



**Gitau v Maina (the Appointed Attorney of Teresia Nduta
Muhia); Njeri (Interested Party) (Environment and Land Appeal
E091 of 2021) [2023] KEELC 17535 (KLR) (22 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17535 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E091 OF 2021**

BM EBOSO, J

MAY 22, 2023

BETWEEN

GRACE WANJIRU GITAU APPELLANT

AND

MARY WANGARI MAINA RESPONDENT

THE APPOINTED ATTORNEY OF TERESIA NDUATA MUHIA

AND

GITAU NJERI INTERESTED PARTY

*(Being an Appeal arising from the Judgment of Hon. G. Omodho (SRM)
delivered at Kiambu Chief Magistrate Court on 29/9/2021 in Kiambu
Chief Magistrate Court Land & Environment Case No 48 of 2018)*

JUDGMENT

Background

1. This appeal challenges the Judgment rendered by Hon G Omodho, Senior Resident Magistrate, on September 29, 2021 in Kiambu CMC Environment & Land Case No 48 of 2018. The dispute in the said suit revolved around the questions of occupation and title to land parcel number Kiambaa/Waguthu/613 [hereinafter referred to as 'the suit property']. Falling for hearing and ultimate determination by the trial court were the respondent's primary suit and the appellant's counterclaim. The trial court heard both the primary suit and the counterclaim. The trial court subsequently rendered the impugned Judgment in which it made two fundamental findings that are at the centre of this appeal. First, the trial court found that it had no jurisdiction to re-open the issue of title to the suit property because the said issue had been determined by the Land Disputes Tribunal in 1999 and



the award of the Tribunal had been adopted as a Judgment of the Chief Magistrate Court in 2002, adding that the resultant decree was still valid and enforceable. The second fundamental finding made by the trial court was that a magistrate court did not have jurisdiction to entertain the issue relating to adverse possession.

2. In the end, the trial court rejected the appellant's defence of adverse possession together with the appellant's counterclaim which were anchored on the doctrine of adverse possession. The trial court proceeded to grant the orders sought by the respondent. A key aspect of the orders granted to the respondent was eviction of the appellant from land that the appellant contended had been her home since 1978, the land having been allotted to her deceased husband in 1978. I will give a brief background to the appeal before I dispose the key issues that fall for determination in the appeal.
3. Through a plaint dated June 8, 2018, Mary Wangari Maina [the respondent in this appeal] instituted Kiambu CMC E & L Case No 48 of 2018 against Grace Wanjiru Gitau [the appellant in this appeal] and Gitau Njeri [the interested party in this appeal]. She instituted the suit in the capacity of an appointed attorney of Teresia Nduta Muhia [hereinafter referred to as 'Teresia']. She alleged that the appellant and the interested party had illegally entered, encroached on, blocked access to, trespassed onto and interfered with Teresia's quiet possession of the suit property. She sought a permanent injunction restraining the appellant and the interested party against the above acts; an order of eviction against the duo; general damages; and costs of the suit.
4. The appellant filed a statement of defence and a counterclaim, both dated October 28, 2020. Her case was that her late husband was allotted the suit property in 1978 by the Kiambu County Council and they had lived on the land as their matrimonial and family home since 1978. It was her case that they were in quiet occupation of the land the time the title held by Teresia was procured, that is the year 1993. She added that her deceased husband left her on the land when he died in 2005 and she had continued to occupy the land since then.
5. By way of counterclaim, she reiterated her case as summarized above and added that she had 'lived in the land continuously and uninterrupted for eighteen years until the year 1999' when they went to process title for the land only to learn that a title had been processed in the name of one Anne Wanjiku Muhia and later transferred into the name of her mother, Teresia Muhia. She contended that in 2018 when the respondent initiated the suit leading to this appeal, she and her family had quietly lived on the land for 40 years. She contended that having lived on the land continuously and uninterrupted for more than 12 years, she had acquired title to the land under the doctrine of adverse possession.
6. By way of counterclaim, she sought the following reliefs against Teresia: (i) a declaration that Teresia's title to the suit property had been extinguished by her possession of the land for a period of more than 12 years in terms of Section 17 of the *Limitation of Actions Act*; (ii) a declaration that she had acquired absolute title to the suit property, having been in adverse possession of the suit property for a period of at least 12 years from at least 1993; (iii) an order directing the Land Surveyor-Kiambu to carry out a subdivision of the suit property to 'ascertain the size of the land occupied by her; and (iv) an order directing the Land Registrar to register her as proprietor of the portion occupied by her.
7. During trial, the respondent testified that her mother, Teresia, acquired title to the suit property through succession. She added that their endeavours to obtain vacant possession of the suit property had been in vain, stating that the Area Chief had been indifferent to their complaints. She urged the court to give her vacant possession and eviction orders against the appellant and the interested party.
8. The appellant testified as DW1 and closed her case. She adopted her written statement dated July 7, 2019. Her evidence was that she got married to the late David Njuguna Gitau in January 1967. They were landless. In 1978, her late husband applied to the County Council of Kiambu and he was allotted



