Joseph & another v Ndoro (Suing as the Legal Representative of the Estate of Dr. A.N Njuguna Ndoro - Deceased) & another (Environment and Land Appeal 3 of 2022) [2023] KEELC 20982 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20982 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL 3 OF 2022

FM NJOROGE, J

OCTOBER 26, 2023

BETWEEN

LUCY KAMAU JOSEPH ..... 1ST APPELLANT

JOSEPH MAINA MAGUTA ..... 2ND APPELLANT

AND

JOYCE MBAIRE NDORO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DR. A.N NJUGUNA NDORO - DECEASED) ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU ..... 2ND RESPONDENT

(Being an appeal against the judgement and decree of Hon. Orenge K.I., PM delivered on 2/02/2022 in CMCC ELC No. 118 of 2014)

JUDGMENT

1. This is a judgement in respect of an appeal brought by way of a Memorandum of Appeal dated 1/03/2022 which was amended on 02/02/2023. It impugns the judgement and decree of Hon. Orenge K.I delivered on 02/02/2022 in CMCC ELC No. 118 of 2014. The appellant sought that the appeal be allowed and the said judgement be set aside or varied.

2. The background of the appeal is that on 06/06/2014 the 1st respondent filed the amended plaint dated 5/06/2014 where she sought the following prayers:

    a. That the plaintiff is the lawful owner of Plot No. 147L, 147M and 147N Bahati Trading Center which have been given new Plot No's 239, 240 and 241 Commercial – Bahati Trading Center.

    b. That the 1st defendant do rectify their records to accord with order (a) above.

c. Costs of this suit.

d. Any other or further relief that this honorable court may deem fit and just to grant.

3. In the amended plaint it was averred that the plaintiff was the lawful allottee of plot number 147 – Bahati Trading Centre, having been allocated the same on 22/1/1983, which he later had subdivided into 13 sub-plots numbered 147A-147L for which he was later issued with allocation letters bearing the new numbers; after that he sold all except three: 147L, 147M and 147N which were allegedly later baptized plots nos 239,240 and 241 Commercial - Bahati Trading Centre by reason of collusion and fraud on the defendants' part and registered in the names of the 2nd, 3rd and 4th defendants and purported new letters of allotment issued to the new allottees by the 1st defendant. The 2nd 3rd and 4th defendants then trespassed onto the suit properties claiming right to use and occupation thereof.

4. The 2nd respondent filed a statement of defence dated 04/08/2014 on 06/08/2014 where it denied the 1st respondent's claim and simply and without any elaboration stated that the suit premises are a "road reserved (sic) for a parking lane/planted strip" that was not capable of being allocated to anyone. The 2nd respondent then sought that the 1st respondent's suit be dismissed with costs.

5. The two appellants, who had been named the 3rd and 4th defendants respectively in the suit, filed their statement of defence dated 04/08/2014 and denied the averments of fraud and collusion in the 1st respondent's plaint and stated that they were allocated plot No's 240 and 241 vide letters of allotment dated 31/01/2011 and that they had been paying land rates for the said properties to the 2nd respondent. The appellants then sought that the 1st respondent's suit be dismissed.

6. After hearing the evidence of all the parties, the learned trial magistrate delivered his judgement on 02/02/2022. The trial magistrate then allowed the 1st respondent's case on a balance of probabilities and entered judgement in her favour in terms of prayers a, b and c of the plaint.

7. Being dissatisfied with the said judgement, the appellants appealed to this court and set forth the following grounds of appeal in the Amended memorandum of appeal dated 21/2/2023:

a. The learned magistrate gravely erred in law and in fact in arriving at a finding that the 1st respondent had proved her case on a balance of probabilities even though she did not produce any receipts to show that she had made payment for the requisite charges within 30 days as demanded in her letter of allotment dated 22nd January, 1983.

b. The learned magistrate erred in law and in fact making a finding that the 1st respondent has been paying rates while no such receipts of payment of rates was tendered in evidence by the 1st respondent. Indeed, had the learned magistrates been keen he would have made a finding that that the receipts tendered were for the year 1983 and 2009 and were not for payment of rates.

c. The learned magistrate erred in fact and in law by making a finding that the allocation of the suit plots was not contravened by any evidence even though the appellants produced letters of allotment dated 2nd November, 2013 for the same plots and continued to pay rates every year as demanded by the 2nd respondent.

