REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC APPEAL CASE NO. 58 OF 2018

MBILA MBONDO.....APPELLANT

-VERSUS-

PATRICK MULEI MBILA (*as legal representative of the Estate of the late*

MUTIE KATHUKU - Deceased).....1ST RESPONDENT

MICHAEL WAMBUA MBILA.....2ND RESPONDENT

JUDGMENT

BACKGROUND

1. By a further amended plaint, further amended on 15th February 2018 and filed on 19th February 2018, the Plaintiffs (Respondents herein) sought for the following orders;

(a) **A declaration that Land Parcel Number Mutonguni/Kauwi/2460 is a family land and the Plaintiffs are entitled to their rightful share.**

(b) **An order that the defendant subdivides the said parcel Number Mutonguni/Kauwi/2460 into two equal portions and a portion be transferred to the 2nd Plaintiff.**

(c) **General damages.**

(d) **Costs of this suit**

(e) **Any other relief which this Honourable Court may deem fit to grant.**

2. The plaintiffs averred that they were related to the defendant and that the defendant got himself registered as proprietor of Land Parcel Number Mutonguni/Kauwi/2460, which according to the Plaintiffs was family land, hereinafter referred to as the suit property. Further that the suit property was jointly acquired by two brothers in 1939, namely Mutie Kathuku and Mbondo Kathuku; that Mbondo Kathuku was the defendants father; that the defendant fraudulently caused a portion of land owned by the family but previously in dispute with a neighbour namely Maundu Yumbya, to be joined to his parcel currently known as Mutonguni/Kauwi/2460, when the said portion ought to have been shared equally between him and the 2nd Plaintiff; that on 6th September 1987, the clan members resolved the dispute by subdividing the suit properly into two equal portions and giving one portion thereof to the 2nd Plaintiff who has been in occupation since 1979 todate.

3. The defendant's case was that the dispute between his family and that of Maundu Yumbya happened during the land adjudication process and the land in dispute was joined to the family land namely Mutonguni/Kauwi/2080, and thereafter the land was subdivided between four family members whereof he got the suit property as his share; that the suit property is not family property and the same is a first registration and therefore cannot be defeated not even on grounds of fraud; that the purported family meeting of 6th September 1987, never happened, and if it did it was an illegality as the clan had no jurisdiction to interfere with private property.

4. Vide a judgment delivered on 15th August 2018 the Chief Magistrate's Court found that the Plaintiffs had proved their case on a balance of probability that the Defendant had obtained a portion of land that had previously been disputed by Yumbya's family, and entered judgment for the Plaintiffs against the defendant in the following terms;

(a) **That a portion as marked out, by the clan and which the 1st Plaintiff is occupying be excised from Land Parcel Mutonguni/Kawui/2460 and the same be transferred to the 1st Plaintiff Michael Wambua.**

(b) **That the Defendant to execute all sub division and transfer documents in favour of the 1st Plaintiff within 45 (forty five) days of this judgment in default, the court's Executive Officer to execute the documents.**

(c) **That the 1st Plaintiff to bear the cost of survey and transfer of the portion to himself.**

(d) **That this being a family dispute, the defendant shall bear half costs of the suit.**

5. The Appellant being dissatisfied with the Magistrate Court's judgment, filed the instant appeal vide the Memorandum of Appeal dated 7th September 2018 and filed in court on 11th September 2018, raising 10 (ten) grounds which have been stated as follows;

1. **The Learned Trial Magistrate grossly erred and misdirected himself in law and in fact:-**

(a) In failing to adequately, sufficiently, correctly or at all to analyse, interpret, appreciate and make correct findings on the factual and legal import of the pleadings, evidence, the source, and the legal effect of the defendant's Registration to Title to No. Mutonguni/Kauwi/2460 and thereby failed to find and hold that contrary to the Plaintiffs' claim and evidence the said parcel was not the original family land acquired in 1930s, and was not the subject of any disputes before its registration.

(b) In failing to find and hold that actual family land acquired in 1930s that was under Adjudication Process was not Title No. Mutonguni/Kauwi/2460 but was the adjudicated parcel Kauwi Adjudication Section Plot No. 2080 and that the disputation process thereon fell under the exclusive jurisdiction of the Land Adjudication Officers and not the family, clan or any tribunal and that on conclusion of the Adjudication disputes, the disputed portion was in the ordinary course rejoined thereto and subsequently shared out under the joint Objection to the Adjudication Register thereof dated 9th November 1976 signed by all four beneficiaries.

(c) In failing to note, find and hold that the registration of Plot No. Mutonguni/Kauwi/2460 to the defendant on 13th September 1989 was legally and solely pursuant to subdivision of the original family land Kauwi Adjudication Section Plot No. 2080 pursuant to a joint objection to the Adjudication Register thereof dated 9th November 1976 by all 4 beneficiaries and that the resultant 4 titles thereof (i.e) Nos. Mutonguni/Kauwi/2460, 2461, 2462 and 2080 were all first registrations, but instead he reached the contrary and erroneous findings, conclusions and wrong judgment contrary to law and evidence thereby resulting in a failure of justice.

2. **The learned trial magistrate grossly erred and misdirected himself in law and fact and failed to fully or at all analyse, interpret, comprehend, apply and appreciate the pleadings, filed witness statements and the evidence and exhibits and thereby reached wrong, false and invalid conclusions and findings that were contrary to the pleadings, evidence and the law by wrongly and erroneously finding and holding that:-**

(a) The original family land acquired in 1930's was originally registered as No. Mutonguni/Kauwi/2080 as first registration which was later subdivided into the four portions among the four brothers, which was not the correct factual and legal position as the original family land before the subdivisions was never registered at all but was land under active Adjudication Process, known as Kauwi Adjudication Section Plot No. 2080 which after a disputation process, the disputed portion was agreeably rejoined to the parent portion and then the whole plot, still under Adjudication process, subdivided into the four portions vide the joint Objection to the Adjudication Register dated 6th November 1976 signed by all beneficiaries.

