



**Kandie v Mogeni & another (Environment and Land Appeal
E005 of 2021) [2023] KEELC 18267 (KLR) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18267 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E005 OF 2021
LA OMOLLO, J
JUNE 19, 2023**

BETWEEN

CHEBII CHEROGONY KANDIE APPELLANT

AND

ZABLON ONDIMU MOGENI 1ST RESPONDENT

JUSTUS BARINGTON NYACHIEO 2ND RESPONDENT

*(Being an appeal arising from the judgment of honorable CM L.
ARIKA delivered on the 19th day of March 2021 in Nakuru
ELC No.287 of 2019 (Formerly Nakuru ELC NO. 172 OF 2017)*

JUDGMENT

Introduction.

1. By the Memorandum of Appeal dated 1st April, 2021, the Appellant appeals against the judgment of Hon. L. Arika delivered on March 19, 2021 in Nakuru CMCC ELC No. 287 of 2019.
2. The grounds of appeal are:
 - a. That the Learned Trial Magistrate erred in law and fact in ordering for a permanent injunction and eviction of the Appellant from land parcel Plot no. Kaptugen Trading Centre/107 in total disregard of clear and undisputed facts that the Appellant is the
 - b. lawful owner and in occupation of Land parcel Plot no. Kaptugen Trading Centre/ 107.
 - c. That the Learned Trial Magistrate erred in law and fact in failing to find that the sale between the 1st respondent and the 2nd respondent was indicated to



have been done before succession of the estate of the late Mogeni Munyoro therefore the 1st respondent lacked locus to engage in the sale of land to the 2nd respondent offending the provisions of sections 45 and 82 of the [Law of Succession Act](#).

- d. That the Learned Trial Magistrate erred in law and fact in failing to consider the lack of locus on the part of the 1st respondent and hence did not consider the principle of *nemo dat quod no (sic) habet* at all and that the resultant sale and transfer was hence illegal.
 - e. That the Learned Trial Magistrate erred in law and fact in sitting as an appellate court to set aside/review/appeal the order of the learned magistrate issued in Civil Case No. 35 of 2008 on October 16, 2008 as they are courts of equal jurisdiction.
 - f. That the Learned Trial Magistrate erred in law and fact when she failed to consider that the decision of Nakuru lands dispute tribunal (claim 35 of 2007) which held in favour of the appellant herein, was appealed against by the 1st defendant and that the appeal was dismissed.
 - g. That the Learned Trial Magistrate erred in law and fact in failing to consider the non-participation of the 1st respondent in the proceedings was tact to avoid liability to the appellant herein and answering to the illegal transfer of the suit parcel to the 2nd respondent herein yet the 1st Respondent was an active Participant in the tribunal.
 - h. That the Learned Trial Magistrate erred in law and fact in failing to find that the decision of the tribunal is still active as no Judicial Review proceedings were preferred by the 1st respondent to quash the said decision in the appellants favour.
 - i. That the Trial Court erred in law and fact in failing to find that the 2nd respondent did not in fact conduct due diligence as required before purchasing the suit parcel as all these issues would have been uncovered.
 - j. That the learned trial court erred in law and fact when she failed to acknowledge the 2nd Respondents own admission that he became aware of the fraud involved in the parcel but chose not act on it and proceeded to plead he was an innocent purchaser for value.
 - k. That the learned trial magistrate misdirected herself in finding merit in the counterclaim and dismissing the appellants claim.
 - l. The appellant seeks that the judgement delivered on March 19, 2021 by the trial court be set aside and the Appeal be allowed.
4. The 2nd respondent also filed an appeal against the judgment of Hon. L. Arika delivered on 19th March, 2021 in Nakuru CMCC ELC No. 287 of 2019 *vide* the Memorandum of Appeal dated April 17, 2021 in ELCA No. 7 of 2021 that was by consent consolidated with the present appeal on September 27, 2022.



