matter into the following four (4) salient issues for its determination. These are:-

    a. Whether this Court have Jurisdiction to entertain proceedings brought thereto?

    b. Whether the Appeal filed by the Appellant through the Memorandum of Appeal dated 8th August, 2019 and the Records of appeal dated 21st April, 2022 has any merit?

    c. Whether the parties are entitled to reliefs sought from the filed Appeal?

    d. Who will bear the costs of Appeal?

ISSUE No. a). Whether the Court have Jurisdiction to entertain proceedings brought thereto?

Under this Sub heading, at the very onset, the Honourable Court wishes to deliberate and make a decision on the fundamental issue the Jurisdiction of this Court as raised by some of the parties in the impugned appeal on dealing with this subject matter. I need not belabor on the legal rationale founded and guided by the famous decision of: "the owners of Motor Vessel MV Lillian "S" - Versus - Caltex Oil (K) Limited" (1989) eKLR 1653 where Justice Nyarangi had this to say:

"Jurisdiction is everything without it a court has no process to make one more step. Where a "Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law dismiss its tools in respect of the matter before it the moments. It holds the opinion that it is without jurisdiction.

43. Specifically, it was submitted by the Learned Counsel for the 1st, 2nd and 3rd Respondents that issue raised before Court was of the nature of a boundary dispute in an area that had not been surveyed and not otherwise. For this primary reason, 'inter alia" this ousted the jurisdiction of the Court as per Section 18 (2) and 19(3) respectively of the *Land Act* Registration Act No. 3 of 2012 that read thus; -

    18

    (2) The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

    19

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

44. From the face value, one would wonder why such a critical and significant legal issue would have to wait until the matter had escalated upto the appellate stage, But for the benefit of doubt and with all due respect to the parties raising the objection, it is trite law that matters pertaining to jurisdiction can be raised at any stage even the appellate stage as was provided in the case of "Dubai Bank Kenya Limited – Versus - Kwanza Estates Limited [2015] Eklr where the Court opined thus:-

> "It would therefore have been prudent for the Appellant to raise the question of jurisdiction before the superior Court as that way this court would have had the benefit of reasoning of the superior court on the issue. However, we must now determine whether the issue of jurisdiction can be properly raised by the appellant at this stage. In Floriculture International Ltd – Versus - Central Kenya Ltd & 3 Others (1995) eKLR, the court held that the issue of jurisdiction can be argued at any time. The court remarked as follows: "It has been held in the case of Kenidia Assurance Co. Ltd – Versus - Otiende (1989) 2 KAR 162 that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction."
>
> The reasoning is that even where the question of jurisdiction is not raised that does not necessary confer jurisdiction on the court if it has none. Accordingly, we find that the Appellants are not precluded from raising the jurisdictional issue for the first time on appeal having not raised it in the superior court."

45. In order to satisfy all and sundry on this rather weighty issue as to whether the Court is clothed with jurisdiction to hear and determine this matter, a quick perusal of pleadings on record the Appellant specifically the Plaint dated 27th November 2015 under Paragraphs 3, 4, 5 and 6 of the Plaint are critical. They hold, "inter alia":-

3 the Plaintiff avers that he is the owner of Parcel Numbers 8xx on Plot No. 830/ORG/1xx/MN/11 measuring 120ft by 60ft at Concordia area of Vikwatani area having purchased the same from one Mbaraka Ali Hamadi in 2005;

4 The Plaintiff avers that on or before 29th and 30th June, 2015 the Defendant without any colour of right brought construction materials onto the Plaintiffs plot and started digging a foundation in readiness to commence construction.

5 The Plaintiff avers that he sought immediate intervention from the area chief and the Defendant was stopped (sic) still continued with the acts of trespassing on the Plaintiff's Plot.