the suit property in 1979. They subsequently settled on the suit property in May 1979. They lived on the suit property peacefully from 1979 to 1999. When they went to process title to the suit property in 1999, they learnt that a title relating to the land had been processed in the name of Ann Wanjiku Muhia and the title had subsequently been conveyed to Teresia Nduta Muhia.

9. She added that a legal battle for the land ensued at the Land Disputes Tribunal. The Tribunal made an award which was adopted by the Senior Principal Magistrate Court at Kiambu in Land Case No 55 of 1999 on August 21, 2002. Her husband eventually died in 2005. She added that in 2010, Teresia filed Kiambu CMC Civil Case No 303 of 2010 seeking eviction orders against her. She filed a defence raising the issue of adverse possession and applied for transfer of the suit land to the High Court. The suit was eventually transferred to the High court. It was her further evidence that in 2018, the primary suit was dismissed for want of prosecution. It was her further evidence that she had acquired title to the suit property after having occupied the land uninterrupted and continuously for a period of over 12 years.
10. Upon conclusion of trial, the trial court rendered the impugned Judgment in which, as earlier observed, it declined to consider the issues relating to ownership and adverse possession on the ground that the decree issued in 2002 was still in force and was enforceable, and that it did not have jurisdiction to deal with the question of adverse possession. The trial court nonetheless awarded the respondent the reliefs sought in the primary suit.

Appeal

11. Aggrieved by the Judgment of the trial court, the appellant brought this appeal through a memorandum of appeal dated October 27, 2021. The memorandum of appeal was amended on February 15, 2022. She advanced the following 17 grounds of appeal:
 1. That the learned trial magistrate erred in law and fact by dismissing the appellant's claim of adverse possession over land parcel Kiambaa/Waguthu/613 by holding that the court lacked jurisdiction over the issue of adverse possession when the court was/is a court of competent jurisdiction, presided over by a gazetted magistrate to handle Environment and Land Court matters as per Section 26 of the *Environment and Land Court Act*, No 19 of 2011 and Section 9 of the *Magistrates' Act*, No. 26 of 2015.
 2. That the learned trial magistrate erred in law in failing to hold that Teresia Nduta Muhia's title to land parcel Kiambaa/ Waguthu/613 had been extinguished by effluxion of time in accordance with section 17 of the *Limitation of Actions Act*.
 3. That the learned trial magistrate erred in law in failing to hold and find that the appellant had acquired absolute title to the part of land parcel Kiambaa/Waguthu/613 that she has been in occupation thereof by her adverse possession for a period of more than 12 years. [sic]
 4. That the learned trial magistrate erred in law in failing to find that the execution of a decree issued on the August 21, 2002 by the Senior Principal Magistrate's Court at Kiambu in land case number 55 of 1999 by the respondent 16 years since the decree was issued without extension of time was a nullity and in contravention of section 4(4) of the *Limitation of Actions Act*.
 5. That the learned trial magistrate erred in law in finding that a decree issued on the August 21, 2002 by the Senior Provincial Magistrate's Court at Kiambu in land case number 55 of 1999 was valid and enforceable.
 6. That the learned trial magistrate erred in law in failing to find that the respondent's suit for recovery of land was time-barred in accordance with Section 7 of the *Limitation of Actions Act*.



