



NO. 308

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CIVIL APPEAL NO. 261 OF 2010

BETWEEN

NICK ODHIAMBO OLOO.....APPELLANT

AND

CHRISTOPHER OYIEYO BATI.....RESPONDENT

**(Being an appeal from the Judgment and decree of Hon. C.L. Yalwala, (Resident Magistrate) dated
and**

delivered on the 23rd November 2010 in the original Oyugis PMCC No. 82 of 2010).

JUDGMENT

1. By the amended plaint dated 23rd July 2010, the Respondent herein, Christopher Oyieyo Bati as plaintiff, sued the appellant herein, Nick Odhiambo Oloo, for the following reliefs:-
 - (a) Permanent injunction restraining the defendant from interfering with the disputed portion of LAND TITLE NO. WEST KARACHUONYO/KAWADHGONE/709 by burying his late brother thereat.
 - (b) Costs
 - (c) Interest.
2. The Respondent averred that he was the registered owner and/or proprietor of the disputed portion of land and that the body of Zablon Ojwang Oloo (deceased) which was lying at the mortuary was due for burial at any time in the disputed land, an eventuality that the Respondent did not wish to see hence the suit in the lower court.

3. The appellant entered appearance and filed defence in person in which he averred that the respondent was not the registered owner of the suit land and that the deceased's home was on the suit land which parcel of land belonged to the deceased's father, the late Oloo Okebe. The appellant also contended that the respondent's suit did not disclose any cause of action and that he would raise a preliminary objection for the suit to be dismissed on that ground.

4. The respondent filed a reply to defence, joining issue with the defendant upon the defence save where there were express admissions to the same.

5. After a number of interlocutory applications the suit was set down for hearing during which the Respondent testified and called one witness. The Respondent's case was that the dispute herein was heard and determined by the Rachuonyo Lands Disputes Tribunal on 5th October 1995. He said that though the suit land was registered in the name of Oloo Okebe, the Tribunal had found that there was an encroachment into the Respondent's own parcel of land known as Karachuonyo/

Kawadhgone/708. The Land Dispute's award was produced as **P. Exhibit 1**. The Respondent stated that the award was never appealed against, though when the Surveyors and the Land Registrar visited the Registrar visited the suit land with a view to rectifying the encroachment which had led to the award of 5th October 1995, the appellant's father stopped them on grounds that there was before the court Kisii HCCC No.396 of 1996 – See **P. Exhibit 2**. In that suit, the appellant herein sought a declaration that he was the absolute proprietor of the suit land measuring 13.2 hectares and that the acts of the Land Disputes Tribunal of transferring part of the suit land to the Respondent herein were illegal, unlawful and null and void. The appellant also sought an order to compel the defendants therein to retransfer to himself the portion of the suit land that had been illegally and unlawfully transferred to the Respondent herein. That case was dismissed for want of prosecution on 3rd March, 2009.

6. Throughout his testimony the respondent maintained that his claim was not over the whole of the suit land, but only over the portion that was given to him by the Rachuonyo Land Disputes Tribunal on 5th October 1995. The respondent stated that he had refused to have the appellant's brother buried on the suit land because a surveyor's report had established that the appellant's parcel of land Karachuonyo/Kawadhgone/709 had encroached onto land parcel 708. The Respondent prayed that the deceased's brother should be buried on land parcel No. 709 where the deceased's wife was also buried.

7. During cross examination, the respondent conceded that at the time the dispute went before the tribunal, he did not have the Grant of Letters of Administration.

8. The Respondent's witness, PW2 was Harrison Owino Robby. He was one of the elders who delivered the award dated 5th October 1995 in favour of the respondent – **P. Exhibit 2**. He confirmed the respondent's allegations of encroachment.

9. The appellant testified as DW1. His testimony was that land parcels 708 and 709 shared a common boundary with land parcel No. 708 being registered in the name of Bati Oloo, the respondent's father, while land parcel 709 belonged to Oloo Okebe, the appellant's father. He also stated that the homestead of the deceased Zablon Ojwang Oloo was situate on land parcel 709. That is 1995, the common boundary between the two parcels of land was fixed by the South Nyanza District Land Registrar in the presence of the Respondent, and that since that boundary was fixed the respondent had never sued the appellant's father or the appellant for that matter over the boundary. The appellant conceded that the deceased's

homestead was within the disputed portion on land parcel number 709. He denied suggestions put to him that his testimony was an afterthought.