6 The Plaintiff avers that unless the Defendant is restrained by an order of injunction he shall suffer irreparable damages since the said plot is his investments and wanted to develop on the said piece of land"

46. However, under the contents of Paragraphs 3, 4 and 5 of the Statement of Defence dated 17th March, 2016 they aver as such:

> " ....The Defendant admits the averments made in Paragraph 3 of the Plaint to the effect that the Plaintiff is 823 on Land Parcel No. 8xx/II/MN (Original 1xx/II/MN) but denies that

he has trespassed upon or entered the Plaintiffs said Plot.....the Defendant asserts that he is the lawful owner of a portion of land Plot No. 2074 on Land Parcel No. 8xx/II/MN (Original 1xx/II/MN) measuring 64ft by 72ft by 50ft which he bought jointly with Mrs. Zena Karisa and Mohamed Chebe Shomari from Shehi Murisa Kumbi. The Defendant shall at the hearing of this suit rely on their sale agreement with Shehi Murisa Kumbi dated the 25th of October, 2015.....the Defendant further states that the Plaintiff is his immediate neighbour and shares a common boundary with him and he has never entered upon (sic) the Plaintiff's Plot as claimed or at all a....."

47. Indeed, with great humility and respect to the Learned Trial Magistrate, in his Judgement under Page 134 line 12 and 13 of the Records of Appeal he has rightfully stated verbatim:-

> " In my view the issues for determination are whether the 1st Plaintiff is the owner of the suit land and if so whether the 1st Defendant and/or the Defendants had encroached and constructed thereof to warrant the orders sought" (Emphasis is mine).

Clearly, from all these averments within the pleadings and the Judgement of the trial court, it alludes that the bone of contention is the ownership of parcel Number 8xx on Plot No 8xx/ORG/1xx/MN/11 measuring 120ft by 60ft and whereas the Defendant in their statement of defence alluded to a boundary issue as their property was allegedly adjacent to the Appellant. In my considered opinion issue raised forth in the Plaint was that of ownership of the suit parcel and its parameters. In my own view is that the ownership issue raised falls squarely under the ambit of this Court as provided by under the provision of Section 13 (1) (2)(d) of the Environment and land Court that reads thus:-

> " The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) b of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to Environment and Land.(1) In exercise of its jurisdiction under Article 162 (2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes-d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land.

48. Hence, in a nutshell, based on the surrounding facts, inferences and the circumstances set out here, this Honourable Court has jurisdiction to hear and determine this matter and the objection by the 1st and 2nd Respondent is dismissed forthwith. The matter is now put to rest.

ISSUE No. b). Whether the Appeal by the Appellant through the Memorandum of Appeal dated 8th August, 2019 and the Records of appeal dated 21st April, 2022 has any merit?

49. Under this Sub heading, having stated the issue of the Jurisdiction of the Court and before delving into the substantive issues the Court must reinstate the duty of the appellate Court. The duty of the appellate Court is it re-evaluate the evidence afresh and draw its own evaluations and calculations. This was aptly provided in the case of "Selle & Another – Versus - Associated Motor Boat Co. Ltd. & Others (1968) EA 123 in the following terms:

> " I accept Counsel for the Respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of 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 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 this respect.

> In particular, this court is not bound necessarily to follow the trial judge's findings 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 based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif – Versus - Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

50. While in the from the case of: "Abok James Odera (Supra) to the effect that: -

> "This being a first appeal we are reminded of our primary role as a first Appellate Court namely to re-evaluate, re-assess and re-analyze the extracts on the record and then determination whether the conclusion reached by the Learned Trial Judge are to stand or not and give reason either way".

Similarly, in the case of "Peter –Versus - Sunday Post Limited 1958 E.A. 424" Sir Kenneth O'Connor P. rendered the applicable principles as follows:-

> "It is a strong thig for an appellate court to differ from the finding on a question of facts, of the judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a Jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...."

51. Thus, due to the intricacies and complexity of the facts of this case, the Honourable Court has felt it needful to elaborately extrapolate to detail the facts of the matter from the filed Record of Appeal.