5. The grounds of appeal are;
 - a. That the learned trial magistrate erred in law and in fact in holding that the prayer for general damages for trespass fails despite holding that the counterclaim had merit.
 - b. That the learned trial magistrate erred in law and in fact in holding that the prayer for general damages for unlawful interference fails despite holding that the counterclaim has merit.
 - c. That the learned trial magistrate erred in law and in fact in not granting the costs of the suit and counterclaim to the Appellant having held that the 2nd respondent's suit fails and the counterclaim has merit contrary to the principles applicable in awarding costs.
 - d. That the learned trial magistrate erred in law and in fact in failing to consider the pleadings and submissions filed by the Appellant thus arrived at an erroneous conclusion.
6. The 2nd respondent seeks orders that the appeal be allowed and the judgement and decree of the lower court dated March 19, 2021 in so far as it states that the prayer for general damages for trespass fails, prayer for general damages for unlawful interference fails and each party to bear own costs of the suit, be set aside and be substituted with orders awarding him general damages for trespass, general damages for unlawful interference and costs of the main suit and counterclaim in the subordinate court together with costs of the appeal.

Factual Background

7. The suit before the Magistrate's Court was instituted by the Appellant vide a Plaint dated April 24, 2017. He claimed that he was the owner of Plot No. Kaptugen Trading Center/107 and had been allocated the same by Kalenjini Enterprises Limited.
8. The appellant also claimed that he later agreed to sell the suit property to one Zablun Mogeni Munyoro who is deceased and was the father of the 1st respondent. He also averred that the sale did not go through and the father of the 1st respondent died on April 16, 1995.
9. He averred that on July 23, 2015, the late Mogeni Munyoro was allegedly fraudulently registered as the owner of the suit property and yet he was deceased at that time.
10. He sought the following prayers in his plaint;
 - a. A declaration that plot No. Kaptugen Trading Center/107 belongs to the Plaintiff and that the lease certificate in the name of the 2nd Defendant should be cancelled.
 - b. An order that the 2nd Defendant do sign the necessary transfer documents to enable the Plaintiff to be registered as the proprietor of Plot No. Kaptugen Trading Center/107 and in the alternative the Deputy Registrar to sign on his behalf.
 - c. Costs of the suit and interest at court rates.
 - d. Any other or further relief the honorable court may deem fit to grant.



11. The 1st respondent did not enter appearance or file his statement of defence.
12. The 2nd respondent filed his statement of defence and counterclaim dated November 10, 2015. He denied the averments in the Plaint and stated that on March 12, 2012, he purchased land parcel No. Kaptugen Trading Center/107 from the 1st Respondent the administrator of the estate of Mogeni Munyoro (deceased).
13. He also stated upon payment of the full purchase price, the 1st Respondent transferred the suit property to his name and that of his wife.
14. He further stated that in the year 2015 and without any prior notice, the Appellant evicted him and his family in an alleged execution of a decree and orders issued against the 1st Respondent in Nakuru CMCC No 35 of 2008 *Chebii Cherogony Kandie v Zablon Ondimu*.
15. He stated that he was not a party in the said proceedings and that the Appellant has been in possession of the suit property to date.
16. He sought the following orders in his counterclaim;
 - a. A declaration that the 2nd defendant is the lawful owner of all that parcel of land known as Title Number Kaptugen Trading Centre/107.
 - b. A mandatory injunction directing the Plaintiff either by himself, his agents or otherwise howsoever to remove the restriction lodged against Title Number Kaptugen Trading Centre/ 107.
 - c. An eviction order against the Plaintiff, his agents or otherwise howsoever from all that parcel of land known as Title Number Kaptugen Trading Centre/107.
 - d. A permanent injunction restraining the plaintiff either by himself, his agents, or otherwise howsoever from trespassing onto or dealing with all that parcel of land known as Title Number Kaptugen Trading Centre/107 in any manner whatsoever.
 - e. General damages for unlawful interference with the 2nd defendant's property rights pursuant to the provisions of section 75 of the [Land Registration Act, 2012](#).
 - f. General damages for trespass.
 - g. Costs of this suit with interest till payment in full.
 - h. Any other relief that the Honourable court may deem fit to grant.
17. The Learned Trial Magistrate delivered her judgement on March 19, 2021 in the following terms;
 - a. The Plaintiff's suit fails.
 - b. The counterclaim has merit;
 - i. The 2nd Defendant is the lawful owner.
 - ii. The restriction placed be removed.
 - iii. The prayer for eviction succeeds.