(b) The resultant four Titles therefrom (i.e) Nos. Mutonguni/Kauwi/2460, 2461, 2462 & the remainder as 2080 were not First Registrations and that the recovered portion was wrongly included in the parcel No. Mutonguni/Kauwi/2460 was registered in favour of the defendant which was not the correct position as the said disputed portion was admittedly returned to the parties' original adjudicated family land Kauwi Adjudication Section Plot No. 2080 before the registration process started and same was subdivided only after full demarcation of boundaries followed the joint objection to Adjudication Register dated 9th November 1976 for new numbers.

3. **The Learned Trial Magistrate erred and misdirected himself in law and act in holding and finding that the defendant had personally wrongfully taken advantage of the plaintiffs by including the portion disputed during Adjudication into his portion No. Mutonguni/Kauwi/2460 when the correct factual position was that the said disputed portion was, during the leadership of deceased 1st plaintiff as family head, returned to the original adjudicated family land (i.e) Kauwi Adjudication Section Plot No. 2080 and same wholly demarcated into the four portions under the joint objection to the Adjudication Register thereof dated 9th November 1976 as per demarcated boundaries and all four resultant portions subsequently registered on 13th November 1989, the consequence of which their respective different sizes were as agreed under the said objection and the defendant was not at any fault or under any burden to answer for the different sizes.**

4. **The learned trial magistrate erred and misdirected himself in law and fact by grossly failing to correctly, sufficiently or at all to analyse and interpret the law especially the applicable Land Adjudication Act and the Registered Land Act as well as the pleadings, witness statements and evidence and thereby failed to correctly find and hold that the defendant was by law the sole registered absolute indefeasible proprietor by a First Registration of plot No. Mutonguni/Kauwi/2460 as his own**

agreed share of the original family land comprised in former Adjudicated Parcel Kauwi Adjudication Section Plot No. 2080 vide the joint Objection dated 9th November 1976 aforesaid and that his title was absolute, indefeasible and not liable to defeat, challenge, interference or rectification by subdivisions whether by the clan/family, tribunal or the trial court.

5. **The learned trial erred in law fact in failing to note, find and hold that the plaintiff's claim against the defendant's Title No. Mutonguni/Kauwi/2460 was unsustainable in law as same had been wholly extinguished upon its registration (as First Registration) in terms of Sections 27, 28 & 143 of the Registered Land Act and was not liable to defeat, challenge or rectification even on grounds of fraud.**

6. **The learned trial magistrate grossly erred and misdirected himself in law and fact in finding judgment for the plaintiffs on basis of fabricated and false documents and evidence including plaintiff's Exhibit No. 2 (i.e) record of the alleged clan meeting of 6th September 1987 who had no jurisdiction over land under Adjudication Process and was not a valid, genuine or authenticated clan record but a fabrication by the deceased 1st plaintiff and his son PW4.**

7. **The learned trial magistrate grossly erred in law and fact in failing to note, consider and adequately or at all interpret and appreciate and uphold the defendant's pleadings, evidence and exhibits, but ignored the same including the defence exhibit No. 2 (i.e) the Joint Objection to Adjudication Register dated 9th November 1976 signed by all 4 listed beneficiaries for sub division of the original family land under Adjudication being Kauwi Adjudication Plot No. 2080, which had he considered he would have reached the uncontroverted finding and conclusion that title No. Mutonguni/Kauwi/2460 was a first registration over which he had no jurisdiction for rectification.**

8. **The learned trial magistrate grossly erred and misdirected himself in law and fact in entering judgment & granting orders for the plaintiffs contrary to and outside the pleadings and the reliefs sought and contrary to the law on registered titles, Judicial Precedents and the weight of the evidence and further erred in wrongly shifting the burden of proof to the defendant.**

9. **The learned trial magistrate erred and misdirected himself in law and fact in failing to address and determine the legality and validity of the Grant used in substitution of the 1st plaintiff when that issue had not been addressed and determined by any court and was a question of law to be settled.**

10. **The judgement and orders of the learned trial magistrate amount to an illegal rectification of the register in respect of the first registration which the affects absolute registered title of the defendant in possession and is unreasonable, unsustainable and a violation of Article 40 of the Constitution of Kenya 2010, Sections 27, 28 & 143 of the Registered Land Act, Cap 300 applicable to the title and all Judicial/Legal Authorities thereon and amounts to an illegal or unlawful overthrow by a subordinate court of the land laws as lawfully settled in Kenya.**

6. The Appellant has sought for the prayer that the judgment and the consequential decree and orders of the learned Chief Magistrate Hon. A. G. Kibiru CM, dated 15th August 2018 be forthwith set aside and the same be substituted by an order dismissing the plaintiffs/respondents suit No. CMCC 1103 of 2013 with costs and interest.

SUBMISSIONS

7. The Appellant filed his submissions on 12th November 2020 where he submitted that the parties in this suit are close relatives, the Appellant being the biological father of the Respondent vide a Kamba customary law cohabitation with their mother. He also argued that the award of the panel of elders and the Land Disputes Tribunal was invalid and irrelevant as the same was struck out by the High Court having been challenged by the Appellant's application dated 29th June 1998 and rejected by the court vide its ruling dated 29th September 2009 and hence that there was no valid award on record for the lower court to find that the same corroborated the family meeting of 6th September 1987. Counsel further submitted that the substitution process of substituting the original 1st plaintiff with Patrick Mulei Mbila was irregular and disputed.