10. The appellant's witness, DW2, was Essau Oloo Odero, the District Land Registrar, Rachuonyo North and South. His testimony was that land parcel 709 was a first registration in the names of Oloo Okebe upon adjudication in 1970. Land parcel 708 was registered to Bati Oloo in the 1970's as sole proprietor. DW2 told the court that when the Land Registrar visited the locus in quo in or about 1995, he concluded that the boundary was to be planted using the Register Index Map (RIM) and that any aggrieved party could file an appeal within 30 days from 5th October 1995. That the Land Registrar planted the boundary on that same 5th October 1995 and that since the appeal period had expired, the Land Registrar marked the boundary dispute as determined in accordance with **section 21** of the **Registered Land Act (RLA), Cap 300 Laws of Kenya** which provides as follows:-

“21 (1) Except where, under section 22, it is noted in the register that the boundaries of a parcel have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.

(3) Where the Registrar exercises the power conferred by subsection (2), he shall make a note to that effect on the registry map and in the register and shall file such plan and description as may be necessary to record his decision.

(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.

(5) Except where, as aforesaid, it is noted in the register that the boundaries of a parcel have been fixed, the court or the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as it or he thinks fit.”

11. DW2 further stated that since 5th October 1995, there had been no further correspondence on the matter; and further that since that date, there was nothing else to be fixed.

12. At the close of the oral testimonies by both sides, counsel appearing made submissions. After carefully considering the evidence on record and the submissions made by parties' counsel, the learned Resident trial magistrate Mr. C.L. Yalwala found that the dispute in the case related to a common boundary between land parcel numbers 708 and 709 of West Karachuonyo/Kawadhgone with each party taking a different view when it came to the question as to whether the boundary dispute had been resolved or not. In other words, whether plot 709 had indeed encroached on land parcel 708. The learned trial magistrate also found that there was no concrete evidence before him showing that the issue of encroachment and boundary planting had been concluded. The conclusion reached by the learned trial magistrate was that the boundary issue had not been resolved and that in the circumstances, the appellant herein could not lawfully bury the remains of his brother, Zablon Ojwang Oloo on the disputed portion of land. In his view, that particular portion of land belonged to land parcel No. West Karachuonyo/Kawadhgone/708 save only that the due process had not been complied with in terms of the provisions of **section 19** of the **Registered Land Act**, so as to complete the process necessary to transfer that portion to Land Parcel 708.

13. On the question of the respondent's capacity to sue, the trial court was of the view that though the

respondent did not produce proof that he had obtained the Letters of Administration before he commenced proceedings in the matter, there was however no dispute that the respondent was the son of the late Bati Oloo who was the registered proprietor of land parcel 708, and that in the circumstances, the estate of the deceased Bati Oloo automatically devolved to the respondent. The trial court relied on the interpretation given to the phrase **“legal representative” by the provisions of section 2 of the Civil Procedure Act, Cap 21 Laws of Kenya** which says:-

“Legal representative” means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.”

14. The trial court concluded that with such interpretation, the respondent did not have to take out Grant of Letters of Administration in order to sue or be sued as a legal representative. It was the view of the trial court that the requirement for taking out Letters of Administration as provided under **section 2 (3) (b)** of the **Law Reform Act Cap 26 Laws of Kenya** is restricted to causes of action in tort only.

The stated section of Cap 26 reads:-

“2(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either –

(a) proceedings against him in respect of that cause of action were pending at the time of his death; or

(b) proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation.”

15. The appellant was aggrieved by the judgment of the lower court barring him from burying the deceased on the disputed portion of land measuring 1.6 hectares out of land parcel 709. The appellant has set out seventeen (17) grounds of appeal as hereunder:-

1. The Honourable Court having referred the dispute concerning the boundary position between **LR NO'S. WEST KARACHUONYO/ KAWADHGONE/708 & 709**, respectively, to the District Land Registrar, Rachuonyo District, for arbitration and the District land Registrar, having filed a report on the dispute, the honourable court erred in law in hearing, entertaining and/or adjudicating on the same dispute, without superseding the arbitral order. Consequently, the Honourable Court acted in Vacuum in rendering the impugned judgment.