7. That the learned trial magistrate erred in law in failing to find that the Provincial Land Disputes Appeal Tribunal at Nyeri lacked jurisdiction to determine the question of ownership of land.
8. That the learned trial magistrate erred in law in failing to find that the on the decree issued by the Senior Principal Magistrate's Court at Kiambu in land case number 55 of 1999 adopting the Provincial Land Appeals Tribunal award was null and void ab initio incapable of enforcement the award having been issued by a tribunal that lacked jurisdiction on matters dealing with ownership to land contrary to section 3 of the repealed Land Disputes Tribunal Act.
9. That the learned trial magistrate erred in law in failing to consider the issue of ownership of title and holding that the issue of ownership had been heard and determined thus the court was functus officio yet the question of ownership of title to land parcel Kiambaa/Waguthu/613 had not been heard and determined by a court of competent jurisdiction.
10. That the learned trial magistrate erred in law in failing to consider the appellant's defence that the respondent's title to land parcel Kiambaa/ Waguthu/613 had been acquired irregularly by holding that the question of ownership had been heard and determined by the Provincial Lands Appeal Tribunal at Nyeri and its award adopted by a court of competent jurisdiction and thus the question of ownership of land was functus officio despite the fact that the Provincial Land Appeals Tribunal at Nyeri had no jurisdiction to determine the question of ownership and thus its subsequent orders were null and void ab initio incapable of enforcement by any court of law.
11. That the learned trial magistrate erred in law in failing to hold that the respondent's title to the suit was acquired irregularly.
12. That the learned trial magistrate erred in law in failing to consider the appellant's evidence challenging the respondent's title to land parcel Kiambaa/Waguthu/613 despite the fact that the appellant had challenged the respondent's title to the suit land and the same had not been controverted by the respondent.
13. That the learned trial magistrate erred in law in ordering for a permanent injunction restraining the appellant, her servants, agents, nominees and or any person acting under their authority from entering, encroaching, blocking access from trespassing onto or in any way interfering with the quiet possession of the respondent's suit property Kiambaa/Waguthu/613 in execution of a court decree that was issued in 2002.
14. That the learned trial magistrate erred in law in ordering for the eviction of the appellant herein in execution of a court order that was issued in 2002 without there being an underlying application for extension of time.
15. That the learned trial magistrate erred in law in failing to hold that the respondent's suit for eviction was premature as the respondent had not complied with the mandatory procedure for evictions provided for under the *Land Act* 2012.
16. That the learned trial magistrate erred in law in failing to find that the respondent had failed to prove the time the appellant had trespassed onto land parcel Kiambaa/Waguthu/613.
17. That the learned trial magistrate erred in law and fact in failing to hold that the appellant's right to property over the land parcel Kiambaa/ Waguthu/613 will be infringed by ordering the eviction of the appellant disregarding the undisputed fact that the suit land herein was



allocated to the appellant's husband by the defunct Kiambu County Council in 1986 and that the suit land is the only place of residence that the appellant has had for the last 42 years.'

12. The appellant urged this court to allow the appeal and set aside the order of the trial court and allow the counterclaim of the appellant.