The summary of Appellant's evidence

PW - 1 -Daniel Kyusya Muthami

52. He testified that on April 2005, he bought a piece of land measuring 60ft by 120ft (Hereinafter referred to as "The Suit Land") from one Barak Ali Hamadi through his father in law Maalim Fundi Lewa for a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000.00/-). He produced the sale agreement marked as Plaintiff Exhibit -1. The suit parcel was a part of a lager parcel with a mother title 8xx/ORE/1xx/MN/11 (Original No. 1xx/II/MN) A committee named Concordia Development Group was responsible for the issue of its demarcation. He was a member of the group. After the committee undertook sub division he took ownership of the suit parcel and he paid a sum of Kenya Shillings Twenty Five Thousand Two Fifty (Kshs. 25,250.00/=) to cover expenses for survey, and land rates. He produced receipts dated 1st July, 2015, and 6th June, 2015 as PEN (2 a & b). On 29th July, 202015 after developing a third (1/3) of the property he got information that one Mohamed Mutsongi had instructed people to build on the suit parcel. He reported the matter to the local rea chief and on 30th June, 2015 and the 1st Defendant was prevented from going on with the construction. He produced the chiefs letter to the 1st defendant as "PMF – 13".

53. He further testified that in a meeting held by Concordia Committee he learnt that the suit parcel was sold by Murisa Kambi to the 1st Defendant. Murisa Kambi who claimed that he had initially sold the land to Suleiman who had sold it to Mbarak who had sold it to him. The committee informed him that they had subdivided the suit parcel without his consent and had sold it to the 1st Defendant. The committee recommended that the portion that had a foundation be retained by the 1st Defendant and he retain the other portion. His Advocate took action and sent a demand letter dated 16th July, 2015

produced as PMF - 4. The 1st Defendant vacated the suit parcel but on 28th November, 2015 the 1st Defendant commenced construction on the suit parcel and he reported the matter to Kiembeni Police Station where he was showed an agreement dated 28th November, 2015 between Murisa Kambi and the 1st Defendant in respect to the suit parcel. He was referred to Court.

54. He further testified that he did not know the 2nd and 3rd Defendants and that the suit parcel did not boarder plot No. 20xx, 20xx and the same were curved out of his plot 8xx. He owned the entire portion and no one had laid claim on the suit parcel between the year 2005 till year 2010 and he had never been consulted by the committee when sub-dividing the suit parcel.

55. On cross examination conducted by the Learned Counsel Ngugi he testified that he did not get into a written agreement until 8th April, 2005 though he met the buyer first and according to the agreement he was to purchase plot No. 8xx. He added that he was the one who had inserted the size of the plot in the agreement. After getting wind of the fact that the 1st Defendant had constructed on his land on 29th July, 2015 he went to Concordia Group on 1st July, 2015 and learnt that he was allocated plot number 8xx. He was a member of Concordia but was not aware that Murisa Kambi was a member as well.

56. On cross examination by the Learned Counsel Njoroge, he testified that Hamadi was not present on the 8th April, 2015 when the agreement was made. They had met earlier with Hamadi and agreed verbally before he moved to Dar Es Salaam. He said he did not have title to the land and had no evidence that the land belonged to Hamadi. He relied on neighbor's word. The Group was to follow up the subdivision of the land and eventually issuance of the title deed. He paid for the agreement dated 25th October, 2014 but did not send it to the 2nd and 3rd Defendant. He visited the site with the 1st Defendant and Concordia officials among others and he was not given any documents. He further testified that the 1/3 portion that had no foundation was developed by him and there was no ownership dispute as to the said portion. His wife and another witnessed the sale agreement with Maalim and measurements were done by themselves as they did not engage surveyors.

57. On re-examination he testified that when he was showed the land by Maalim it was fenced and ownership was confirmed to him by neighbors. No. 823 was given to him at the group office. He added that it was difficult to differentiate between Plot No. 20xx and 8xx on the ground.

PW - 2- Suvi Fundi Lewa (Maalim)

58. He testified that he sold the suit parcel to the Appellant on behalf of his son in law for consideration of a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000.00). He however said he had no authority from his son in law Hamadi. The land parcel was No.830 measuring 120ft by 60 ft. When he showed the Appellant the suit parcel it was not fenced and had a foundation and he went ahead to develop the portion that had no foundation. In 2015 however the Appellant told him that the suit parcel had been encroached.

59. PW - 2 wished to produce the letter of authority give to him by Hamadi but it was objected to and the Court ordered the Appellant avail a witness to produce the document marked as "PME – 15".