8. The Appellant's counsel further argued that the plaint is grounded on false and mischievous claim against the defendant's rightful share of the original family land, which share is the suit properly. Counsel argued that the finding by the trial court that the suit property was family land was erroneous and contrary to the weight of evidence. It was his contention that the suit property was not subject of adjudication and disputation process, but the same was created from the original family land number 2080 after all the family members had confirmed the sharing.

9. Counsel argued that the trial court ignored the Appellant's evidence and more specifically exhibit 2, which according to the Appellant was an unequivocal objection dated 9th November 1976 for subdivision of original family land adjudicated as parcel no. 2080 into new numbers as agreed. He stated that the said objection was registered as number 148 of 1976 as endorsed on the said exhibit. It was therefore the appellants contention that the trial magistrate failed to adequately analyse the facts and the law hence making wrong conclusions that the suit property was family land; when family land was Parcel Number 2080. It was asserted by the Appellant that titles that were created from the original adjudicated Parcel No. 2080 were first registrations. He argued that all the four titles emanating from parcel number 2080 were created without any disputes or claims.

10. It was further submitted for the Appellant that the trial court's conclusion that land parcel number 2080 was registered as a first registration was erroneous and the same was not supported by any evidence. Counsel argued that parcel number 2080 was only an adjudicated parcel number that did survive registration, but that the same was reparcelled at the objection stage to create new adjudicated parcel numbers, which were all later registered as first registrations. It was further argued that the trial court misdirected itself by holding that the Appellant had taken advantage of Mutie Kathuku, now deceased due to the latter's blindness. It was argued that the issue of taking

advantage of Mutie Kathuku's blindness was not raised in the pleadings nor the witness statements. It was argued that despite the late Kathuku's blindness, he remained in control as the head of the family and dealt with the objection that led to reparcellation.

11. The appellants counsel submitted that the award by Kitui Land Disputes Tribunal had nothing to do with the adjudication process and that in any event, the same was suspended by the order of the trial court to hear this case and therefore that it was erroneous for the trial court to base its judgment on the same. Counsel disputed there having been a family meeting and or award of 6th September 1987, and argued that the record thereof was not signed by the elders named therein nor the parties. He opined that if the clan shared the family land parcel No. 2080 in 1976, the same was not shared equally, but all parties had agreed to that sharing.

12. Counsel submitted that the trial magistrate failed to correctly analyse the import of the Land Adjudication Act as well as the Registered Land Act (repealed) in so far as the same were relevant to the proceedings before the court. Counsel argued that to the extent that the trial court failed to hold that reparcellation of the original adjudication family Land No. 2080 resulted in new adjudication parcel numbers and new adjudication registers within the adjudication section and closure of the adjudication register of the original adjudication Parcel No. 2080 that ceased to exist and did not survive the registration, it acted erroneously. Counsel argued that the original parcel No. 2080 was objected upon and therefore new numbers Mutonguni/Kauwi/2460, 2461, 2462 and 2080 were given for each of the four family members. That the original Parcel No. 2080 ceased to exist upon the objection. That the disputed portion in respect to the family of Yumbya, was joined to this Parcel No. 2080, and thereafter, sharing to the four family members was done. Counsel reiterated that the suit property is therefore a first registration title and the Appellant is the sole registered proprietor therefore his title is absolute, indefeasible and not liable to challenge or rectification even on grounds of fraud. Counsel argued that in any event the respondents' particulars of fraud pleaded were never proved.

13. It was further reiterated by counsel for the Appellant that under Sections 9 to 28 of the Land Adjudication Act, the process of demarcation, adjudication, objections and reparcellations were within the mandate of the District Land Adjudication Officer and not clan or family members. Counsel opined that once the above process is over, an adjudication record and register are prepared for each parcel and formerly disputed portions are rejoined to the successful claimant's parcels. That therefore the sharing by the four family members was in respect of the entire original family land which included the formerly disputed parcel (dispute with Yumbya's family) and the sharing was as agreed. Counsel argued that at the point of sharing the family parcel No. 2080, no parcel or portion of land was left out for sharing on a later date.

14. Counsel argued that the trial court erred in not considering the provisions of the Registered Land Act (repealed) on close of adjudication process and registration of new titles. It was argued that Section 27 of the Land Adjudication Act, the Adjudication register is altered and closed after reparcellation into new numbers creating a new register for each parcel. That Section 28 of the Land Adjudication Act provided that a new adjudicated parcel on getting its register was due for registration which was a first registration. That the clan meeting of 6th September 1987 had no authority to interrupt the registration. Counsel argued that there was no appeal filed against the first registration of the suit property and therefore the same is indefeasible, absolute and not liable to challenge. Counsel further contended that the original family land No. 2080 was never registered and therefore it was not a first registration.

15. Counsel contended that the trial court's judgment was premised on a fabricated exhibit No. 2 which was a decision of the family meeting of 6th September 1987. He argued that the said document was not genuine as it contradicted the defence exhibit No. 2 which was the objection dated 9th November 1976, where all the four family members filed an objection to having the family land adjudicated as Parcel No. 2080. He argued that the same was fabricated by Mutie Kathuku and his son who testified as PW4. He argued that the document of 6th September 1987 was invalid as it was not signed by both the elders who arbitrated over the matter as well as the parties. He reiterated that on 5th September 1987 the clan declined to interfere with the suit property as titles were being processed after close of adjudication. It was his contention that only the Land Adjudication Officer could cause subdivision of any of the new numbers through a valid objection, yet the Plaintiff/Respondent did not file any such objection. Further counsel argued that the trial court erred by relying on the document of the family dated 6th September 1987 merely because it was written.