2. Having found and held that the subject dispute concerned the exact boundary location between **L.R. NO'S. WEST KARACHUONYO/ KAWADHGONE/708 & 709**, which dispute (sic) had not been marked and/or planted by the Land Registrar, the Learned Trial Magistrate erred in law in entertaining and/or adjudicating upon the subject dispute contrary to the provisions of section 21 (4) of the Registered Land Act, Chapter 300, Laws of Kenya.

3. Having found and held that the subject dispute concerned the exact boundary location between **L.R. NO'S. WEST KARACHUONYO/ KAWADHGONE/708 & 709**, The Learned Trial Magistrate erred in law in disregarding and/or ignoring the evidence of the District Land Registrar, (DW 2), who is the expert on determination of boundary disputes.

4. The Learned Trial Magistrate erred in law in finding and holding that the Respondent herein was

seized of the requisite *locus standi*, to mount, maintain and/or prosecute the suit concerning a claim in respect of (sic) encroachment on **L.R. NO. WEST KARACHUONYO/KAWADHGONE/708**, registered in the name of Killion Bati Ooro, Deceased, in the absence of Letters of Administration.

5. The Learned Trial Magistrate misapprehended and/or misconceived the tenor, effect and consequence(s) of the provisions of Section 82 of the Law of Succession Act, Chapter 160, Laws of Kenya and thereby arrived at an erroneous and illegal decision.
6. The Learned Trial Magistrate erred in law in granting an Order of Permanent Injunction against the Appellant, in the absence of any factual and/or legal basis, to warrant such an order being made against the Appellant, whatsoever and/or howsoever.
7. The Learned Trial Magistrate erred in law in entertaining, handling and/or adjudication upon a claim for ownership of a portion of land registered under the Registered Land Act, Chapter 300, Laws of Kenya, without jurisdiction and in contravention of Section 159 of the Registered Land Act, Chapter 300, Laws of Kenya.
8. The Learned Trial Magistrate erred in law in finding and holding that the provisions of Sections 1A & B of the Civil Procedure Act, Chapter 21, Laws of Kenya, would suffice to defeat a substantial point of *locus standi*, which goes to the root of the jurisdiction of the court.
9. The Judgment and/or Decision of the Learned Trial Magistrate, awarding (sic) a portion of **L.R. NO. WEST KARACHUONYO/KAWADHGONE/709**, to the Respondent amounts to and/or constitutes rectification of the register in respect of a first registration. Consequently, the judgment sought to be impeached contravenes the provisions of Section 143 (1) of the Registered Land Act, Chapter 300, Laws of Kenya.
10. Having found and held that the suit related to a claim of ownership over (sic) a portion of **L.R. NO. WEST KARACHUONYO/KAWADHGONE/709**, registered in the name of Oloo Okebe, Deceased, the Learned Trial Magistrate erred in entering judgment against the Appellant, in the absence of Letters of Administration.
11. The Learned Trial Magistrate erred in fact and in law in not finding and holding that the Respondent was *non-suited* as against the Appellant. Consequently, the Judgment and/or Decision of the Learned Trial Magistrate is irregular, unlawful and illegal.
12. The Learned Trial Magistrate erred in law in failing to appreciate the substratum and/or crux of the Respondent's claim and thereby proceeded to grant orders touching and/or concerning ownership of a portion of **L.R. NO. WEST KARACHUONYO/KAWADHGONE/709**, in the absence of pleading to that effect, whatsoever.
13. The Learned Trial Magistrate erred in law in returning a verdict in favour of the Respondent over (sic) cause of action, which arose and/or accrued in **1995**. Consequently, the Learned Trial Magistrate erred in not finding and holding that the Respondent's claim was barred by the Limitation of Actions Act, Chapter 22, Laws of Kenya.
14. The Learned Trial Magistrate erred in law and in fact in finding and holding that the disputed boundary between **L.R. NO'S. WEST KARACHUONYO/KAWADHGONE/708 & 709**, had not been determined and planted, contrary to *uncontroverted* evidence on record.
15. The Judgment and/or Decision of the Learned Trial Magistrate is contradictory and self defeating. Consequently, the judgment herein has occasioned a miscarriage of justice and thus ought to be set aside *Ex Debito Justitiae*.

16. The Learned Trial Magistrate erred in fact and in law in failing to properly or at all, analyze, evaluate and consider, the totality of evidence, adduced by the Appellant and witnesses. Consequently, the Trial Court arrived at a passionate and biased conclusion contrary to the evidence on record.