60. On cross examination he testified that Hamadi gave him consent to sell the land on 8th April, 2005 when he was in Dar e Saalam. He had left for Dar – e Saalam five years' prior the year 2005. He had gotten the land in the year 1999. He sold the land in parcels of 120ft by 60ft and received the money in installments of a sum of Kenya Shillings Seventy Five Thousand (Kshs 75,000.00), Kenya Shillings Thirty Thousand (Kshs. 30,000.00) and Kenya Shillings Fourty Five Thousand (Kshs. 45,000.00) and agreement was drawn after last installment. He was given the letter of authority after the dispute arose

hereon. He had earlier given him verbal authority. The authority had been prepared by Hamadi and he was the one who could have elaborated on size of the suit parcel.

61. On cross examination he testified that Hamadi had not been in the country since the suit parcel was sold. He added that he was not a member of Concordia Group and was not present when the Appellant met with Hamadi. He added that the development portion is less than the developed portion.

62. On re - examination he stated that he knew the size of the land he sold to the but was not sure of the measurement of the land known as 8xx.

The Summary of the Defence

DW - 1- Mohammed Mutsongi Chenjele

63. He testified that on 25th October 2014 together with one Bibi Zena and Mohammed Shebe Shomari on behalf of his daughter Mariam Mohamed Shomari jointly purchased land measuring 64 x 7 x 74 x 50 out of the bigger portion of land known as plot No 8xx/11/MN known as Concordia land. The land was purchased from Shehi Murisa Kumbi at a consideration of Kenya Shillings Three Thousand (Kshs. 300,000.00), was deposited and Kenya Shillings One Hundred Thousand (Kshs. 100,000.00) was agreed to be paid. The transaction was reduced to writing vide a sale agreement dated 25th October 2014 and it was agreed Mohamed Shebe Zomari would take 50 % of the suit parcel and himself and Bibi Zena would each take 25%

64. After payment he sent some people to clear the plot and started laying foundation for a construction in December 2014. It was after that the Appellant approached him and told that the suit parcel was his, prompting them alongside others to go to the office of Concordia Development Group. One Shehi Murisa Kumbi gave a history of the portion of the land and he have said that he had at one time sold half of the portion of the land to one Suleiman Ali. Mr Suleiman confirmed he had. He further stated that he had sold the said portion to one Mbarak. They went to the field and Suleiman identified the portion of the land sold to him and the portion he had sold. The Appellant was requested to bring Mbarak the person who had sold to him but failed to do so. Thereafter the official of Concordia told them to go on with their development. The Appellant however reported them to Kiembeni police station and he was told to bring Mbarak but he failed to do so. He went on with the construction and was later sued by the Appellant.

65. On cross examination he testified that Shehi Kambi had sold the land to them whereas the Appellant had bought the land from Ali Mbarak. He added that he lost his membership receipt to Concordia.

66. On re - examination he testified that Concordia deliberated over the matter; himself, the Appellant and 3rd Defendant testified. The committee visited the site and asked Appellant to bring in Mr Barak in person but he failed to do so. He added that the survey of land was done by Concordia and Concordia 8xx was subdivided into two parcels of land.

DW - 2 - Suleiman Ali Dzombo

67. He adopted his witness statement dated 23rd November, 2017. He testified that he was approached Mzee Sammy Shehi Murisa Kambi for a portion of land at Vikwatani and paid him a sum of Kenya Shillings twenty thousand (Kshs. 20, 000.00/=) He started developing it but due to ill health he sold the plot to Mr Mbarak for the sum of Kenya Shillings Fourty Thousand (Kshs. 40,000.00/=). He could not remember the year of the sale. He later came to know that Mbarak had sold the plot to someone else. Before Mbarak sold the land he had laid a foundation on the said plot and when the wrangle

occurred he confirmed the portion that had the foundation was the one he had sold to Mbarak. The Appellant was however claiming he had been sold a bigger portion than that with the foundation.