16. The appellant's counsel opined that the size of the parties' parcels of land was a non issue, as can be seen that Mutie Kathuku and Muli Mbondo whose parcels of land were smaller in size never complained because the sharing was done by agreement. Counsel argued that the Respondent got his title No. 2462 on the same date the Appellant got his title of the suit property and two other family members got Nos. 2461 and 2080. Counsel also argued that the family had no authority to make the decision dated 6th September 1987, as the only person who could make such decisions was the District Adjudication Officer.

17. It was further contended in conclusion by the Appellant that the judgment and subsequent orders made by the trial court was contrary to the pleadings and reliefs sought; that the same was contrary to the provisions of the Land Adjudication Act and the Registered Land Act (repealed); that the same was premised on unauthenticated clan/family meeting document dated 6th September 1987 which was not signed and that the latter document was held to have been corroborated by a tribunal award that had been made of no effect by the court's order to proceed with the matter to hearing.

18. The respondent's counsel filed submissions in opposition to the appeal on 30th November 2020. Counsel submitted that the appellant was intentionally distorting the facts to defeat the Respondent's claim. Counsel argued that the land owned by the family was originally registered as **MUTONGUNI/KAUWI/2080,** which position is fortified by the appellants submissions before the trial court in paragraph 1(c) and (d). That therefore it is not true that the suit property was a first registration, as the same was created from **MUTONGUNI/KAUWI/2080.** Counsel further argued that the trial court record of 4th February 1998 confirmed that Mutie Kathuku was blind. Counsel confirmed that the Appellant took advantage of Mutie Kathuku's blindness to award himself the land recovered from Yumbya's family.

19. Counsel argued that the Appellant's attempt to discredit the authenticity of the document emanating from the clan meeting of 6th September 1987, were unsuccessful as the trial court did not agree with him. It was counsel's contention that the clan meeting was to subdivide the land in accordance with the award of the Land Disputes Tribunal which had been read to the parties by the court. Further, counsel argued that the court did not appreciate the Appellants letter of objection dated 9th November 1976, which according to the

Respondent, the letter shows that the land Parcel No. 2080 had already been registered as Mutonguni/Kauwi/2080 and therefore reference to the same land by its adjudication number does not change the fact that the said land had already been registered.

20. It was submitted for the Respondent that the court only granted the prayers sought and gave timelines within which its orders ought to be complied. Counsel further argued that the court did not grant orders not sought for and the court did not shift any burden of proof to the defendant instead, it held that the plaintiffs had proved their case on the required standard.

21. On the issue of the legality of the grant used to substitute the 1st Plaintiff counsel argued that the argument was misconceived because the grant indicated on its face that its purpose was to enable the petitioner prosecute and finalize Machakos High Court Civil Case No. 15 of 1990 pending before the said court. Counsel argued that the appellant seemed to fault the headline of her grant as it read "limited letters of administration *ad colligenda bona* under Section 67 (1) of the Act". Counsel relied on the case of ***Martha Ndiro Odero (Suing as the administrator and personal representative of the Estate of Willy Patrick Ochieng Ndiro (Deceased) vs. Come Cons Africa Limited [2015] eKLR,*** where the court held that a party had the requisite locus standi to institute a suit in a matter where the grant of letters of administration *ad colligenda bona* was for "the collection of the assets of the estate of the deceased including the filing of suit to claim the deceased's properties." Additionally, counsel confirmed that the question of substitution was addressed by consent as the record shows that the initial plaintiff **MUTIE KATHUKU** was substituted and the suit revived on 3rd August 2006 when the application for substitution was allowed by consent in presence of both counsel, before the Deputy Registrar. Counsel also contended that the Appellant is estopped from revisiting the issue of the grant or substitution having not set aside the orders of this court made on 3rd August 2006 and that therefore the trial court correctly held that the issue of the grant was conclusively dealt with and that the same was not an issue before the trial court.

22. Counsel further contended that the Respondent proved that the land recovered from the Yumbya family was taken by the appellant and included in his land and one title issued for 45 Hectares; that, that is the reason the Appellant could not explain why he had bigger land than the rest of the family members, and that this meant that the Respondent had proved his case as required by law.

23. On the question of the import of the tribunal award dated 6th November 1997 and read to the parties on 4th February 1998 by Hon. Justice Mwera, counsel argued that the court referred the matter to arbitration before the District Officer Central Division by consent of the parties, which was done on 9th June 1994 before Justice J. A. Osiemo. Counsel submitted that on 12th June 1996, the award was filed in court but the same was not clear which led the court to refer the matter for fresh arbitration before the Kitui Land Disputes Tribunal and that on 4th February 1998 the tribunal award was read to the parties and parties advised to pick copies thereof. He referred to the decision of Tribunal which stated as follows;

> **"After carefully considering the evidences given by both the disputing parties, all the elders arbitrating the dispute ruled that the land in dispute should be subdivided into two portions so that Michael Wambua and Patrick Mbila Mbondo retains the other portion of the land. The elders felt that this is the only long lasting solution that would bring peace and harmony among the disputing parties for failure to do so, the dispute will continue dragging as it has been before, the disputing party should therefore consult the surveyor to redemarcate the parcel of land to the dispute."**

24. It was the Respondent's contention that the Appellant filed the application dated 29/6/1998 to set aside the award of the Land Disputes Tribunal, but the same was never prosecuted. The Respondent maintains that the ruling of the Tribunal is valid and binding on both parties as the same was never set aside. Counsel relied on the case of ***Alfred Sagero Omweri vs. Kennedy Omweri Ondieki [2015] eKLR,*** for the proposition that an order or decree of a court of law is binding unless varied or set aside. Counsel also argued that the validity and legality of the tribunal award was never an issue before court. That the appellant having not raised any challenge against the tribunal award in his pleadings cannot validity challenge the award by way of evidence as a party is bound by his pleadings. Counsel also placed reliance on the case of ***Florence Nyaboke Machani vs. Mogere Amosi Ombui & 2 Others [2015] eKLR,*** which this court has considered.

