



**Kivunzyo v Musoro (Environment and Land Appeal 53 of 2022)  
[2023] KEELC 20208 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20208 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL 53 OF 2022  
LL NAIKUNI, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**DAVID NYAMAI KIVUNZYO ..... APPELLANT**

**AND**

**MRS KIRONGO MUSORO ..... RESPONDENT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgment herein pertains to an appeal lodged before this Honorable Court by David Nyamai Kivunzyo – the Appellant herein. The appeal was filed through a Memorandum of Appeal dated 15<sup>th</sup> March, 2018 and subsequently a 65 Pages Record of Appeal dated 11<sup>th</sup> August, 2021 respectively against Mrs. Kirongo Musoro (a duly appointed Legal Administrator the Estate of Michael Kirongo Musoro (Deceased), the Respondent herein.
2. The Appeal emanates from a Judgment delivered and dated 13<sup>th</sup> February, 2018 by the Principal Magistrate Hon. Nyakweba (as he was then) at Mombasa in the Civil Case –ELC. Case No. 842 of 2013. Based on the Affidavit of Service on record, the Record of Appeal was properly served upon the Respondent.
3. On 9<sup>th</sup> March, 2023 the parties having fully complied with court’s direction, the matter was slated for highlighting of the written submissions which the parties discharged effectively. In a nutshell, the appeal revolves around the manner in which the lower court from its own orders herein interpreted the law on the manner the parties ought to have instituted their suits before it -m either by way of Plaint or Originating Summons under the provision of Order 37 of the Civil Procedure Rules, 2010 as seen here below.



## II. The Appellant's case.

4. From the filed Memorandum of Appeal, the Appellant averred as follows:-
  - a. That the Learned Principal Magistrates erred in law and in fact by holding that the pleadings herein are fatally defective.
  - b. That the Learned Principal Magistrates erred in law and in fact by failing to appreciate that there were contested issues and the suit was properly before the court.
  - c. That the Learned Principal Magistrates erred in law and in fact by striking out the pleadings after fully hearing all the parties.
  - d. That the Learned Principal Magistrates erred in law and in fact by moving himself suo moto in dismissing the Appellants suit.
  - e. That the Learned Principal Magistrates erred in law and in fact by failing to consider the submission of the parties.
5. The Appellant prayed:-
  - a. That this Appeal be allowed with costs and the Order striking out the pleadings be varied and substituted by an order allowing the Plaintiff's case.
  - b. That alternatively the suit be submitted for hearing before another court other than the impugned trial Magistrate.
6. From the filed pleadings, the Appellant informed this Honorable Court that through a Plaint dated 23<sup>rd</sup> February, 2013, the Appellant sought the following orders;
  - a. A declaration that the Plaintiff is the owner of parcel of land measuring 48 feet by 38 feet on Plot No.2877 SHANZU.
  - b. An Order of specific performance directed at the Defendant to transfer the other half of plot No.2877 as per the agreement duly executed between him and the deceased MICHAEL KIRONGO MUSORO.
  - c. An order of permanent injunction restraining the Defendant by herself, her agent and /or assignee from interfering with the parcel of land measuring 48 feet by 38 feet occupied by the Plaintiff on plot No.2877.
  - d. Costs of this suit
  - e. Interest on (a) (b) and (c) above.
  - f. Any other relief.
7. From the filed Plaint, the Plaintiff claimed to enforce a contract of purchase of immovable property against the Legal Administrator of the vendor's estate. He could only obtain the prayers he was seeking by taking out originating summons in the manner aforesaid and not by way of Plaint. Similarly, the Defendant who never disputed the capacity under which she was sued could not equally sustain her Counter - Claim unless done in a similar manner.
8. According to the Learned Magistrate the pleadings were fatally defective and he struck them out with costs to the Defendant.



### III. The Submissions

9. On 9<sup>th</sup> March, 2023, as stated the Record of Appeal was admitted and directions given specifically in the presence of all the parties. The Honorable Court directed that the said appeal be disposed of by way of written submissions with given stringent time lines. Pursuant to that the parties herein fully complied, and on 30<sup>th</sup> May, 2023 all the Counsels – Mr. B.W Kenzi and Mr. Akanga Advocates were granted ample opportunity to highlight their written submissions a duty they effectively and ably executed, with great diligence, devotion dedication and resilience accordingly. Thereafter, Judgment was reserved on notice by this Honourable Court.