Appellant's Submissions

13. The appeal was canvassed through written submissions dated February 28, 2022 and supplementary written submissions dated June 23, 2022, filed by M/s Waweru Kihara & Company Advocates.
14. On whether the trial court had jurisdiction to determine the question of adverse possession, counsel for the appellant referred the court to Section 7(1)(c) and Section 7(3) of the Magistrate's Court Act 2015; Section 26 of the Environment and Land Curt Act and the Court of Appeal decision in [*Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others \[2017\] eKLR*](#) . Counsel argued that the trial court having been presided over by a duly appointed magistrate seized of pecuniary jurisdiction, it had jurisdiction to determine the question of adverse possession. Counsel relied on the decision of this court (Ohungo J) in [*Patrick Ndegwa Munyua v Benja, min Kiiru Mwangi & another \[2020\] eKLR*](#) where the court held that a magistrate court seized of pecuniary jurisdiction and gazetted to handle environment and land disputes had jurisdiction to determine questions relating to adverse possession.
15. On whether the title deed held by Teresia had been extinguished by the effluxion of time under Section 17 of the [*Limitation of Actions Act*](#), counsel made reference to Sections 13 and 17 of the Limitation of Action Act and submitted that the appellant together with her late husband had occupied the suit property from 1979, adding that when the suit property was registered in the name of Anne Wanjiku Muhia in 1993 and subsequently conveyed to Teresia in 1997, the appellant was in occupation of the suit property. Counsel added that even when Teresia lodged a claim in the Land Disputes Tribunal against the appellant's husband, the appellant remained in possession of the suit property. Counsel argued that the Tribunal did not have jurisdiction to determine questions relating to title to land, hence the claim lodged at the Tribunal was not an action to recover land. Counsel contended that Ann Wanjiku Muhia and Teresia had failed to institute action against the appellant for recovery of the suit property between 1993 and 2010 hence their title had been extinguished upon expiry of 12 years under Sections 7 and 17 of the [*Limitation of Actions Act*](#).
16. On whether the appellant should be registered as the absolute proprietor of the part of the suit property that she occupies, counsel submitted that the appellant demonstrated through evidence that she had been in adverse possession of one half of the suit property for at least 12 years, adding that the interested party occupied the other half. Counsel urged the court to grant a plea for ascertainment of the actual size of the land that is occupied by the appellant and order that she be registered as proprietor of the portion under the doctrine of adverse possession.
17. On whether the decree issued by the Kiambu Senior Principal Magistrate Court in Land Case No 55 of 1999 was still valid and enforceable, counsel referred the court to Section 4(4) of the [*Limitation of Actions Act*](#) and submitted that the decree was no longer valid and enforceable. Counsel submitted that the trial court erred in enforcing the decree issued in 2002.
18. On whether the question of ownership of the suit property had been conclusively determined by a court of competent jurisdiction, counsel for the appellant submitted that the Tribunal did not have jurisdiction to determine questions relating to ownership of the suit property, hence the trial court erred in declaring itself functus officio.



19. On whether the title held by Teresia was irregularly acquired, counsel submitted that Ann Wanjiku Muhia did not acquire the suit property regularly because the suit property had been allotted to the appellant's husband in 1979 and the appellants were in occupation of the suit property all along. Counsel argued that the appellant tendered evidence to prove that indeed the suit property was allotted to her late husband in 1979. Counsel argued that the respondent did not tender evidence on how Ann Wanjiku Muhia acquired the title that was conveyed to Teresia.

Respondent's Submissions

20. The respondent opposed the appeal through written submissions dated May 17, 2022, filed by M/s Njehu Ndirangu & Company Advocates. Counsel for the respondent submitted that the appellant had raised issues that were not the subject of trial in the subordinate court. Counsel submitted that Section 38 of the [Limitation of Actions Act](#) required that a person seeking to be registered as a proprietor of land through adverse possession should apply to the High Court (now the ELC) for orders of adverse possession. It was the position of counsel that Order 37 rule 7 of the [Civil Procedure Rules](#) are coached in mandatory terms and that orders of adverse possession can only be sought by way of an originating summons supported with an affidavit and an extract of the title. Counsel argued that the appellant failed to satisfy the above requirement, hence the trial court was right in declining to exercise jurisdiction over the issue of adverse possession. Counsel added that throughout the trial, the appellant's contention was that what was before the trial court was a case of injunctive reliefs.
21. On the question of jurisdiction of the defunct Land Disputes Tribunals, counsel for the respondent submitted that the dispute in the Tribunal related to the question of occupation of the suit property and did not relate to the question of title to the suit property. Counsel further argued that if indeed the appellant and her late husband had been allotted the suit property, nothing would have been easier than for them to challenge the succession orders that gave rise to the title that is held by Teresia. Counsel added that the title deed held by Teresia following transmission is indefeasible in the absence of proof of illegality or fraud under Section 26 (1) of the [Land Registration Act](#). It was the case of the respondent that the appellant neither pleaded fraud/illegality nor tendered evidence demonstrating fraud/illegality.
22. With regard to the appellant's contention that she had acquired title to the suit property by way of adverse possession and her plea that the land be subdivided, counsel submitted that the appellant's case was contradictory because the appellant had at the same time contended that the land had been allotted to them. Counsel argued that adverse possession orders could not issue over land that the appellant contended was hers all along. Counsel added that the appellant had failed to prove that the suit property had been allotted to them.
23. Counsel further submitted that the evidence relating to litigation and succession proceedings demonstrated that the appellant did not satisfy the threshold for a claim of title under the doctrine of adverse possession. On the contention that the appellant had failed to comply with the provisions of the [Land Act](#) on evictions, counsel submitted that the trial court correctly applied Section 152E of the [Land Act](#) with regard to issuance of notice of eviction. Counsel urged the court to dismiss the appeal.