25. The Respondent's counsel further contended that the Appellant did not call any independent witness to corroborate his allegations. Counsel argued that the Appellant in his defence only called his son and one more witness, and therefore that his evidence to prove that the suit property was his share was uncorroborated. Counsel referred the court to Sections 107 and 108 of the Evidence Act for the proposition that he or she who alleges must prove their allegations, as the burden of proof rests with them. Counsel argued that the Respondents proved that they recovered the land from Yumbya's family; that the Tribunal ordered for the sharing of the same and the family subdivided it and that the Respondents graze on the land. It was further counsel's contention that PW2, PW3, PW4 and PW5 corroborated the Respondent's evidence. Counsel underscored the evidence of PW5 who he argues is from the Yumbya family which had a case with the family of Mutie Kathuku in 1979. He argued that survey in that area was done in 1974 to 1976 and therefore that explains why the recovered land could not be shared during adjudication. He further argued that the disputed portion was subdivided by the family in accordance with the tribunal award. That the family subdivided the land in 1987 as evidenced by Plaintiff exhibit 2. Counsel concluded by praying that this court finds that the Respondents proved their case on a balance of probability and proceed to dismiss the appeal with costs.

ANALYSIS AND DETERMINATION

26. This being a first appeal, this court has a duty to re examine and re evaluate the evidence on record and arrive at its own conclusion, while bearing in mind that it did not see nor hear the witnesses and therefore give an allowance for the same. In the case of ***Selle & Another vs. Associated Motor Boat Co. Ltd & Others 1968 E.A. 123,*** the court enunciated this principle as follows;

> **"this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 re consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."**

27. Similarly in the case of ***China Zhongxing Construction Company Ltd vs. Ann Akuru Sophia [2020] eKLR*** the court cited with approval the Court of Appeal for East African Case of ***Peter vs. Sunday Post Limited [1958] E.A. 424,*** where the court stated as follows concerning

the duty of an appellate court on first appeal;

> **"It is a strong thing for an appellate court to differ from the finding, on a question of fact of the judge who tried the case and who has 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 that 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. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their lordships in the House of Lords in Watt vs. Thomas (1), [1947] A. C. 484."**
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> **"My Lords, before entering upon an examination of the testimony of the trial, I desire to make some observation as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart form the classes of cases in which the powers of the court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Act) an appellate court has of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."**

28. It is therefore clear that the duty of this court as the first appellate court is to review the evidence with a view to establish whether the conclusions made by the court below in respect of the evidence on record, were justified. This ought to be done with caution as this court does not have the advantage which the court below had, of seeing and hearing witnesses.

29. With the above in mind, I proceed to consider the issues raised in this appeal. The grounds of appeal in their entirety raise four major issues namely;

> **(a) Whether the validity and legality of the grant to substitute the 1st plaintiff had been determined by the court and did not need to be revisited in the judgment.**
>
> **(b) Whether land parcel number Mutonguni/Kauwi/2460 was family land whereof the plaintiff was entitled to a share therein.**
>
> **(c) Whether registration of title for land parcel number Mutonguni/Kauwi/2460 was a first registration under the Registered Land Act Cap 300 Laws of Kenya, (repealed) hence not liable to challenge.**
>
> **(d) Whether the orders granted by the trial court were merited.**

30. On the first issue, the Appellant stated that the question as to the legality and validity of the grant used for the substitution of the 1st plaintiff was a matter that had not been addressed or settled by the court. On that issue, the Respondent submitted that the purpose of the grant was clearly stated on the face of the grant as being to enable the petitioner prosecute and finalize Machakos High Court Civil Suit No. 15/1990 pending before the said court. Counsel for the Respondent further argued that the issue of substitution was done by consent. He pointed out that the initial plaintiff was substituted when the application dated 14th June 2006 was allowed by consent and therefore that the appellant cannot revisit that issue of the grant without having set aside the orders of the court of 3rd August 2006. On this issue, the trial court made its finding as follows;

> **"The submissions by defence counsel on the legality of the 2nd Plaintiff's substitution takes court back to an issue that had already been dealt with and settled by court as rightly observed by defence counsel himself on 14th February 2018."**

31. I have perused the record; at page 83, counsel for the defendant confirmed that on 3rd August 2006 the application dated 14th June 2006 was allowed to join the 2nd Plaintiff to the case pursuant to the grant in issue. The application dated 14th June 2006 sought to join **PATRICK MULEI MBILA** in the suit as the administrator to the estate of **MUTIE KITHUKU.** That application came up for hearing on 3rd August 2006. On the said date counsel for the defendant did not oppose the application and did not raise any issue concerning the grant annexed to the application. It is my considered view therefore that the issue as to the legality or validity of the grant substituting the 1st plaintiff was never an issue in the first place before the trial court and therefore the trial court's finding that the same was a settled matter which could not be revisited was justified.

32. On the second issue as to whether the suit land is a family land, in which the Respondent has a share, it is pleaded by the Respondents in their further amended plaint that the suit land though registered in the Appellant's name, was family land having been acquired by Mutie Kathuku and Mbondo Kathuku in 1939. He further stated that though the suit land was adjudicated upon in 1974/1975, the defendant fraudulently adjusted his parcel by joining it to the land recovered from the family of Maundu Yumbya upon which he registered the same in his name, thereby depriving the 1st Respondent his share, which the latter occupies. The burden of proving these allegations lay on the Respondents.