d. That the learned magistrate failed to make a finding that the 2nd respondent being the custodian of land allocated by the then County Council of Nakuru was the proper body to state who was the owner of the suit plots was a fact that was contravened by the 2nd respondent by stating that the land did not belong to the 1st respondent.

e. That further the learned magistrate failed to place any weight on the re-issued letters of allotments and the receipts of payments of rates issued by the 2nd respondent to the appellants.

f. That the learned magistrate erred in law and in fact by failing to appreciate that the 1st respondent had issued a search to the appellants confirming that they were the owners of the suit plots and therefore would have found in their favour.

g. That the learned magistrate failed to find that the 1st respondent did not prove how plots Nos 147L, 147M and 147N Bahati Trading Center became plots Nos 239, 240 and 241 and yet there was no approved PDP (Part Development Plan) produced as evidence by the 1st respondent.

h. That the learned magistrate failed to make a finding that the proposed sub-division of plot No. 147 was just a proposal as there is no evidence to show that the proposed sub-division was approved and therefore could not produce plots Nos 147L, 147M and 147N.

i. That the learned magistrate erred in law and in fact by failing to consider the evidence of appellant who admitted in re-examination that he was shown the land by the 2nd respondent and yet going ahead to make a finding that the appellants were not shown the land.

j. That the learned trial magistrate erred in law and fact giving excessive weight to evidence and submissions of the 1st respondent and totally disregarding the submissions by counsel for the appellant.

k. The learned trial magistrate misapprehended the law and facts and arrived at an erroneous conclusion.

l. The learned magistrate went on a frolic of his own disregarding the pleadings, evidence and submissions and as a result arrived at an erroneous conclusion.

8. The appellants seek that the appeal be allowed and the judgement delivered on 02/02/2022 be set aside and the respondents to pay the costs of the appeal. It should be noted from inception that the 2nd respondent has not joined in the appeal as an appellant against the impugned judgment. it only remained a respondent.

Submissions

9. The appellants filed their submissions on 18/05/2023, the 1st respondent filed her submissions on 29/05/2023 while the 2nd respondent filed its submissions on 05/06/2023.

The Appellants' Submissions

10. The appellants in their submissions identified the following issues as arising for determination: (1) whether the learned magistrate erred in law and fact by finding that the 1st respondent had proved her case on a balance of probability, and (2) whether the trial court erred in ordering the 2nd respondent to rectify their records to reflect the 1st respondent as the lawful owner of plot numbers 239, 240 and 241 Commercial – Bahati Trading Center.

11. On the first issue, the appellants submitted that:

    a. Though the 1st respondent claims that she owned plot No. 147 through a letter of allotment dated 22/01/1983 and that the she claimed that Plot No. 147 was subdivided into 13 plots to include plots 147L, 147M and 147N, no proof was given to show that the application for sub-division was made or that any consent was given by the 2nd respondent to allow for sub-division.

    b. That therefore, relying on Section 107(1) of the *Evidence Act*, no successful sub-division was done and therefore the plots that allegedly came from the subdivision never came to exist;

    c. Relying on the case of *Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhamed Dagane, suing on behalf of the estate of Mohamed Haji Dagane) v Hakar Abshir & 3 Others* [2021] eKLR, that the 1st respondent did not produce or file any part development plan (PDP) accompanying the letter of allotment as required.

    d. Relying on the case of *Nelson Kazungu Chai & 9 Others v Pwani University College* [2014] eKLR and also the case of *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands & 2 Others* [2014] eKLR, that the 1st respondent did not produce any evidence to show that she paid the requisite fees as was set out in the letter of allotment and so she could not be the owner of the suit property without paying the rates;

    e. That they had conducted a search at the 2nd respondent's offices to determine the owner of plot No's 240 & 241 and they were informed by the 2nd respondent through the letters dated 12/11/2013 that those properties were registered in the appellants' names.

    f. That they had produced their letters of allotment for plot No's 240 & 241 that were dated 31/01/2011 pursuant to their applications dated 2/04/1997 as well as receipts which confirmed payment of land rates to the 2nd respondent and the learned trial magistrate erred in law and in fact in finding that the 1st respondent had proved her case on a balance of probabilities and yet the 1st respondent did not produce the receipts to show payment of the fees required in the letter of allotment among other crucial documents.