#### A. Written submission by the Appellant

10. On 31<sup>st</sup> May, 2022, the Learned Counsel for the Appellant, the law firm of Messrs. B. W. Kenzi & Company Advocates filed their written submissions dated 23<sup>rd</sup> May, 2022. Mr. Kenzi Advocate commenced his submissions by providing this Honorable court with a brief background of this case. He submitted that the Appeal before the Honourable Court was the one dated 15<sup>th</sup> March 2018. It was an Appeal from the Judgement of The Principal Magistrate H. Nyakweba delivered on 13<sup>th</sup> February 2018.
11. The Learned Counsel stated that the background of the appeal was that by a filed Plaintiff dated 23<sup>rd</sup> February 2013 the Appellant (as the Plaintiff) sought the following orders;
- a. A declaration that the Plaintiff is the owner of parcel of land measuring 48ft by 38ft on Plot No.2877 SHANZU.
  - b. An Order of specific performance directed at the defendant to transfer the other half of plot No.2877 as per the agreement with the deceased MICHAEL KIRONGO MUSORO.
  - c. An order of permanent injunction restraining th defendant by herself, her agent and /or assignee from interfering with the parcel of land measuring 48ft by 38ft occupied by the plaintiff on plot No.2877.
  - d. Costs of this suit
  - e. Interest on (a) (b) and (c) above.
  - f. Any other relief.
12. The said filed Plaintiff was found on pages 4 - 6 of the Record of Appeal. Together with the Plaintiff, the Plaintiff filed a list and copies of documents in support of his claim as evidenced from pages 8 to 16 of the record of appeal. Further, he filed his written witness statement. The Defendant also filed a defence, witness statement which were found from pages 19 to 2 of the record of appeal. Subsequently, the Plaintiff filed a reply to defence and defence to Counter - Claim at page 26 of the record of appeal. The case went through pre-trials and the suit was set down for full hearing. The Plaintiff tendered his evidence in chief, was cross-examined and eventually closed his case. Likewise, the Defendant also gave evidence and called One witness and closed her case.
13. According to the Learned Counsel, the full proceedings of the matter were at pages 29 to 51 of the record. The parties then filed their written submissions which are at Pages 52 to 60 of the record of appeal. After all these processes, the Magistrate set down the matter for delivery of Judgment accordingly. The Magistrate in the Judgment analyzed the case and concluded the case by striking out the pleadings – both the Plaintiff and the Counter – Claim altogether.



14. Hence and in a nutshell, the Learned Counsel submitted that the above was the Judgment which the Appellant was appealing against. He wished to go by the Grounds of Appeal as under. The Memorandum of Appeal was found in pages 2 & 3 of the Record of Appeal.
15. On the issue of whether the Learned Principal Magistrate erred in law and in fact by holding that the pleadings herein were fatally defective. It was the contention by Learned Counsel that the pleadings are brought by way of a Plaint. The Magistrate held that the same should have been brought through filing of an Originating summons as stipulated under the provision of Order 37 Rules 1 (f) and 3 of Civil Procedure Rules, 2010 which he entirely relied on while arriving at his final conclusion and findings. Order 37 provides.
- “ 1. ....
2. ....
3. A Vendor or purchaser of immovable property or their representative MAY, at any time or times take out an Originating summons returnable before a Judge sitting in Chambers, for the determination of any question which may arise in respect of any requisitions or objections, or for any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract.”
16. The Learned Counsel argued that the operative word here is “MAY”. This clearly gives the Plaintiff the discretion to either ventilate his case by way of Plaint or Originating Summons. The Magistrate therefore on the face of it misapprehended the provisions of Order 37 Rule 3 of the Civil Procedure Rules, 2010. Furthermore, the Leaned Counsel argued that it was the existence of the contract and its validity that were being disputed.
17. On the ground that the Learned Principal Magistrate erred in law and in fact by failing to appreciate that there were contested issues and the suit was properly before the court, the Learned Counsel asserted that it had been held that Originating Summons could only be taken out in a straight forward matter for easy determinations by the court. According to him, the Summons could not be raised where there were contested issues. To him, in cases whereby the issues had been found to be contested the courts always gave direction for them to be dealt with as if they were commenced by way of Plaint. In the present case there were contested issues. To prove this, the suit was strenuously defended with the defence calling two witnesses. The issues raised by the Plaintiff were denied by the defence especially whether he had purchased the land at all and which land he had purchased.
18. To buttress his point, the Learned Counsel relied on the case of “ELC Civil Case No. 77 of 2014 (O.S.) Malindi Cyril L. Haroo – Versus - Sonja Karen Anderson” and quoted in the case of “Kibuthi – Versus - Kibuthi (1983) KLR 62” in which it was held that Originating Summons procedure was intended to enable simple matters be settled by the court without the expense of bringing an action in the usual way. The facts as pleaded by the Plaintiff and the orders sought were not straight forward for determination without calling evidence. The Learned Counsel urged the court to fault the Magistrate on that.
19. On whether the Learned Principal Magistrate erred in law and in fact by striking out the pleadings after fully hearing all the parties, the Learned Counsel submitted that as the record bears witness the Magistrate read pleadings, did pre-trials, heard the parties and took their evidence and without warning proceeded to conclude the procedure used to bring the case was wrong. This went against the Overriding objective of the law as provided under the provision of Section 1A & B of The Civil