33. Sections 107 to 109 of the Evidence Act provides for the burden of proof as follows;

> **"107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2). When a person is bound to prove the existence of any facts it is said that the burden of proof lies on the person.**
>
> **108. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.**
>
> **109. The burden of proof 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."**

34. To prove the assertions in the further amended plaint, the Respondents herein testified that the suit property was family land having been acquired by their father and uncle in 1939 and that here was a dispute between their family and a neighbour Maundu Yumbya in 1974, where it was resolved that the disputed portion of the land reverts to the Respondents' family. They stated that before the disputed portion was recovered, the family land was shared as follows;

> **Mutie Kathuku - Mutonguni/Kauwi/2080**
>
> **Mbila Mbondo - Mutonguni/Kauwi/2460**
>
> **Wambua Mbondo - Mutonguni/Kauwi/2461**
>
> **Muli Kitetu - Mutonguni/Kauwi/2462**

They further contended that the disputed portion which had been recovered from the family of Maundu Yumbya, had not been included in the family land at the time the said family land was shared. According to them, the disputed parcel measured 18¼ ropes and that the family meeting that happened on 6th September 1987 divided the said portion into two; 8¼ ropes going to the Respondents while 10 ropes were awarded to the Appellant. They insisted in their evidence that their claim was in respect of the 8¼ ropes and not the Respondents' land.

35. The Appellant on his part pleaded and testified before the trial court that the land parcel number Mutonguni/Kauwi/2460 was not family land and that the same was registered as a first registration and therefore protected under Section 143 (1) of the Registered Land Act Cap 300 Laws of Kenya (repealed). His case was that by an objection to the adjudication committee dated 9th November 1975 the four family members agreed to have the family land which was originally adjudicated as Parcel Number 2080, to be subdivided into four portions, which process led to the defendant getting the suit land. His position is that the sharing of the family land was done after the recovery of the land from Maundu Yumbya and joining the same with the family land. As concerning the alleged family meting decision of 6th September 1987, he stated that no such meting happened and the document was a forgery. He further stated that even if such meeting were to happen, such a decision was of no legal consequence, as the family had no legal authority or jurisdiction to interfere with private property. On the question as to the validity and import of the Land Disputes Tribunal award, he argued that the same was rejected by the court and that when the court decided to hear the matter, the award became obsolete.

36. It is therefore not in dispute that the family land was shared between four members of the family resulting in title numbers Mutonguni/Kauwi/2460, 2461, 2462 and 2080. It is also not in contention that there was a dispute between the family of Maundu Yumbya and the family of the parties herein which led to recovery of land from the Yumbya family. What is in contention is whether the land recovered from the Yumbya family was added and or joined to the family land before or after the same was shared to the four family members. Since the Respondents argued that their claim is based on the fact that the recovered land was added to the family land after sharing, they were under duty to prove those allegations, before the defendant could be invited to rebut the plaintiff's evidence. They were obligated to prove how much land the defendant had from the family, before adding the land recovered from the Yumbya family. They also had the duty to prove how much land was recovered from the Yumbya family and prove when the recovery was made, when the family land and recovered land were joined and the justification of claiming for ½ of the share thereof.

37. Merely stating that the recovered land was 18¼ ropes and that the defendant had 45 Ha while the plaintiffs had 23 Ha was not sufficient proof of the plaintiff's claim. It was not pleaded by the plaintiff that the four family members were entitled to an equal share from the family land. Indeed land parcel number 2461 measures 22.5 Ha, land parcel number 2462 measures 32.5 Ha and parcel number 2080 measures 18.5 Ha.

38. The burden of proof of the claim herein rested with the plaintiffs. The ***Hulsbury's Laws of England, 4th Edition*** at paragraphs 13 and 14 provides that the legal burden of proof remains constant throughout the trial and rests on the party who desires the court to take action. Therefore the legal burden is discharged by way of evidence with the opposing party bearing a corresponding obligation of adducing evidence in rebuttal. This constitutes evidential burden. Therefore evidential burden keeps shifting. In essence, the plaintiff always bears the legal burden of proof, to prove his claim; while the evidential burden may shift between the parties depending on the adduced evidence by one party and the effect of such evidence.

39. In the ***Supreme Court Presidential Election Petition No. 1 of 2017*** between ***Raila Amolo Odinga & Another vs. IEBC & 2 Others [2017] eKLR,*** the court had this to say concerning the legal burden of proof and the evidential burden of proof;

> **"132. Although the legal and evidential burden establishing facts and contentions which will support a party's case is static**

and remains constant throughout a trial with the plaintiff however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

133. It follows therefore that once the court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears the evidentiary burden to adduce "factual" evidence to prove his/her allegations of breach, then the burden shifts and it behoves the Respondent to adduce evidence to prove compliance with the law."

40. It therefore follows that in the trial before the court below, the legal burden of proof rested with the Respondents to prove that the suit property was family land and that they were entitled to the share thereof which they had claimed. It was only after factual proof of those assertions that the evidential burden would then shift to the Appellant to show that the suit land was not family land or that even if it were family land, the Respondents were not entitled to any part thereof or adduce any other evidence that would rebut the Respondents' claim. In this appeal, the appellant has complained that the court shifted the burden of proof to him.