12. With regard to the second issue, the appellants relied on the case of *Republic v Council of Legal Education & 2 Others Ex parte Mitchelle Njeri Thiong'o Nduati* [2019] eKLR and submitted that having been issued with letters of allotment by the 2nd respondent, they had a legitimate expectation to be declared owners of the suit properties; that the learned trial magistrate ordered for the rectification

of the records without considering the doctrine of legitimate expectation thereby disregarding a fundamental principle of fairness and justice.

13. The appellants concluded their submissions by seeking that their appeal be allowed and the judgement of the trial court delivered on 02/02/2022 in Nakuru CMCC No. 118 of 2014 be set aside with costs.

The 1st Respondent's Submissions.

14. The 1st respondent in her submissions relied on the submissions she had filed before the trial court and submitted that the terms of the allotment did not include a requirement to make payments within thirty days; that failure to make payment within 30 days did not invalidate the allocation; that the learned trial magistrate was satisfied that she was shown the plot on the ground and that the allotment letter had indicated that the allottee would not be shown the ground unless he had made the necessary payments indicated in the allotment letter; that the fact that she was allowed to remain in possession of the suit properties and even subdivide the same is an indication that she had met the conditions set out in the letter of allotment. Therefore, she stated, due to the passage of time, she would be excused if a receipt or two were missing especially noting that the allotment had been made to her late husband.

15. In the submissions filed by the 1st respondent before the trial court dated 05/04/2020, the 1st respondent had given a summary of the evidence that was adduced and submitted that the appellants were not shown their plots on the ground and so their claim that their plots lie on the 1st respondent's plots were without merit. The 1st respondent relied on the case of *John Githui Gatua v County Government of Turkana & another* [2020] eKLR where the court held that it was double speak for the County Government of Turkana to claim that the plaintiff's land fell on a public utility and yet it went ahead and allocated the same to other parties. The 1st respondent concluded her submissions by stating that she had proved her case on a balance of probability.

The 2nd Respondent's Submissions

16. The 2nd respondent in its submissions, set out the background of the suit and submitted on whether the trial court erred in law and fact by finding that the 1st respondent was the rightful owner of plot numbers 239, 240 and 241 Commercial -Bahati Trading Center. The 2nd respondent submitted that land parcel No's 240 and 241 were repossessed by the defunct County Council of Nakuru in the year 2003 so that they could be used as a road reserve for the sake of the general public. The 2nd respondent also submitted that the due process was not followed to convert the suit properties from public utilities to private plots. The 2nd respondent relied on Article 62 of the *Constitution* of Kenya, the *Land Act*, the *Land Registration Act*, the cases of *Naz Mohammed Jan Mohammed v Commissioner for Lands & 4 Others* [1996] eKLR, *Kenya Guards Allied Workers Union v Security Services & 38 Others* High Court Miscellaneous Application No. 1159 of 2003 and sought that this court determines that the suit properties herein were not available for allocation since they are public land and therefore neither are the appellants and the 1st respondent owners of the said properties.

Analysis and Determination

17. After considering the grounds of appeal and the submissions of the parties, the following issues arise for determination:

    a. Whether the learned trial magistrate erred in law and in fact in holding that the 1st respondent was the owner of plot numbers 239, 240 and 241 Bahati Trading Center;

b. Who should bear costs of this appeal.

Whether the learned trial magistrate erred in law and in fact in holding that the 1st respondent was the owner of plot numbers 239, 240 and 241 Bahati Trading Center.

18. The role of the Appellate Court on a first appeal was stated as follows by the Court of Appeal in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR:

> " 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."

19. So, on the basis of the pleadings and also the evidence that the parties adduced, can the learned trial magistrate be said to have erred in arriving at the findings that he did?

20. It is important to first consider what the 1st respondent produced as documentary evidence or if failure to do so, if any, disadvantaged her vis a vis the appellants.

21. The 1st respondent's case was that the land was allocated as one plot in 1983 vide an allotment letter dated 22/1/1983 which was produced as an exhibit. The letter however upon a more detailed perusal, appears not to be the actual letter of allotment but it refers to an earlier letter which was the allotment letter. The 1st respondent argued that in the letter of allotment issued to her late husband, there was no requirement for any payment to be made within thirty (30) days and further there was no mention that the allocation would be invalidated by failure to pay the said monies within thirty days. The 2nd respondent on the other hand alleged that plot No's 240 and 241 had been repossessed by the defunct County Council of Nakuru in the year 2003 and were to be used as a road reserve. The 2nd respondent however failed to present any documentary evidence in proof of that assertion of repossession, but its evidence alluding to a "repossession" is a clear admission of the suit premises having been allocated to someone before the year of the alleged repossession, that is, 2003. Further, the purported letter of allocation dated 22/01/1983 issued by the County Council of Nakuru to A. N. Njuguna Ndoro, the 1st respondent's deceased husband, and which was in respect of plot No. 147 Bahati was not denied by the 2nd respondent.