17. The Learned Trial Magistrate failed to properly evaluate and/or analyze the tenor of the submissions tendered by the Appellant. Consequently, the Learned Trial Magistrate misapprehended the crux of the legal issues attendant to the matter before the court.

16. The appellant thus prays that the appeal herein be allowed and the judgment of the trial magistrate dated 23rd November 2010 vide Oyugis PMCC No. 82 of 2010 be set aside and in lieu thereof, this court do make an order dismissing the respondent's suit in the subordinate court. The appellant also asks for costs of this appeal and for the costs incurred in the subordinate court. The appellant further prays for such further and/or other relief as the court may deem expedient.

17. This is a first appeal, and on a first appeal, this court is required to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. This court is also required to weigh and consider the judgment of the trial court remembering only that this court does not have the privilege of seeing and hearing witnesses. See **Peters –vs- Sunday Post Ltd. [1958] EA 424**, in which it was also held that an appellate court should only interfere with the findings of a trial court where there is no evidence whatsoever to support the particular conclusion reached by the trial court, or unless it is shown that the trial court has failed to appreciate the weight or bearing of the circumstances admitted or proved or has plainly gone wrong. See also **Geoffrey Kihunyu Wanjira –vs Gichiri Kiguta & another – Civil appeal No. 67 of 1997 – Court of Appeal**.

18. I have carefully reconsidered and evaluated the evidence afresh. I have also carefully weighed and considered the judgment of the trial court. I have also heard submissions from counsel for the appellant and the respondent, both written and oral. I have also had occasion to carefully read the authorities cited to me by both counsel. I am indebted to them. After considering all the above, I find that the issues that arise for determination are as highlighted in the submissions of both counsel and I shall proceed to consider the same as framed.

19. The first issue for determination is one of jurisdiction of the trial court to deal with the dispute. Counsel referred the court to the consent entered into by the parties on 17th August 2010, referring the dispute to arbitration before the District Land Registrar and Surveyor, Rachuonyo District and submitted that by referring the dispute to the District Land Registrar and Surveyor, respectively, the trial court divested itself of the jurisdiction to continue handling and/or entertaining the subject suit. That in case either party was aggrieved by the decision of the reference, then the aggrieved party had the obligation to go back to the court and apply to rescind, recall and/or supersede the order of reference before the court could continue with the dispute. Counsel submitted the respondent failed to do so.

20. To support this argument, reliance was placed on the provisions of **Order XLV Rules 1, 2, 15 and 16** of the repealed **Civil Procedure Rules** and on the case of **Francis Orosia Orango –vs- Joseph Mato Ngoko & another, Kisii HCCC No.267 of 1996** (unreported). In the case, the issue in hand was a boundary dispute involving land parcels No. Nyaribari Chache/B/B/189 and Nyaribari Chache/B/B/190. The matter was referred to the District Land Registrar, Kisii and the District Land Surveyor for purposes of establishing and fixing the boundary between the two parcels of land. The same was done in the presence of both parties and the area Assistant Chief and many local residents. A report was duly filed in court and parties given time to study the same and make representations. It had been alleged that the first defendant in the case had carved out of the plaintiff's land some 5 metres by 82 metres while the second defendant had carved out 5 metres by 20 metres.

After hearing submissions by counsel and considering the provisions of **section 21** of the **Registered Land Act**, the court ruled that since the Registrar had already determined the boundary dispute, the court had no jurisdiction to deal with the dispute again. Counsel for the appellant urged this court to make a similar finding.

21. In response to appellant's arguments, counsel for the Respondent submitted that upon presentation of the report to the court by the parties, both parties were in agreement that the issues that had been referred to the District Land Registrar and the District Surveyor had not been resolved and that they agreed to abandon the report and to go on with the full hearing. The relevant record on the issue is the one of 6th September 2010. On that day, Mr. Onyino for the Respondent informed the court in part:-

“The Land Registrar’s Report has been filed. We have both gone through it. We feel that the report is vague and has not dealt with the pertinent issues we expected it to address. It does not show whether the disputed portion of land exists on the plaintiff’s side nor (sic) defendant’s side. We thus have agreed to go on with the full hearing.”