41. The Respondents did not adduce evidence on when the disputed land was recovered from the Yumbya family. They testified that the dispute between the Yumbya family and their family was filed in 1974 and that the family land was shared in 1975/76, and that the sharing did not include the disputed portion. The Respondents relied on the family decision of 6th September 1987 as well as the award of the Kitui Land Disputes Tribunal which the court relied on to allow the Respondents claim. The family decision of 6th September 1987 states that the decision was made with agreement by both the 1st plaintiff and the defendant. However, the evidence on record from the testimonies of witnesses shows that both the 1st Respondent and Appellant were not present in that meeting and did not take part in the said decision. The award of the tribunal referred to was that read in court on 4th February 1998 during the pendency of the case in the lower court.

42. The appellant has argued that the family had no legal authority to interfere with private property. I have considered the document dated 6th September 1987, it does not make any reference to registered land, but refers to the subdivision of the land that had not been subdivided between the 1st Respondent and the Appellant due to a pending suit. The family land was subdivided and registered in the names of the four family members on 13th November 1989, as demonstrated by the searches for parcels 2460, 2461 and 2462. Therefore registration of the four family members was done two years after the family's decision of 6th September 1987. I have considered the record and I note that the Respondents did not give any evidence to show that the decision of the family dated 6th September 1987 was not taken into account when the family land was registered in the names of the four family members. Of more importance however is the fact that the family decision made before the defendant was registered as proprietor of the suit property, was applied by the court to interfere with private property registered under the Registered Land Act Cap 300 (repealed).

43. Sections 27 (a) and 28 of the Registered Land Act Cap 300 Laws of Kenya (repealed) provided as follows, concerning rights of a proprietor;

27 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;

(b) …….

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

a) to the leases, changes and other encumbrances and to the conditions and restrictions if any, shown in the register; and

b) unless the Contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register.

Provided that nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

44. The said provisions is replicated in Section 25 of the Land Registration Act No. 3 of 2012. Therefore the rights of the Appellant as the registered proprietor under the repealed Registered Land Act could not be defeated by the decision of the family dated 6th September 1987 as they had no authority under the Act to make such a decision. Sections 27 and 28 of the Registered Land Act Cap 300 (repealed) are applicable in this matter by dint of Section 107 of the Land Registration Act No. 3 of 2012. The said provision provides as follows;

107 (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

(2) Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act …"

45. The Appellant also complained that the trial magistrate's decision was based on an award of the Kitui Land Disputes Tribunal, which award had been rejected by court and which the court had disregarded by proceeding with the matter to hearing, despite the existence of the award. The record shows that on 9th February 1994, Osiemo J, by consent of the parties, referred the dispute to arbitration before the District Officer, Central Division with the assistance of 4 elders. On 12th June 1996 the court stated that what the District Officer had filed could not be referred to as an award as the same did not make sense. On the same date the court referred the matter before Kitui Land Disputes Tribunal. On 4th February 1998, the court read to the parties, the award from the District Officer (Kabati) dated 6th November 1997 and each party was directed to take a copy thereof. After the reading of the award, parties kept fixing the matter for hearing. Eventually both parties amended their pleadings severally and subsequently the matter was heard.

46. The issue that this court ought to address is the import of the award of the Land Disputes Tribunal that was read on 4th February 1996. Under Section 7 of the Land Disputes Act (repealed), once the award is filed in court, the court was under a duty to enter judgment in accordance with the decision of the Tribunal, upon which a decree was to issue. What happened in this case was that the award was read to the parties. The record does not show that the same was adopted as judgment of the court. It is my view that the same was not binding on the parties as no judgment was entered in terms of the award and no decree issued to that effect. Even the parties conduct in proceedings to fix the matter for hearing and changing the very foundation and stratum of their respective cases by amending both the plaint and the defence only points to the fact that the tribunal award which had not been adopted as judgment, was not of any legal consequence in so far as the rights of the parties were concerned. Clearly, the parties moved on, and hence making reference to the award as the cornerstone of the judgment in the lower court did not have any legal backing.

47. Looking at the decisions of the trial court on whether the plaintiffs proved their case on a balance of probability, the court stated as follows;

"I am satisfied that the plaintiffs have proved on a balance of probability that the defendant obtained a portion of land that was disputed by Yumbya's family. The clan determined on 6th September 1987 that the 2nd defendant was entitled to a portion thereof and that finding was buttressed by the finding in the arbitration by Kitui Land Disputes Tribunal read in court on 4th February 1998. The defendant has not explained why they got a parcel of land that was more than what the other family members got. His claim that he was rightfully entitled to the portion has not been supported by any evidence before court. The defendant cannot hide under the provisions on first registration as his title to the land was not a first registration as alleged."

48. The trial court therefore premised its decision on the decision of the family dated 6th September 1987 as well as the award of the Land Disputes Tribunal read on 4th February 1998. By failing to make an independent assessment of the facts of the case and the applicable law and instead putting more weight on the decisions of the family and the tribunal, the trial court failed to determine whether the Respondents' evidence as it was, without the two aforesaid decisions was sufficient to support their claim. This is in view of the fact that the family decision was not binding on the Appellant who was registered as proprietor of the suit land and therefore under Sections 27 and 28 of the Land Registration Act (repealed), his title could not be defeated by the decision of the family. Besides, the parties having severally amended their pleadings and fixed the matter for hearing despite the reading of the tribunal award, meant that the award was obsolete. Moreover, though the award had been read, the same had not been adopted as the court's judgment and therefore had no legal effect.

49. By finding that the Appellant did not explain why he had a bigger portion of land than other family members, when the size of the portion of land was not an issue in the pleadings, the trial court was shifting the evidential burden of proof to the Appellant, when the Respondents had not discharged their legal and evidentiary burden of proof and when the Appellant was not under any obligation to make such explanations as the evidence on record did not allude to the requirements of equality in sharing of family land.