- iv. Prayer for permanent injunction succeeds.
 - v. Prayer for general damages for trespass fails.
 - vi. Prayer for general damages for unlawful interference fails.
- c. Each party to bear to bear their own costs of the suit.
18. On September 27, 2022 the Appeal came up for directions and by consent the present appeal was consolidated with ELCA No. E007 of 2021.
19. The present appeal was deemed the lead file while ELCA E007 of 2021 was to be treated as a cross appeal for purposes of hearing the consolidated appeals.
20. It was further agreed, by consent, that the appeal would be disposed off by way of written submissions. On 30th January, 2023 parties confirmed having filed their written submissions and the appeal was reserved for judgement.

SUBMISSIONS.

21. The appellant filed his submissions on 14th October, and the 2nd respondent filed his submissions dated on January 30, 2023.
22. The appellant submits on the various grounds on the face of his memorandum of appeal as set out in the subsequent paragraphs.
23. On grounds one and two, the Appellant relies on section 26 of the [Land Registration Act](#), section 45 of the [Law of Succession Act](#) and order 1 rule 3 of the [Civil Procedure Rules](#).
24. He reiterates that he acquired the suit property by virtue of his membership at Kalenjini Enterprises and sold it to the 1st Respondent's father one Mogeni Monyoro who failed to pay the entire purchase price before he died.
25. The Appellant submits that the 1st Respondent sold the suit property to the 2nd Respondent without conducting succession in his late father's estate. He relies on the cases of [Shaneebal Limited v County Government of Machakos](#) [2018] eKLR and [Daudi Kiptugen v Commissioner of Lands & 4 others](#) [2015] eKLR in support of his arguments.
26. On ground 3 of the Memorandum of Appeal, the Appellant submits that the rule "*nemo dat quod non habet*" which means that no one can give that which one does not have applies to the purported sale of the suit property to the 2nd Respondent to the 1st Respondent.
27. The Appellant relies on the case of [Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & 2 others](#) [2015] eKLR in support of his arguments.
28. On grounds 4, 5 and 7, the Appellant submits that there was a previous matter which was Nakuru CMCC No. 35 of 2008 in which an order was issued that required the 1st Respondent to vacate the suit property.
29. The Appellant also submits that Nakuru CM ELC No. 287 of 2019 from which the present appeal originates from deals with the same property and therefore the second case was res judicata.
30. On ground 6, the appellant submits that the 1st respondent did not enter appearance and therefore his evidence as against him was uncontroverted and so his case should succeed.