68. On cross examination he said that he bought the land from Shehi Musa Kambi but he did not recall the year he bought it nor did they measure it. He later learnt that he later sold the land to Mbarak and person who Mbara sold to developed an adjacent plot.

69. On re - examination he said that he had sold the portion of land to Mbarak vide an oral agreement. He was not a witness to the agreement between the Appellant and Mbarak but Appelant had developed a house on the wrong portion of land.

DW - 3, Mohamed Shebe Shomari.

70. He testified that he bought plot Number 20xx alongside Mohammed Mutsong, Mariam Bilai, Zena Kariasa. He produced the sale agreement marked as DEX a & b dated 25.10.14. He added that the dispute between them and the Appellant was heard by Concordia Development group and it was dismissed on 5.11.15. He produced the decision marked as "MDFI – 12"; he further produced the special power of authority to testify on behalf of the 3rd Defendant as "DEM – 3" and letter of authority as "DEM -4".

71. On cross examination he said the land had been sold to his daughter by Shehi and they later learnt that the land had a foundation that had been put there by Mr. Mbarak and Appellant's Plot was next to it. The Plot No. was 20xx size of the Plot was 64 x 72 x 74 x 50 ft.

DW - 4 - Darius Mwawasi Tole

72. He testified that his plot was adjacent to the one of the Defendants and he bought his in 1989. The Appellant found him on his plot and he constructed the house on the plot. The 1st Defendant has developed a house on it but it hasn't been completed.

73. On cross examination he said the Appellant land was previously owned by Suleiman who sold it to Mbarak but did not know who sold the land to the Appellant.

DW – 5 - Samson Gusu Tangai

74. He testified he was a clerk and surveyor hired by Concordia and his role entailed recording the plot numbers and location. The plot in dispute was located number 8xx and had been subdivided into two. The two Plots were numbers 8xx for the Appellants while Plot No. 20xx which had a foundation on it belonged to Musa Kambi who sold it to the Defendants.

75. On cross examination he testified that he carried out the survey in the year 2012. All plots were subdivided in the portion of 70ft by 40ft.

DW – 6 - Kabu Mumbu Mduchi chariman of Concordia.

76. He testified that the whole plot was owned by Shehi and Appellant bought the land from Said Fundi, father in law of Mabwama. The Appellant had built his house on the wrong portion and they had instructed him to retain that portion in their decision which he produced as Defendant Exhibit - 2.

77. On cross examination he testified that the survey by the group was done in the year 2014 - 2015 and it was subdivided by a court order. However, the Appellant's plot was however not subdivided for sale purposes. He did not record evidence given during the hearing but they were six witnesses.

DW - 7- Shehi Murisa Kambi.

78. He testified that he was a trustee of Concordia and he sold plot No. 20xx to Suleiman Ali Nzombo in the year 1990 and retained the other portion. Suleiman sold it to Mbarak who constructed a foundation. Mbarak sold the land to the Appellant. The Appellant constructed on his other portion and he gave the portion that Mbarak had sold to the Appellant to the Defendants. He said it was his wish that the Appellant retain the plot he had constructed on and the Defendants retain the plot with the foundation.

79. On cross examination, he testified that he did not know who sold the Appellant his land. He also did not stop the Appellant from constructing the land because he was away and never engaged him.

ISSUE No. c). What reliefs is Appellant entitled to if any.

80. It is trite law that certificate of title is held as conclusive evidence of proprietorship but it is an undisputed fact that neither of the parties have title to property as the parcels of land were curbed out of the mother property from an informal settlement. However, the Appellant produced a sale agreement dated 8th April 2005 marked as Plaintiff Exhibit 1 as proof of ownership of Plot No. 8xx. On perusal of the document I made the observation that its title was 'purchase agreement.' It was between Daniel Kyusya Muthami and Mr Mbaraka Ali Hamadi for a sum of Kenya Shillings One and Fifty Thousand (Kshs. 150,000.00) However, on the body of the agreement it was indicated that the purchase price of a sum of Kenya Shillings One and Fifty Thousand (Kshs. 150,000.00) was paid in installments that were received by Maalim Fundi Lewa on behalf of the seller Mr. Mbarak Ali Hamadi. It is noteworthy that the power of authority given to Maalim Fundi Lewa by Mr Mbarak Ali was never admitted as evidence as Mr Maalim never appeared as a witness to authenticate the document.