50. On the question as to whether the suit property's registration was a first registration, under the Registered Land Act (repealed), it was the Appellant's duty to prove that fact. The Appellant allege that the original family land was parcel 2080 adjudication section. While the Appellant submitted extensively on this matter, the only evidence on record in that respect are the search certificates for land parcel numbers Mutonguni/Kauwi/2460, 2461,2462 and 2080. A search certificate shows the status or position of a parcel of land at a particular time but does not show the history of such parcel. To prove a title is a first registration, a party making such allegation ought to show by documentary evidence the history of the parcel in issue, and in this case a copy of the register or the green card would provide such evidence. No such evidence was produced by the Appellant. The Respondents alleged that the original parcel from which the four family members got their title was land parcel number Mutonguni/Kauwi/2080, which to them was registered under the Registered Land Act. However, this allegation was not also proved as the search for Mutonguni/Kauwi/2080 produced by the Appellant shows that the same title was closed on subdivision to create parcels Mutonguni/Kauwi/2727 and 2728. The defendant on his part alleged that parcel 2080 adjudication section is what was subdivided to give rise to the four parcels 2460, 2461, 2461 and 2080, all of which were first registrations. However, no evidence was adduced to prove that land parcel 2080 adjudication Section, did indeed exist and that the same was shared to create the four titles. The defendants' letter of 9th November 1976 is alleged to have emanated from family members and therefore the same is not proof that land parcel 2080 adjudication section did exist or was the original parcel that created the four parcels aforesaid.

51. Section 3(4) of the Evidence Act provides that a fact is not proven when it is neither proved nor disproved. Therefore there was no proof that the suit land was created from parcel Mutonguni/Kauwi/2080, neither was there proof that the suit land was a first registration. In view of the fact that the legal burden of proof lay with the Plaintiffs/Respondents which they failed to discharge, the Defendant's/Appellant's failure to prove first registration did not discharge the plaintiff's from proving their case.

52. While the Respondents sought for a declaration that land parcel number Mutonguni/Kauwi/2460 is family land and the plaintiffs are

entitled to their rightful share together with an order that the Defendant subdivides the said parcel Number Mutonguni/Kauwi/2460 into two equal portions and a portion be transferred to the 2nd plaintiff, the Plaintiff's evidence was that they were not interested in the land that the defendant was given as his share from the family land. Their interest was only 8¼ ropes from the land recovered by their family from Yumbya's family. Neither the pleadings nor the evidence by the Plaintiffs have attempted to created the nexus between their prayer for half of land parcel number Mutonguni/Kauwi/2460 and the 8¼ ropes that was allegedly awarded by the family on 6th September 1987. What the Plaintiff did not tell the trial court was whether the 8¼ ropes amounts to half of parcel number Mutonguni/ Kauwi/2060. That being the Plaintiff's claim in the pleadings and evidence, the court made the following orders in favour of the Plaintiffs/Respondents;

> **"From the foregoing, this court enters judgment for the plaintiffs against the defendant in the following terms;**
>
> **(1) That a portion as marked out by the clan and which the 1st plaintiff is occupying be excised from land parcel Mutonguni/Kauwi/2460 and same be transferred to the 1st Plaintiff Michael Wambua.**
>
> **(2) That the defendant do execute all subdivisions and transfer documents in favour of the 1st Plaintiff within 45 (forty five) days of this judgment, in default, the courts Executive Officer to execute the documents.**
>
> **(3) That the 1st plaintiff to bear the cost of survey and transfer of the portion to himself.**
>
> **(4) That this being a family dispute the defendant shall bear half cost of the suit."**

53. It is a settled principle of law that parties are bound by their pleadings, and evidence that is at variance with the pleadings ought to be rejected, however strong the evidence, because pleadings are the foundation of a suit, upon which evidence is built. In the case of ***Raila Amolo Odinga (****Supra),* the Supreme Court held as follows in respect of pleadings;

> **"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings."**

54. Similarly in the case of ***Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR,*** the court of Appeal cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Olade J; (NIG)** ***vs. Nigeria Breweries PLC SC 91/2002,*** where the court emphasized the importance of pleadings as follows;

> **"….it is now trite principle in law that parties are bound by their pleadings and that any evidence let by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded…….**
>
> **In fact, that parties are not allowed to depart form their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situations."**

55. The requirement that evidence adduced in a case should resonate with the pleadings is not just meant to create order in litigation but also to ensure fairness and justice both procedurally and substantively. Pleadings being the foundation upon which blocks of evidence are built, must give the scope of the suit, demarcating the suit by placing beacons on how far evidence in the suit can go.

56. The Respondents' further amended plaint does not seek for what is sought for in the evidence. The pleadings of the Respondents laid a claim on half of parcel number Mutonguni/Kauwi/2460 while the evidence sought for a half of the share of the land recovered from Yumbya's family. It is therefore clear that the Respondents' pleadings and evidence were at variance. In addition, in its judgment, the lower court ordered that the portion marked out by the clan and which the 1st plaintiff was occupying be excised from land parcel number Mutonguni/Kauwi/2460. This order was not sought for in the further amended plaint. By granting orders not sought for in the pleadings the learned trial magistrate made orders which he had no jurisdiction to make. In the case of ***Otieno Ragot & Company Advocates vs. National Bank of Kenya Limited [2020] eKLR,*** the court of Appeal held that a court has no power to grant orders not sought for.

57. The upshot is that the appeal is allowed and the judgment of the lower court in Machakos Chief Magistrate's Land Case Number 1103 of 2013 is hereby set aside and substituted with an order dismissing the Plaintiffs'/Respondents' suit with costs. The Appellant shall have the costs of this appeal.

58. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 19TH DAY OF JANUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Muumbi for the Respondents

No appearance for the Appellant

Ms. Josephine Misigo – Court Assistant