31. He relies on the case of *Shaneebal Limited v County Government of Machakos* [2018] eKLR in support of his arguments.
32. On Grounds 8 and 9 the Appellant submits that it was the responsibility of the 2nd Respondent to investigate the root of the title of the suit property before purchasing it.
33. The Appellant also submits that the 2nd respondent chose not to conduct due diligence and so he cannot lose ownership of the suit property because of the 2nd Respondent's indolence.
34. The appellant relies on the cases of *Mohammed Shanaz Butt & another v Kenya Revenue Authority & 2 others* [2020] and *Joseph Muriithi Njeru v Mary Wanjiru Njuguna & another* [2018] eKLR in support of his arguments.
35. On the cross appeal, the Appellant submits that the 2nd Respondent has never lived on the suit property and so he has not suffered any loss to warrant orders for damages. He relies on the case of *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR among other cases in support of his arguments.
36. He concludes his submissions by seeking that the learned trial magistrate's judgement be set aside and his appeal be allowed.
37. The 2nd Respondent in his submissions on grounds 1 and 2 of the Appellant's Memorandum of Appeal relies on section 107(1) and 109 of the *Evidence Act* and submits that during the hearing of the matter at the lower court, the Appellant failed to produce any evidence to show ownership of the suit property while he produced an allotment letter dated May 1, 1991 issued to Mogeni Munyoro c/o Kalenjini Enterprises.
38. He also submits that it was the Appellant's evidence that he had entered into an oral agreement for sale with the 1st Respondent's deceased father which was never reduced into writing.
39. The 2nd Respondent further submits that the 1st Respondent acquired the confirmed grant of representation to the estate of his deceased father before selling the suit property to him and relies on the case of *Jane Kirigo Moses (Administratrix of Estate of Moses Kioi Muturi) & another v Lucy Wanjiru Nyaga (Administratrix of the Estate of Joseph Nyaga Wambiti) & another* [2019] eKLR in support of his arguments.
40. On grounds 3, 8 and 9, the 2nd Respondent relies on the cases of *Republic v The Registrar of Titles, Mombasa & 2 others ex parte Emfil Limited* [2012] eKLR, *Lawrence P. Mukiri v Attorney General & 4 others* [2013] eKLR *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR among other cases and submits that the concept of innocent purchaser for value stands as an exception to the *nemo dat quod non habet* rule.
41. The 2nd Respondent also submits that the Learned Trial Magistrate considered the evidence tendered in support of his counterclaim and found that he had followed all the proper processes in acquiring the title and he was therefore an innocent purchaser for value.
42. On grounds 4, 5 and 7, the 2nd Respondent submits that at the hearing before the trial court, the Appellant admitted that he had instituted a claim at the Nakuru District Land Disputes Tribunal which was claim Number 35 of 2007 against the 1st Respondent who had not obtained a grant of representation in respect of the estate of Mogeni Monyoro (deceased).
43. The 2nd Respondent relies on the case of *Isaya Masira Momanyi v Daniel Omwoyo & another* [2017]eKLR, section 80(2) of the *Law of Succession Act* and submits that a suit commenced without



letters of administration is null and void *ab initio* and cannot be cured by a party subsequently obtaining the letters of administration.

44. The 2nd Respondent submits that the said proceedings before the Land Disputes Tribunal were a nullity as the 1st Respondent did not have the requisite authority to represent the estate of Mogeni Munyoro.
45. The 2nd Respondent also submits that the Nakuru District Land Disputes Tribunal had no jurisdiction to determine the dispute regarding any sale or ownership of the suit property. The 2nd Respondent relies on the case of *Stephen Kibowen v Chief Magistrate's Court Nakuru & 2 others* [2017] eKLR among other cases in support of his arguments.
46. On ground 6, the 2nd respondent reiterates that the proceedings before the tribunal are a nullity as the tribunal did not have jurisdiction to determine the issue of ownership.
47. The 2nd respondent submits on grounds 1, 2 and 4 of the cross appeal and states that he should be awarded general damages for the interference of his rights under section 75 of the *land Registration Act*.
48. The 2nd Respondent relies on the cases of *Milkah Muthoni Wagoco v County Council of Kirinyaga & 2 others* [2017] eKLR, *Ochako Obinchi v Zachary Oyoti Nyamongo* [2018]eKLR among other cases and submits that a figure of kshs. 4,000,000/= is sufficient general damages for trespass.
49. On the issue of costs, the 2nd Respondent relies on the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014]eKLR and submits that the court should vary the decision of the learned trial magistrate and award him costs of the lower court and those of the appeal.

ANALYSIS AND DETERMINATION.

50. After considering the grounds of appeal, it is my view that the following issues arise for determination;
 - a. Whether the Learned Trial Magistrate erred in holding that the 2nd Respondent was the lawful owner of land parcel No. Kaptugen Trading Center /107.
 - b. Whether the learned trial magistrate sat as an Appellate Court with regard to the orders of the Magistrate's Court issued in Civil Case No. 35 of 2008 on October 16, 2008.
 - c. Whether the learned trial magistrate erred in finding that the 2nd Respondent was not entitled to general damages for trespass and unlawful interference together with costs despite holding that the counterclaim had merit.
51. The role of the appellate court was stated as follows by the Court of Appeal in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR where it was held:

“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 allowances in this respect.”
52. The decision in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR also sheds more light on the role of the court in hearing a first appeal. It was held 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 reanalyze 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.”