22. As stated herein before, the said letter dated 22/01/1983 made reference to a letter of allotment that had been earlier been issued. Further, it required the payment of sums of money by Mr Ndoro before he could be shown the boundaries to the said plot. The next document produced by the plaintiff was a letter notifying Mr Ndoro that he was required to be at the Bahati Trading centre on 1/11/1983 in order to be shown the boundaries of his plot upon payment of a fee. Copies of County Council of Nakuru receipts in respect of "land acquisition fee" and "plot allotment fee" for Plot No 147 L both dated 23/9/2009 were also produced. An application for development permission for leave to subdivide the land into 13 plots dated 3/3/2011 was also produced but it lacks any indication of approval by the County Government. A proposed subdivision plan which appears not executed by any County official was also produced by the plaintiff. That is what was contained in the bundle of the plaintiff's evidence.

23. The 1st respondent admits that due to the passage of time and upon the death of her husband, she was not able to get all the documents to show how much money was paid.

24. It is noteworthy that despite the lack of evidence of payment of the required fees indicated in the letter dated 22/01/1983, Mr Ndoro was summoned vide an undated letter that required him to appear at Bahati Trading Center on 01/11/1983 to be shown the boundaries of the said plot. It would appear that when he applied to have plot No. 147 subdivided into thirteen plots as per the letter dated 2/11/10, Mr Ndoro surrendered the original allotment letter and sought for new allotment letters for the new parcels 147 L and 147 M, copies of which were produced in evidence. The said copies of letters of allotment on their face suggest that the District Plot Allocation Committee Nakuru County Council held a meeting on 10/6/1997 at which the allocation was approved. The receipts for payment issued in respect of those fresh re-allocations pursuant to the subdivision are as follows:

    a. Receipt dated 23/9/2009 Ksh 3000/= plot 147L –land acquisition fee;

    b. Receipt dated 23/9/2009 Ksh 500/= plot no 147- L plot allotment fee.

    c. Receipt dated 23/9/2009 Ksh 3000/= plot 147M –land acquisition fee;

    d. Receipt dated 23/9/2009 Ksh 500/= plot no 147 M -plot allotment fee.

    e. Receipt dated 23/9/2009 Ksh 3000/= plot 147N –land acquisition fee;

25. The 1st respondent's notifications for plot allocation for plot No. 147 'M' and 147 L had required the payment of Kshs. 9,300/= within thirty days from the date of offer to signify the acceptance of the said offer. The said letters of notification are not dated but they indicate that the said allocation was made by the District Allocation Committee on 10/06/1997.

26. The great drawback to the 1st respondent's case is that she admits not have in her possession some of the receipts for payment of the requisite fees that were required in respect of the letters of allocation. Of special focus is the notification of plot allocations for plot No's. 147 'N' and 147 'M'. They both indicate that pursuant to meeting held on 10/06/1997, the said plots were allocated to A. N. Njuguna Ndoro, the 1st respondent's deceased husband who was required to pay Kshs. 9,300/= for each of the plots within thirty days to signify acceptance of the said offer. The receipts that were produced as evidence of payment of the sums required in the notification of plot allocations were issued on 23/09/09, about twelve years after the Nakuru County Council apparently sat and allocated the suit property to A. N Njuguna Ndoro. I can not unequivocally state that there is evidence that all the conditions in the letters of allotment were fulfilled by Mr Ndoro, but it is evident that he made some payments both with regard to the first allocation and the subsequent re-allocations. Inexplicably also, A. N. Njuguna Ndoro applied for new allotment letters for the subdivisions of Plot No. 147 on 2/11/10, but was issued with notifications of plot allocations for plot No. 147 'N' and 147 'M', the subdivisions of Plot No. 147, that made reference to a Nakuru County Council Meeting that had been held on 10/06/1997 that allotted the suit properties to him. Further the payment receipts produced were issued on 23/09/2009 almost a year before the 1st respondent's deceased husband applied for the new allotment letters. It is my view from the above analyzed documents that there were unexplained discrepancies in the dates of the documents that the 1st respondent relied on in support of her case. Notwithstanding those discrepancies, all the documents produced by the 1st respondent pre-date those of the appellants, and in my consideration, the said discrepancies do not detract from the fact that Mr Ndoro appears to have been issued with the letter of allotment and that he was shown the boundaries, and took possession of the suit lands before the appellants were issued with their respective letters of allotment. Further, even though the receipts were dated one year after Ndoro applied for new letters of allotment, there was no clear evidence from the 2nd respondent as to what proper procedure should have been followed then. In any event, the payment for the second generation allotment letters, whatever