81. Having elaborately stated out the facts and the evidence adduced, I hold that at the time of signing of the purported sale agreement the law in operation was under the provision of Section 38 (1) of the *Land Act*, No. 6 of 2012 and the Law of Contract Cap. 23 under Section 3(3) which provide thus: -

> " No Suit shall be brought upon a contract for the disposition of an interests in land unless-
>
> The contract upon which the suit is founded-
>
> a. Is in writing
>
> b. Is signed by all parties thereto; and
>
> c. The signature of each party signing has been attested by a witness who is present when the contract was signed by the party.

82. By perusal of the purchase agreement it is evident that the original owner and purported seller Mr. Ali Mbarak Hamadi never signed the sale agreement nor did testify as to confirm that he had given his father in law authority to sell the land on his behalf. The Appellant in his cross examination also stated that he was the one who added the measurement of the plot on the sale agreement and relied on neighbor's word of mouth to ascertain that he had brought the right plot.

83. In the case of "Kukal Properties Development Limited - Versus - Tafazzal H Maloo & 3 Others (1993) eKLR the Court of Appeal pronounced itself on a similar dispute where only one party had signed the agreement for sale of land and the other party had failed to sign or hi signatory had also not signed

on his behalf. Commenting on the legal framework in Section 3(3) of the *Law of Contract Act*, Muli JA held as follows:

> " With the greatest respect, the learned trial judge misdirected himself completely. In the first place it matters not what the parties or one of them believed or was made to believe. The real issue was whether the agreement was duly executed by the parties, and if not, was the agreement binding and enforceable against any of the parties?.....
>
> It is trite law on this point and is made beyond doubt under Section 3(3) of the *Law of Contract Act* (Cap. 23) Laws of Kenya)I hold that the intended agreement between the Appellant and the Porbundarwallas was inoperative and therefore unenforceable for lack of execution by the Appellant; the sum total was that there was no valid agreement enforceable in law"3Kwach JA pronounced himself on the same legal framework and issue as follows: -
>
> > "The agreement in question was not signed by the Appellant or anyone authorized by the appellant to sign it. The Porbunder wallas could not rely on the provision because they had not taken possession of the maisonette. It is therefore plain beyond argument that there was no concluded agreement both in fact and in law between the appellant and the Porbunderwallas which could be enforced by a decree for specific performance. And as to the judge's holding that the Appellant was estopped from denying the validity of the agreement, this is quite clearly erroneous on the authority of "Patterson – Versus - Kanji (1956) 23 EACA 106", where the Court of Appeal for East Africa held that there can be no estoppel against an Act of Parliament. The result is that the order for specific performance in favor of this couple should never have been made at all because it clearly had no legal basis"

84. In the instant case, I find that this Court cannot maintain a suit that runs afoul of a mandatory section that being section 3 (3) of the *Law of Contract Act* Cap 23 of the Laws of Kenya as they were the applicable regime then.

85. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act*, Cap. 80 provide as follows:-

107

> "(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.
>
> (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.

108. 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."

86. Given the documentary evidence and testimony provided by the Appellant in the Record of Appeal, I find that it falls short in proving ownership of the suit property to the required standard. In actual fact the Trial Magistrate captured the whole matter graphically so well at the conclusion of the Judgement founded at Page 134 of the Records of Appeal which, rather than re – invent the wheel, I feel very much obliged to reproduce cue here in verbatim:-