Analysis and Determination

24. I have read and considered the original record of the trial court; the record in this appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issues that fall for determination in this appeal. Parties did not agree on a common set of issues to be determined in this appeal.



25. Taking into account the grounds of appeal and the parties' respective submissions, the following are the key issues that fall for determination in this appeal: (i) Whether the trial court erred in finding that it lacked jurisdiction to determine the issue of ownership of the suit property; (ii) Whether the trial court erred in finding that it lacked jurisdiction to consider the defence and counterclaim of adverse possession; (iii) Whether the trial court erred in finding that the decree issued in August 2002 in Kiambu SPMC Case No 55 of 1999 was valid and enforceable; (iv) Whether the appellant satisfied the criteria for acquisition of title under the doctrine of adverse possession; (v) Whether the respondent's claim for recovery of land was statute-barred; (vi) Whether the title procured by Ann Wanjiku and transmitted to Teresia was regularly acquired.
26. I will dispose the above issues sequentially in the above order. Before I dispose them, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
27. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of [*Susan Munyi v Kesbar Shiani \(2013\) eKLR*](#) as follows:-
- ' As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.'
28. The above principle was similarly outlined in [*Abok James Odera t/a AJOdera & Associates v John Patrick Machira t/a Machira & Co Advocates \[2013\] eKLR*](#) as follows:
- ' 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-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.'
29. The first issue is whether the trial court erred in finding that it lacked jurisdiction to determine the issue of ownership of the suit property as between the parties to the suit. The trial court fully heard the dispute but declined to pronounce itself on the question as to whether the respondent's title to the suit property had been extinguished as at the time of filing the suit. The trial court rendered itself thus:
- ' The plaintiff herein seeks to execute by way of eviction and also prevent the defence from trespassing the suit land once and for all. What is clear to me is that the suit is basically on execution as there exists a decree. In a rejoinder the 1st defendant challenges propriety of the title to the suit property which in their view ought to be cancelled, they further seek the suit property ought to be surveyed and subdivided to create some room for the both parties and in the alternative the plaintiff's right over land to be considered extinguished by lapse of time in the doctrine of adverse possession.
- It is not in dispute that the suit parcel has a title issued to the plaintiff. It is also not in dispute that the 1st defendant is in occupation of the suit parcel. The evidence placed before me reveals that the issue of ownership was already determined by a tribunal and the same adopted by a Court of parallel jurisdiction. A decree was equally drawn therefrom. I will have to mention at this point that, this court lacks jurisdiction to reopen the issue of ownership for consideration. It therefore leaves me with one issue for determination; whether the orders herein sought have crystallized'