*Procedure Act*, Cap. 21. It also offended the provisions of Article 159 of *the Constitution* of Kenya, 2010 which provides that Justice shall be dispensed without undue regard to technicalities. It was the Learned Counsel's submission that the Judgement of the Magistrate should be set aside.

20. On whether the Learned Principal Magistrate erred in law and in- fact by moving himself "Suo moto" in dismissing the Appellant's suit, it was the Learned Counsel's argument that as indicated earlier, the issue of the procedure to be used was raised on its own motion by the Magistrate for the 1<sup>st</sup> time in the Judgement. All through the trial the Magistrate never pointed out to the parties that, ideally, he had no jurisdiction in view of the procedure used. This offended the very basic principle of Natural Justice that a party should not be condemned unheard. The Magistrate never indicated to the parties that he had no jurisdiction and get their view. As pointed out in ground 1, Order 37 (3) used the word "MAY" and does not make it Mandatory for a party to approach the court vide an Originating summons in the circumstance of this case.
21. The Learned Counsel argued that by moving himself "Suo moto" while writing the Judgement, the Magistrate closed all the avenues of the parties to ventilate on the issue of jurisdiction.
22. On whether the Learned Principal Magistrate erred in law and in fact by failing to consider the submissions of the parties, the Learned Counsel submitted that the submissions clearly showed the contentious issue in the suit. The Magistrate never bothered to consider them.
23. In conclusion, the Learned Counsel urged this Honorable Court to allow the Appeal herein. That the order striking out the pleadings be varied and substituted by an order allowing the Appellants case with costs. Alternatively, he urged the Court to have the suit be held to be competent and heard before another Magistrate.

#### **IV. The Issues for Determination.**

24. I have had a chance to critically assess all the pleadings filed in this Appeal being the 65 Pages Record of Appeal and its contents, the Memorandum of Appeal by the Appellant, the written submissions, the Plethora of cited authorities by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
25. For the Honorable Court to be in a proper position to arrive at an informed, plausible, just, fair and reasonable decision from the filed Appeal by the Appellant herein, the Honorable Court has condensed the subject matter into the following three (3) salient issues for its determination. These are:-
  - a. Whether the filed appeal through the filed Memorandum of Appeal dated 15<sup>th</sup> March, 2018 by the Appellant being aggrieved by the decision/Judgment delivered by the Lower Court on 13<sup>th</sup> February, 2018 has any merit whatsoever.
  - b. Whether the parties are entitled to the relief sought from the filed Appeal.
  - c. Who will bear the costs of the Appeal?

#### **V. Analysis and Determination**

**Issue No. (a) Whether the filed appeal through the filed Memorandum of Appeal dated 15<sup>th</sup> March, 2018 by the Appellant being aggrieved by the decision/Judgment delivered by the lower court on 13<sup>th</sup> February, 2018 has any merit whatsoever.**

26. Before embarking on the issues for analysis under this sub-heading as indicated earlier in the Judgement the Honorable Court in a preamble form the court makes two assertions. First on the re - evaluation



and analysis of the evidence from trial court and secondly the brief facts of this case. To begin with, while dealing with all appeals emanating from the decision by the trial Courts, as a first appellate Court it is guided and informed by the principles summarized in myriad of decisions in particular that of: - “Selle & Another – Versus- Associated Motor Boat Co. Limited & Others (1968) E.A. 2123” at Page 126 as:-

“Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make allowance in that respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

27. 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 thing 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....”