> " .....It must be noted that the suit land is an informal settlement in land that is unsurveyed that is without property demarcated and recognized boundaries. Purchase and settlement

theof was thus (sic) based on good faith and trust that the seller was disposing what is (sic) his entitlement and that the measurement is as agreed and more importantly that the same was owned by the person purporting to sale the same.....in the instant case, devoid of a regime of registration and/or ownership, the community residing in the larger portion of land that the suit property seats organized themselves and under the umbrella of Concordia Develeoment Group, they formed an organization to not only resolve disputes on the land but also proportionately distribute land. The dispute herein arose and indeed it was established that the Plot No. 8xx comprises of a larger parcel than what the Plaintiff herein alleges (sic) to have bought. There is evidence that the Plaintiff indeed bought land from one Mbarak by proxy, the evidence on records is that the Plaintiff bought land that had a foundation theron but that he went ahead to develop an adjacent piece of land. The Plaintiff now wants seeks (sic) to claim the land irregularly developed and retain the one he legitimately bought. In my view and noting the circumstances surrounding ownership of the land above, it is only fair and just that each party be allowed to retain their parcel of land they currently occupy. I do take notice of the fact that this matter was deliberated upon by the locally constituted committee which in my view was even better placed to understand the issue now before Court....."

87. This Court cannot agree more with the Learned Magistrate in his wise anaylsis, appreciation of the facts and the final decision. Critically speaking, the Appellant seem to be unreasonably and unfairly discontent on an obvious issue particularly of insisting on taking over an adjacent Plot inhabited by the 1st Respondent yet he has already caused extensive development on the Plot where he is currently occupying. To me this is what the English adage "You cannot eat the cake and have it" and the Swahili sayings that:- "Mpanda farasi wawili hupasuka msamba" or "Mtaka yote hupoteza yote" comes in handy to his aid. Let him be settled by what he has as wisely advised by the Concordia Development Group through Solomonic wisdom from the Holy Bible - Scriptures of 1 Kings 3 Verse 16 to 28 on the story of the two harlots who approached King Solomon claiming the living child and his wise decision.

88. In conclusion, I hold that the Appellant has miserably failed to discharge burden of proof to the required standard he is not entitled to any relief. I dare say no more.

ISSUE No. d). Who bears costs of the appeal?

89. It is well established that the issue of costs is at the discretion. Costs means the award that is granted to a party at the conclusion of legal action and/or proceedings in any litigation. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the event. By event, it means the results or outcome of the legal action and/or proceedings thereof. See this from the case of the Supreme Court – "Jasbir Rai Singh – Versus – Tarchalans Singh", eKLR (2014); the Court of Appeal cases of: "Republic – Versus - Rosemary Wairimu Munene, Ex - Parte Applicant – Versus - Ihururu Dairy Farmers Co-operative Society Ltd and Kenya Sugar Board – Versus – Ndungu Gathini (2013) eKLR where this Court held as follows:-

> " The issue of costs is the discretion of the Court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case"

90. In the instant case, in the given circumstance where the Appellant has not been successful in prosecuting its filed Appeal from the Judgement of the trial Court, it follows that costs are awarded to the 1st, 2nd and 3rd Respondents jointly and severally for their participation in the Appeal herein.

VI. Conclusion & Disposition

91. Consequently, upon conducting an elaborate and indepth analysis of the framed issues in this Appeal, the Honorable Court on the preponderance of probability finds that the Appellant has failed to prove its appeal in accordance with the facts and Law. The upshot of the matter , the Honorable Court specifically makes the following findings.

    a. that Judgement be and is hereby entered that the filed Appeal through a Memorandum of Appeal dated 8th August, 2019 and the Records of Appeal dated 21st April, 2022 by the Appellant from the Judgement of the trial Court delivered on 30th July, 2019 is unmerited and hence dismissed with costs.

    b. that the Judgement delivered on 30th July, 2019 by the trial Court in the Principal Magistrate, Civil Case number 2314 of 2015 be and is hereby upheld.

    c. This matter is now closed.

    d. that the Costs of the Appeal is awarded to the 1st and 2nd Respondents herein jointly and severally.

    It is ordered accordingly

JUDGEMENT DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF MAY 2023

HON. JUSTICE MR. L.L. NAIKUNI

ENVIRONMENT & LAND COURT AT MOMBASA

Judgement delivered on the presence of:

b. Mr. B. W Kenzi Advocate for the Appellant.

c. Mr. B. Njoroge holding brief Mr. Ngugi Advocate for the 1st Respondent.

d. Mr. B. K. Njoroge Advocate for the 2nd Respondent.

e. Non appearance for the 3rd Respondent.