the discrepancies crept into the process, should not obfuscate the fact of existence of a prior letter of allotment for the suit premises, the subdivision of which was the prompt for the application for the second generation allotment letters. In my view, the discrepancies are therefore not fatal.

27. On the other hand, what is the evidence that was presented by the appellants before the trial court? The appellants produced as D. Exh 8 a copy of a development plan, departmental reference number R/295/82/1 of 2/9/1982 showing zones and land uses for Bahati trading centre. The said development plan showed that the suit plot was planned for a "motel". Another development plan, departmental reference no R 295/81/1 of 18/5/1981 was also produced as D. Exh 1, also showing that the suit land was planned for development of a motel. No evidence of approval of the two plans was demonstrated. The appellants also produced their allotment letters both dated 31/1/2011 notifying them of allocation to them of plots nos 240 and 241 as per what was referred to as their application for allocation dated 2/4/1997. The appellants'actual letter of application for allocation was not produced before court. Two letters dated 12/11/2013 from the Nakuru County Government stated that the two plots were registered in the 1st and 2nd appellant's names respectively. An assortment of the appellants' original receipts for ground rent arrears for dates ranging from 25/2/2011 to 12/6/2028 for the two plots were produced. These were evidently issued and officially stamped by the County Council or the County Government of Nakuru as the case may be. That is the sum total of documentary evidence the appellants had.

28. It is noteworthy that P. Exh 1 was produced by DW1, Laban Otieno Ayoma a surveyor working with the County Government of Nakuru, whose evidence left quite a lot to be desired. It is further noteworthy that the County Government of Nakuru has not appealed the decision of the lower court. The finding that there is no evidence that the suit land was public utility land is therefore not challenged by any party in the present appeal. Each of the parties save the 2nd respondent is preoccupied with asserting their claim to private rights to the suit premises. I would have expected the 2nd respondent to have filed a counterclaim from inception, or a substantive appeal against the said finding, or a cross-appeal. It never took up any of the three options. The issue of whether the suit land is public utility land therefore automatically falls by the wayside, for this court can not take it upon itself to determine an issue not urged before it by any party. It is also doubtful that had this issue arisen on appeal, the evidence of the development plans tacitly approved by DW1 and produced in the defence case would stand in the way of its success since the plans suggest the suit land was planned for a motel, which in my view does not connote any public use.

29. Having said as above, this court is left with only the question for determination as to who between the appellants and the 1st respondent has a better claim to the suit land.

30. Did the failure to produce all receipts showing that payments were made by Mr Ndoro as required by the allotment letter or letters disqualify the 1st respondent from any relief that she had sought in the lower court? The Court in the case of *Commissioner of Lands and another v Kithinji Murugu M'agere* (2014) eKLR held as follows:

> "In this case, the applicant's case is that having been allotted the suit parcels of land, the Respondents ought to be compelled to issue him with the title documents. In *Dr. Joseph N K Arap N'gok v. Justice Moijo Ole Keiwua & Others* Civil Application No. Nai. 60 of 1997 it was held that title to landed property can only come into existence after the issuance of the letter of allotment meeting the conditions stated therein and actual issuance thereafter of title documents pursuant to the provisions under which the property is held. In this case save for the Miritini property no evidence has been exhibited that the applicant paid the requisite fees for the Ngong Township properties. Accordingly, it is not possible to find that

the applicant had met the conditions specified in the letter of allotment with respect to the said property. In the premises there is no basis upon which I can find that the applicant has shown that he has a legal right, or substantial interest the performance of which must be done by the Respondents.

With respect to the Miritini property, it is contended by the Respondents that in the absence of an acceptance by the applicant, it cannot be said that the applicant fulfilled the conditions specified in the letter of allotment."