#### **Brief Facts:**

28. Based on the above legal reasoning, it is imperative that before the Honorable Court embarks on the analysis under this Sub – heading, that it extrapolates on the facts of the case briefly. From the filed pleadings, at all material times to this suit the Plaintiff was the owner of Plot no. 2877. On or about the 8<sup>th</sup> December 1999 the Plaintiff purchased part of The plot no.2877 measuring 48ft by 38ft. From the owner MICHAEL KIRONGO MUSORO (deceased). The Plaintiff averred that the sale agreement indicated plot no 2876 while in reality the plot was 2877 as it can be confirmed on the ground. And during the lie time of MICHAEL KIRONGO MUSORO and with the full knowledge of the administrator herein he did substantial development on the plot by construction of rental houses. The Plaintiff averred that they had entered into a sale agreement with the deceased for him to buy the rest of the Plot no. 2877 and had paid a deposit of 10%. The Defendant with the aid of area Assistant Chief were harassing him to vacate his property by insinuating that he was a trespasser on Plot no. 2877 while they were fully aware, he purchased the same. The Defendant had refused to finalize the sale of the 2<sup>nd</sup> half of Plot no. 2877 to the Plaintiff which he had paid 10% to the deceased prior to his demise. For this, he sought for specific performance. Despite demand made and notice of intention to sue duly given the Defendant had failed and/or refused to admit liability thus necessitating this suit.
29. The Defendant responded to the Plaintiff’s claim and denied the contents and put the Plaintiff to strict proof. From her filed Counter – Claim, the Defendant affirmed the averments set out in Paragraphs 1 to 7 the Defendant Counter - Claims against the Plaintiff for vacant possession and damages for trespass.



30. On 13<sup>th</sup> February, 2018 having heard the parties on this suit the trial Court rendered its Judgment as follows:-

“From the Plaint, the Plaintiff claims to enforce a contract of purchase of immovable property against the administrator of the vendor’s estate. He can only obtain the prayers he is seeking by taking out originating summons in the manner aforesaid and not by way of Plaint. Similarly, the defendant who did not dispute the capacity under which she is sued cannot equally sustain her counterclaim unless done in a similar manner. So without belabouring much on the point, the pleadings as drawn are fatally defective and the orders sought cannot be granted. The same are an abuse of the process of the court and they are hereby struck out and dismissed. Each party to bear own costs.”

31. It’s from the foregoing Judgment that the Appellant being aggrieved by the said decision by the trial Court that decided to prefer the Appeal before this Honorable Court. The Court has deliberately re – produce the excerpt of the Judgment as it shall be referring to it extensively at a later of this Judgement.

32. Now turning to the issues for the analysis of this sub - heading. From the materials and records of appeal, it is my view that clearly the main borne of contention herein are two prongs: -

- a. Whether the Learned trial court and/or Magistrate erred in law and fact in holding that the pleadings herein are fatally defective;
- b. Whether the Learned trial court erred in law and in fact by failing to appreciate that there were contested issues and the suit was properly before the court; and
- c. Whether the Learned Magistrate/trial court erred in law and in fact by striking out the pleadings after fully hearing all the parties.

33. Be that as it may, this being a first appeal, the duty of a first appellate court was captured by the Court of Appeal in “John Teleyio Ole Sawoyo – Versus - David Omwenga Maobe [2013] eKLR” thus:

“This being a first appeal we have the duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyse the evidence afresh, re-evaluate it and arrive at our own independent conclusion but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same.”

34. Still on the duty of the first appellate Court, Hancox JA (as he then was), stated in “Ephantus Mwangi & another -Versus - Duncan Mwangi Wambugu [1982-88] 1KAR 278” at page 292, as follows:

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did.”

35. The Court went ahead and stated that:

“The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do so if (a) it appeared that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that the impression based on demeanour of material witnesses was inconsistent with evidence in the case generally.”