A. Whether the learned trial magistrate erred in holding that the 2nd Respondent was the lawful owner of land parcel No. Kaptugen Trading Center /107.

53. The Appellant alleges that the trial magistrate erred in holding that the 2nd Respondent was the lawful owner of the suit property.
54. The Appellant’s evidence was that he was a member of Kalenjin Enterprises and was allocated the suit property which he sold to the 1st Respondent’s father one Mogeni Monyori (deceased).
55. It was also the Appellant’s evidence that the late Mogeni Monyoro failed to pay the entire purchase price (Kshs.5000) and so he refunded the amount he had received (Kshs. 2000) and went to the Land Disputes Tribunal seeking to regain possession of the property.
56. The Appellant’s further evidence is that the Tribunal ruled in his favour and the award by the Tribunal was adopted as an order of the court in Nakuru CMCC No. 35 of 2008. It was his further evidence that pursuant to this order, the 1st Respondent was evicted from the suit parcel and he has been in possession adding that no appeal was preferred from the order of the court.
57. His evidence is that he was shocked to learn that the suit parcel had been transferred to the 2nd respondent who is a stranger to him adding that before succession proceedings were commenced, the 1st respondent sold to the 2nd respondent the suit property.
58. During the hearing before the trial court, the Appellant produced the following documents in support of his case:
 - a. Proceedings of the tribunal, decree dated October 16, 2008.
 - b. Order dated February 1, 2011.
 - c. Death certificate.
 - d. Green card for plot No. Kaptugen Trading Center/107
 - e. Agreement to refund money paid.
59. The 2nd Respondent gave evidence that he purchased the suit parcel from the 1st Respondent and that before purchase he was shown an allotment letter which was in the name of the 1st Respondent’s father. His further testimony was that at the time of purchase, succession proceedings were on going and that after they were concluded, the 1st Respondent transferred the suit property to his name and subsequently to the 2nd Respondent’s name after which he took possession.
60. The 2nd Respondent’s evidence is that he was evicted from the suit parcel sometime in the year 2015 and that he also placed a restriction on the suit parcel to protect his interest because he feared that the 1st respondent would sell the parcel to someone else before transferring it to him.
61. The Learned Trial Magistrate in her judgment noted that it was the Appellant’s case that he sold the suit property to the 1st Respondent’s father through an oral agreement.
62. The Learned Trial Magistrate held that since the agreement was never reduced into writing, then the Appellant could not enforce it. The trial Magistrate further held that the Appellant did not produce any documents to show ownership of the suit property such as the register from the Kalenjin Enterprises and so his claim failed.



63. It is trite law that he who alleges must prove. This is set out in section 107 of the [Evidence Act](#). It is as follows;
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove 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.
64. In her judgment, the Learned Magistrate set out facts that were not in dispute. One of them is that the date on which the purported sale of the suit parcel as between the Appellant and the 1st Respondent's father took place is neither stated in the pleadings nor in evidence. Without this evidence it was logical for the Learned Magistrate to draw the deduction that an agreement for the sale of land must be in writing and signed by all parties. This is provided in section 3(3) of the [Law of Contract Act](#). In the absence of such an agreement, which is the foundation of the Appellant's claim, there is no doubt that he failed to discharge his burden.
65. The Learned Magistrate further observed that the plaintiff did not produce any ownership documents adding that the other documents admitted in evidence were not proof of title.
66. The 2nd Respondent produced the following documents in support of his case;
- a. A letter of allotment dated May 31, 1991 for land parcel No. Kaptugen Trading Center Parcel No. 2010.
 - b. A certificate of death for Mogeni Monyoro.
 - c. Letters of administration intestate issued to Zablon Ondimu Mogeni for the estate of Mogeni Monyoro dated May 31, 2012.
 - d. A certificate of confirmation of grant issued to the 1st Respondent with regard to the estate of Mogeni Monyoro dated March 8, 2013.
 - e. A rectification certificate of confirmation of grant issued on October 23, 2014 (which includes the suit property) issued to the 1st Respondent with regard to the estate of Mogeni Monyoro.
 - f. An agreement for sale of land dated March 12, 2012 between the 1st Respondent and the 2nd respondent.
 - g. A certificate of lease issued on April 12, 2016 to the 2nd Respondent and Emma Nyanchama Nyakundi.
67. I agree with the findings of the trial magistrate that the 2nd respondent was able to show the root of his title and the judgement in his favour was therefore merited.
68. Section 24 of the [Land Registration Act](#) provides as follows;
24. Subject to this Act—
 - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and



- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

69. Section 26 of the [Land Registration Act](#) provides as follows;

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original. (Emphasis mine)

70. The court in the case of [Ali Wanje Ziro v Abdulbasit Abeid Said & another](#) [2022] eKLR held as follows;

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

71. An analysis of the law and judicial decisions leads to a conclusion that once a person has been issued with documents of title to land Courts must proceed on the premise that such a person is the absolute and indefeasible owner. Such a person's title shall not be challenged except on the grounds that it was acquired fraudulently, through misrepresentation, illegally, unprocedurally or through a corrupt scheme. Consequently, the Appellant had a legal obligation to prove that the 2nd Respondent, as a registered owner of the suit land, acquired his certificate of lease fraudulently, through misrepresentation, illegally, unprocedurally or through a corrupt scheme and he failed to do so.

72. On account of the foregoing and in answer to the first issue for determination, I find that Learned Trial Magistrate was right in holding that the 2nd Respondent was the lawful owner of land parcel No. Kaptugen Trading Center /107.



B. Whether the learned trial magistrate sat as an appellate court with regard to the orders of the Magistrate’s Court issued in Civil Case No. 35 of 2008 on 16th October, 2008.

73. This question is intended to specifically answers Ground 4 of the Memorandum of Appeal. In order to do so, I must interrogate the legal effect of the documents produced as exhibits. The documents are:
- a. The proceedings of the Nakuru District Lands Tribunal.
 - b. The Decree in Nakuru CMMC No. 25 of 2008.
 - c. The Eviction Order issued pursuant to the said decree in Nakuru CMMC No. 25 of 2008 .
74. The said Decree and ensuing order arose from the adoption of the award of the Nakuru District Lands Tribunal as an order of the court.
75. The Appellant submits that the Learned Trial Magistrate sat as an appellate court with regard to the orders of the Magistrate’s court issued in CMCC No. 35 of 2008 on October 16, 2008.
76. The 2nd respondent on the other hand argues that the proceedings that were commenced by the appellant before the Tribunal, whose determination was adopted by the court in CMCC No. 35 of 2008 against the 1st respondent, were defective as the 1st respondent did not have the *locus standi* to represent the estate of his deceased father.
77. I am of the view that ground 4 of the Memorandum of Appeal is mischievous for the reason that suit subject of this appeal was filed by the Appellant knowing fully well that he had in his possession an Order of the Court which had been issued in respect of the suit parcel.
78. The appellant is precluded from making assertions that the hearing before the trial court was akin to the Learned Magistrate sitting as an appellate court and that the judgement delivered by her has the effect of setting aside, reviewing or appealing the decree and order issued in Nakuru CMMC No. 25 of 2008.
79. The appellant moved the court seeking orders declaring him as owner of the suit parcel. It was incumbent upon him to furnish the court with documents intended to prove his ownership. The learned magistrate rightfully observed at page 8 of the judgment that the documents produced by the Appellant were not ‘ownership document’. These documents that the learned magistrate is referring to are; Tribunal Proceeding, Decree and Order. The Learned Magistrate further observed that excerpts of the register of Kalenjin Enterprises Limited which the Appellant alleged to be a member of were also not produced. Essentially, nothing was produced which would have explained the root of his claim as owner of the suit parcel.
80. The learned trial magistrate held as follows at page 8 of the judgement;
- “I find that the proceedings before the said tribunal were not valid for two reasons. Not only did they deal with the issue of ownership, which is not within their jurisdiction, but they dealt with the 1st Respondent, who had not bought land from the Plaintiff. It was a none starter. I say so humbly, well aware that the findings of the tribunal were adopted as an enforceable decision of the court, and this court cannot purport to sit to review the findings of my colleague.” (Emphasis mine)
81. These expression of views by the learned trial magistrate is in the realm of things stated ‘by the way’ (*obiter dicta*) in the course of writing judgments. I am doubtful that they were intended as a finding. In any event, the trial court at page 6 of the judgement listed the issues for determination which does not include the question of legality or Validity of the decision of the Nakuru Land Dispute