30. In coming to the above conclusion, the trial court took the view that the appellant's suit was res judicata and that there existed a valid and enforceable decree against the two defendants in the suit under determination. Was there evidence of a prior determination of the issue of ownership as between the appellant and the respondent? Was the appellant's defence and counterclaim challenging the respondents title wholly the same as what had been determined before?
31. From a perusal of the record, the only litigation that ever existed between the respondent and the appellant was Kiambu CMC Civil Suit No 303 of 2010 which was transferred to the High Court and subsequently dismissed owing to the respondent's failure to prosecute the case. The case was never determined on merits. The appellant was not a party to the dispute in the Tribunal. Part of the appellant's defence was that the respondent's title had been extinguished under Section 17 of the Limitation of Actions Act. There was no evidence demonstrating that the above issue had previously been heard and determined on merits. There was therefore no proper basis for the trial magistrate's contention that the issue of ownership between the parties to the suit had been heard and determined by a competent court.
32. Suffice to say that if the trial court had a valid reason as to why it felt that the appellant was to be deemed to have been a party to the case in the Tribunal, that reason was not set out in the impugned Judgment.
33. Secondly, it was clear from the pleadings and from the parties' submissions in the Tribunal that a key issue that fell for determination by the trial court was whether under Section 4(4) of the Limitation of Actions Act, a judgment rendered in the year 2002 would be enforceable in 2018 [when the suit was filed] or 2021 [when the impugned judgment was rendered]. This issue was neither considered nor answered.
34. It is clear from the foregoing that there was no proper factual or legal basis for the trial court's finding that there were no triable issues in relation to the title held by the appellant, thereby effectively locking the appellant out of the seat of justice and proceeding to issue the drastic order of eviction without a consideration of her full defence and counterclaim.
35. For the above reasons, I find that the trial court erred in finding that it lacked jurisdiction to determine the issue of ownership as between the parties to the suit. That is my finding on the first issue.
36. The second issue is whether the trial court erred in finding that it lacked jurisdiction to consider the defence and counterclaim of adverse possession. The trial court rendered itself thus:
- ' Last is the extinguishing of the plaintiff's right over the suit land by lapse of time in the doctrine of adverse possession. Section 37 of the Limitation of Actions Act stipulate that application for adverse possession shall be made before the High Court for an order that the applicant be registered as the proprietor of the land. So that jurisdiction being a dictate of the statute, limits this rather humble court in delving into that domain. See Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] eKLR.
- In the circumstances, I proceed to dismiss the counterclaim while enter Judgment in favour of the plaintiff.'
37. What was before the trial court was not an originating summons taken out under Section 38 of the Limitation of Actions Act? What was before the trial court was a defence and counterclaim brought under Sections 7 and 17 of the Limitation of Actions Act which contain a codification of the common law doctrine of adverse possession.



38. Our superior courts have umpteen times stated that where a title holder brings a suit against an adverse possessor, seeking orders of eviction, the adverse possessor is entitled to plead and ventilate the defence or counterclaim of adverse possession in the suit. Indeed, not too long ago, the Court of Appeal made the following pronouncement in *Gulam Mariam Noordin v Julius Charo Karisa, Civil Appeal No 26 of 2015*:

' Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala v Okumu* [1997]LLR 609 (CAK), which, like this appeal, the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co Ltd v Kosgey* [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.'

39. There is nowhere in our laws where a magistrate court duly appointed to adjudicate land disputes and duly seized of pecuniary jurisdiction is precluded against adjudicating a defence or counterclaim of adverse possession raised in a suit filed by way of plaint. A defence or counterclaim of adverse possession is a dispute about title to land and properly falls within the ambit of Section 26(3) of the *Environment and Land Court Act* and Section 9(a)(i) of the *Magistrates' Courts Act*. The trial court's finding to the effect that Section 37 [sic] precluded it from adjudicating the defence and counterclaim of adverse possession was an error because what was before the magistrate court was not an originating summons taken out under Section 38 of the *Limitation of Actions Act*.

40. With the above two findings, it is clear that the Judgment of the trial court cannot stand. It cannot stand because the appellant's defence and counterclaim were neither considered nor determined. It is also clear that the proper thing to do, in the circumstances, is to remit the dispute to the Chief Magistrate Court for fresh trial and determination of all the issues that needed to be determined. In the circumstances, this court will restrain itself against making definitive pronouncements on the other issues that were identified in this appeal because such pronouncements may prejudice the parties when they go for fresh trial.

41. Owing to the fact that the errors culminating in this appeal were committed by the trial court, parties will bear their respective costs of the appeal.

42. In the end, this appeal is allowed in the following terms:

- a. The Judgment rendered by the trial court on September 29, 2021 in Kiambu CMC Environment and Land Case No 48 of 2018 is wholly set aside.
- b. The said suit shall be heard afresh by a different Magistrate.
- c. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 22ND DAY OF MAY 2023

B M EBOSO



JUDGE

In the Presence of: -

Mr Amunyunzu for the Appellants

Court Assistant: Hinga