36. I also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (See “Ephantus Mwangi & Another – Versus - Duncan Mwangi Wambugu [1982-88] 1 KAR 278”).
37. From the record, the Appellant refers the Honourable Court to the receipts for the payment of rates which indicate that the property is owned by the Respondent’s deceased husband. I have also had the pleasure to peruse the sale agreement duly executed between the deceased and the Appellant and it is clear that the sale was for Plot No. I/MN/2876 and not Plot no. I/MN/2877. In his Complaint, the Plaintiff sought an order for specific performance and an order for permanent injunction restraining the Defendant from interfering with the parcel of land measuring 48ft by 38ft occupied by the Plaintiff on plot No.2877.
38. The provision of Sections 107, 108 and 109 of the *Evidence Act*, Cap 80 Cap of the Laws of Kenya make provision as to who bears the burden of proof and provide as follows:-
- “ 107. Burden of proof
- (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. Incidence of burden
- 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.
109. Proof of particular fact
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
39. The Plaintiff stated that upon purchase of Plot 2877 he made substantial developments on the plot and build a house which he had let to tenants. The Plaintiff averred that when they entered into the sale agreement, the Plot had been shown as Plot No. 2876 and not Plot No. 2877. The vendor Mr. Kirongo Musoro died in the year 2003. It was not until the year 2012 when the Defendant (Deceased’s wife) who is the widow and duly appointed legal Administrator of the Estate of Kirongo Musoro started to claim that the Plaintiff (Appellant) was a trespasser and hence the suit herein. In his evidence the Appellant produced two sale agreements, one was produced and marked as Plaintiff Exhibit - 1 and the other dated 13<sup>th</sup> February, 2010 was marked as Plaintiff Exhibit 2. Both agreements clearly show that the Plaintiff purchased parcel land measuring 48 ft by 38 ft from the deceased KIRONGO MUSORO. There is evidence of payment through receipts produced as exhibit No. 3.
40. From the pleadings especially the Complaint, the Plaintiff sued the Defendant as the administrator of the Estate of Michael Kirongo Musoro on the basis of a contract to buy plot No.2877. This position draws my attention to the provisions of Order 37 Rules 1 (f) and 3 CPR, 2010 which provide as follows:
- “ 1. The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person



claiming to be interested in the relief sought as creditor, devisee, legatee, heir or legal representative of the deceased person or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment or otherwise, under any such creditor or other person as aforesaid, may take out as of course an originating summons returnable kind following as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust of any of the following questions:

f) the approval of sale, purchase, compromise or other transaction;

2. ....

3. A vendor or purchaser of immovable property or their representatives may, at any time or times take out an Originating Summons returnable before a judge sitting in Chambers, for the determination of any question which may arise in respect of any requisitions or objections, or for any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract). [Underlining mine].

41. The Honourable Court is compelled to deliberate slightly more on the issue of the commencement of suits and also the legal rationale under Order 37 of the Civil Procedure Rules, 2010 as that formed the basis and substratum upon which the trial Court arrived at its conclusion and hence the basis of this appeal. The provision of Section 2 of the *Civil Procedure Act*, cap. 21 defines “Suit” to mean all civil proceedings commenced in any manner prescribed.

“Prescribed” under Section 2 means prescribed by Rules. “Rules” means rules and forms made by the Rules Committee to regulate the procedure of Courts.

While the provision of Section 3 of the *Civil Procedure Act*, states that:- “In the absence of any specific provisions to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred or any special form or procedure prescribed, by or under any other law for the time being in force”

Section 19 of the *Civil Procedure Act*, Cap. 21 states:-

“Every Suit shall be instituted in such manner as may be prescribed by Rules”. Clearly, it will be observed that this provision of the law, does not pretend that the Civil procedure Rules have a monopoly on how suits should be instituted. It provides that suits may be instituted in the manner prescribed by rules. Based on the above, it is an indication that there are several ways upon which any civil proceedings may be commenced. These include Petitions, originating summons or Plaint.

42. With regard to the legal basis of Order 37 of the Civil Procedure Rules, 2010. Suits brought under this provision are of special nature and straight forward ones. For instance, claim of land Adverse possessions, removal of caveat or caution among others. I fully concur with the submissions by the Learned Counsel for the Appellant to the effect that the operative word here is “MAY”. It means the rule is not cast in stone. This clearly gives the Plaintiff the discretion to either ventilate his case by way of Plaint or Originating Summons. Therefore, the trial Court on the face of it misapprehended the provisions of Order 37 Rule 3 of the Civil Procedure Rules, 2010. Furthermore, there was existence



of the contract and its validity that were being disputed. Additionally, there were contested issues and the suit was properly before the court and that Originating Summons could only be taken out in a straight forward matter for easy determinations by the court. The Summons could not be raised where there were contested issues. To him, in cases whereby the issues had been found to be contested the courts always gave direction for them to be dealt with as if they were commenced by way of Plaint. In the present case there were contested issues. To prove this, the suit was strenuously defended with the defence calling two witnesses. The issues raised by the Plaintiff were denied by the defence especially whether he had purchased the land at all and which land he had purchased. Furthermore, the provision of Order 37 Rules 11, 16 and 18 on directions, an originating summons is converted into a Plaint in the long run.