31. In the instant case, it is significant that the 1st respondent's purported letter of allotment dated 22/1/1983 refers to the plot as "motel" the same designation it has been issued in the development plans produced by the appellants and the 2nd respondent. A letter which is part of the 1st respondent's evidence summoned him to appear on 1/11/1983 to be shown the boundaries of his plot. Whether or not he actually paid the required dues upon allocation or whether his subsequent attempts at subdivision of Plot No 147 were successful, fades away in the face of the fact that the 1st respondent was indubitably in possession of portions of the original plot no 147. The only matter of consequence in this case is the 2nd respondent's act of showing Mr Ndoro the boundaries to the suit land, putting him into possession, and allowing that possession to subsist for a lengthy period, which obviously raises the rebuttable presumption that the premiums demanded in the original allotment letter were paid. The 2nd respondent, being the custodian of the records of payments and cadastral maps and having physical oversight over development plans within its jurisdiction was, upon the filing of the instant suit, if it disputed the payments by Mr Ndoro, was duty bound to demonstrate that no payment was made to it for the allocations and that they never took effect. The 2nd respondent however left that unwieldy mantle on the puny shoulders of the appellants who had no access to the records it had; it focused all its energies on the pleading and submission and oral evidence, which were unsupported by documentstion, that the premises were public utility land and had been repossessed some time earlier.

32. In this court's view, the 2nd respondent can not feign ignorance of the 1st respondent's claim to the land and purport to allocate it afresh to the appellants. Also, for the reasons that it did not demonstrate by way of documents at the trial before the lower court that the land was public utility land, and that it did not lodge its own appeal, and the appellants are not appealing the finding that the land did not fall in that category, it can not maintain that claim at this appellate level

33. In this court's view, the learned trial magistrate's decision that on the basis of the evidence on the record the 1st respondent had established his claim to the required standard can not be faulted.

34. Before I pen off, another point of interest in this appeal is that the appellants allege that the learned trial magistrate failed to find that the 1st respondent did not prove how plot No's 147L, 147M and 147 N Bahati Trading Center became plot No's 239, 240 and 241. It is my view that from the evidence adduced before the trial court and the judgement, the issue of the process of how plot No's 147L, 147M and 147 N Bahati Trading Center became plot No's 239, 240 and 241 was not raised by the appellants. The Court of Appeal in the case of *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto* [2018] eKLR held as follows:

> " It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v. Ruth Watiri Kibe*, CA No. 39 of 2015 and *Openda v. Ahn* [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal

in this Court. The Attorney General is entitled to complain, as he does, that he has been taken by surprise and denied a fair opportunity to respond to the new issue. As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance. (See *North Staffordhire Railway Co. v. Edge* [1920] AC 254)."

35. The Court of Appeal in the above decision held that a new point can only be raised at the discretion of the court on appeal depending on the exceptional circumstances of a case. Since the issue of the process by which plot No's 147L, 147M and 147 N Bahati Trading Center became plot No's 239, 240 and 241 was not raised during the hearing before the trial court, the appellants required to justify why they should raise it at the appellate stage and this they failed to do. They are therefore precluded from raising the same issue before this court. It was in any event for the appellants to demonstrate that the said plots did not translate into the new numbers, which they failed to do at the trial stage.

36. I note that no title has been issued to any of the parties. In this court's view, what remained for determination after the 2nd respondent failed to adduce evidence that the suit land was a public utility, was the question of who between the appellants and the 1st respondent had a better claim, whatever its nature was, to the suit land. From this court's re-evaluation of the evidence and materials placed before the trial court, it is my view that the trial court did not misdirect itself at all in holding that the 1st respondent had proved her case on a balance of probabilities as she had demonstrated that she was the first one to be allotted, and shown boundaries to, the suit properties.

37. In conclusion, it is this court's view that the appellant's appeal lacks merit and the learned trial magistrate's judgment delivered on 2/02/2022 in Nakuru CMCC No. 118 of 2018 is hereby upheld.

38. Costs normally follow the event. However, in the present case the confusion within the 2nd respondent's office has prompted the suit which is an attempt for each of the other parties to establish who has better claim to the suit land. The blame for the morass falls squarely upon the 2nd defendant and I hereby order that the 2nd defendant shall bear the costs of the present appeal.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26TH DAY OF OCTOBER, 2023.

MWANGI NJOROGE

JUDGE