Tribunal. In my view the Learned Magistrate was stating a factual and legal position albeit at no one's invitation and unfortunately to much discomfort of the Appellant.

. Whether the learned trial magistrate erred in finding that the 2nd Respondent was not entitled to general damages for trespass and unlawful interference together with costs despite holding that the counterclaim had merit.

82. This question seeks to make a determination on the cross-appeal filed by the 2nd Respondent.
83. I am reminded that my duties as a court sitting on a first appeal. They are follows:
- (a) I have a duty to reconsider and re-evaluate the evidence on record and draw my own conclusions.
 - (b) In reconsidering and re-evaluating the evidence I must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it.
 - (c) That it is not open to me to review the findings of a trial court simply because I would have reached different results if it were me hearing the matter for the first time.
84. The 2nd Respondent argues that the Trial Magistrate erred in finding that he was not entitled to general damages for trespass and unlawful interference together with costs despite holding that the counterclaim had merit.
85. The Appellant argues that the 2nd Respondent was not entitled to orders of general damages for trespass and unlawful interference because he has never been in occupation of the suit property.
86. The Court of Appeal in *Catholic Diocese of Kisumu v. Sophia Achieng Tete* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:
- “It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”
87. The court further in the case of *Philip Aluchi v. Crispinus Ngayo* [2014] eKLR held as follows;
- “...The plaintiff is entitled to General Damages for trespass. The issue which arises is as to what is the measure of such Damage. It has been held that the measure of Damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less...The Plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess General Damages for trespass...”



88. In *Willesden Investment Limited v Kenya Hotel Properties Limited* HCC No. 367 of 2000 it was held as follows;

“The court held that there is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstance in each case”. (Emphasis mine)

89. An analysis of the decisions set out above shows that a Judicial Officer in deciding whether or not to award damages shall take into consideration facts and circumstances of each case. It is my view that the Learned Trial Magistrate exercised her discretion in not awarding general damages. At page 10 of her judgment she expressly states as follows;

‘I find that this prayer has no merit. The plaintiff genuinely believed the suit premise is his and did what he thought in that belief. This claim fails. The claim can only rise should the plaintiff continue to interfere with the 2nd Defendant’s occupation and/ or trespass, following the prayers granted in this judgment.’

90. On the issue of costs, *Halsbury’s Laws of England*, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes that:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”

91. Further section 27 (1) of the *Civil Procedure Act* stipulates as follows;

“

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid: (Emphasis mine) and the fact that that court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.

Provided that the costs of any action, cause or other matter shall follow the event unless the court or judge shall for good reasons otherwise order.”

92. Therefore, the award of costs is at the discretion of the court. The Learned magistrate exercised that discretion and found that it was appropriate that each party bears its own cost. It is my view that the 2nd Respondent has not laid a basis for the court to find that the Learned Magistrate failed to exercise her discretion judiciously.

Disposition.

93. In the result, I find that both the appeal and the cross-appeal lack merit and are hereby dismissed with no orders as to cost.

94. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19TH DAY OF JUNE 2023.

L. A. OMOLLO

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -

Miss Ndeda for Appellant

No appearance for 1st Respondent

Mr. Mugire for Konosi for 2nd Respondent

Court Assistant; Ms. Monica Wanjohi.