43. I further concur with the Learned Counsel for the Appellant that the Learned Principal Magistrate erred in law and in fact by striking out the pleadings after fully hearing all the parties, From the record, the Magistrate read pleadings, did pre-trials, heard the parties and took their evidence and without warning proceeded to conclude the procedure used to bring the case was wrong. This went against the Overriding objective of the law as provided under the provision of Section 1A & B of The *Civil Procedure Act*, Cap. 21. It also offended the provisions of Article 159 of *the Constitution* of Kenya, 2010 which provides that Justice shall be dispensed without undue regard to technicalities. It was the Learned Counsel's submission that the Judgement of the Magistrate should be set aside.
44. I have further noted that the Learned Principal Magistrate erred in law and in- fact by moving himself "Suo moto" in dismissing the Appellant's suit, as all through the trial the Magistrate never pointed out to the parties that, ideally, he had no jurisdiction in view of the procedure used. This offended the very basic principle of Natural Justice that a party should not be condemned unheard.
45. I have taken note that that the Plaintiff claimed specific performance of a alleged contract between him and the deceased which was not part of the annexures to the Plaint. It is evidence from the record on the trial court file that the Plaintiff was not seeking land adverse possession but rather special performance of a contract which he claims that the same occurred between him and the deceased and that the Respondent herein was aware of. For these reasons, the appeal must succeed.

#### **ISSUE No. (b) Whether the parties are entitled to the relief sought from the filed Appeal.**

46. Under this sub-heading the court has already noted and concluded that the lower court delivered a judgment on 13<sup>th</sup> February, 2018. All the parties were fully aware of these orders as they were informed by their Advocates who were present in court all along during the proceedings and the Honourable Court holds the opinion that the facts of these pleadings have not been conclusively determined and that the Learned Principal Magistrate deduced the suit to one of adverse possession when in real sense the Appellant herein in the Trial Court was seeing special performance of a sale agreement between him and the deceased.
47. The guiding principle of the overriding objective is that the Court should do justice to the parties before it and their interests must be put on scales. I find that, it is only fair to make orders with the Appellant in mind as he contended the ownership of the suit property not just by possessing but as the legal beneficial proprietor and trespass.

#### **Issue No (c) Who will bear the costs of the Appeal?**

48. It is now well established that the issue of Costs is at the discretion of Courts. Costs mean the award that a party is granted at the conclusion of any process, legal action or proceeding in any litigation. The proviso of the provision of Section 27(1) of the *Civil Procedure Act*, Cap 21 holds that costs



follow the events (See the Court of Appeal cases of “Cecilia Karuru Ngayu – Versus – Barclays Bank of Kenya & Another [2016] eKLR while quoting with approval the case of “Republic -Versus – Rosemary Wairimu Munene ex – parte Applicant – Versus – Ihururu Dairy Farmers Co- operative Society Limited (2014) eKLR; and Supreme Court case of “Jasbir Rai Singh – Versus – Tarchalan Singh (2014) eKLR held thus:-

“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 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.”

49. In the instant case, taking that the matter is still to proceed re-trial before the Subordinate Court, the appeal has merit with costs to the Appellant.

#### **V. Conclusion and Disposition.**

50. The upshot of the foregoing, and having conducted an in-depth analysis of the framed issues herein, the Honorable Court finds that the Appeal by the Appellant has merit to a certain extent. Accordingly, and for avoidance of any doubts, the Honorable Court makes the following orders for disposal thereof:-

- a. That the appeal herein be and is hereby allowed by setting aside the Judgment dated 13<sup>th</sup> February, 2018 and subsequent orders delivered by Trial Court – Hon Nyakweba (PM as he was then).
- b. That there be an order for re – trial to be heard a fresh before the Trial Court or another Court of equal jurisdiction.
- c. That the matter to be mentioned before the Trial Court or a Court of equal jurisdiction to it on 24<sup>th</sup> October, 2023 for compliance of this orders and/or further directions.
- d. That the costs of the appeal to be awarded to Appellant.

It is so ordered accordingly

**JUDGEMENT DELIEVERD THOUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2023.**

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**HON. MR. JUSTICE L.L. NAIKUNI (JUDGE)**

**ENVIRONMENT AND LAND COURT AT**

**MOMBASA**

Judgement delivered in the presence of:-

- a. M/s Yumnah Hassan, the Court Assistant;
- b. M/s. Wambua Advocate holding brief for Mr. B. W Kenzi Advocate for the Appellant.
- c. No appearance for the Respondent.