22. On the same day and at the same session before the court, Mr. Bana for the appellant stated as follows:-

“I concede that the report is indeterminate. It does not clearly show the site of the disputed portion. I however feel that to have this matter determined, a fresh referral be made to the Registrar so as to clarify the point as regards the position of the disputed portion.”

23. Mr. Onyino opposed the application for a fresh referral and indicated to the court that the Respondent had opted to proceed with a full trial. He asked for a hearing date.

24. After considering the arguments by parties, the trial court resolved the impasse by allowing the case to go to full trial.

25. Looking at the whole evidence on this issue and the court record of 6th September 2010, it appears clear to me that both parties were agreed that the issues that had been referred to the Land Registrar and the District Surveyor, pursuant to **section 21 (2)** of the **Registered Land Act** had not been determined, that is to say, the boundary dispute had not been resolved. The Respondent chose to proceed to full trial while the appellant wanted a second referral which request the trial court refused to grant. **Section 21 (4)** of the **Registered Land Act** provides:-

“21 (4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.”

26. My reading and understanding of **section 21 (4)** is that unless and until the dispute the subject of the referral has been determined, the court has no power to entertain any action on the issue. **Section 21 (2)** of the **Registered Land Act** makes it mandatory for the Registrar on the application of any interested party to determine and indicate the position of the uncertain or disputed boundary. The Land Registrar in the instant case did not make such a determination and he was thus under a duty to do so. This first ground of appeal in my view succeeds and I so find. This finding equally applies to the second ground of appeal raised by the appellant. The case of **Wamutu –vs- Kiarie [1982] KLR 480** speaks into this point with a high degree of clarity and in particular at holdings numbers 3, 4 and 5 which fortify the position I have taken herein, and as properly submitted by counsel for the appellant that **section 21 (4)** of the **Registered**

Land Act takes away the jurisdiction of any court to hear a matter relating to boundary disputes of registered land unless the boundaries have first been determined by the Land Registrar. I entirely agree.

27. The third issue for determination is covered by grounds 3, 16 and 17 of the Memorandum of appeal. The appellant's complaint is that the trial court fell into grave error when he ignored and/or refused to take expert evidence from DW2, the District Surveyor in order to establish whether there was any encroachment and if so by how much space. The appellant also took issue with the findings of the trial magistrate in trying to distinguish between marking and planting a boundary.

28. In response to the appellant's arguments on this issue, counsel for the Respondent submitted that the report which the court refused to admit was not well received by the parties themselves, and that as such, it could not have added value. Whereas I find that the Report would definitely have been of value, I do not think that refusal to admit it caused prejudice to the appellant. It is also my considered view that the findings I have made hereinabove on grounds 1 and 2 of the Memorandum of Appeal take care of the unfavourable consequences that would have arisen by the refusal of the trial magistrate to admit the report by DW2. I wish to state here however that the distinction drawn by the trial court between the words "**fixing**" and "**marking**" the boundary could easily have been avoided, as same was not necessary.

29. The fourth issue that has arisen for determination is anchored in grounds 4, 5, 8, 10, 11 and 15 of Appeal, the gist of which is that the Respondent did not have the *locus standi* to commence any proceedings in respect of the estate of a deceased person without first of all taking out Grant of Letters of Administration. The respondent freely conceded that fact. The appellant placed reliance on **section 82** of the **Law of Succession Act Cap 160 Laws of Kenya** and on the case of **Trouistik Union International & another –vs- Mrs. Jane Mbeyu & another, Court of Appeal at Nairobi, Civil Appeal No. 145 of 1990**. The Respondent has replied by saying that he brought these proceedings in his capacity as the legally recognized owner or special owner and not on the basis that he was the Administrator of his deceased father's estate which was a matter of procedure if he were to litigate as an Administrator of the said estate. Counsel for Respondent referred to actions taken against the respondent by the appellant, which included the filing of Kisii HCCC No.396 of 1996.

30. In the **Trouistik Union case** (above) the capacity of the plaintiff to commence an action for the benefit of a deceased's estate under the Law Reform Act was disputed. The Court of Appeal said that it is only **section 82 of Cap 160, Laws of Kenya** that sheds light on who may take out proceedings in respect of a deceased person's estate. **Section 82 of Cap 160**, provides as follows:-

"82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:-

(a) to enforce, by suit or otherwise all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

(b) -----

Provided that –

(i) -----

(ii) no immovable property shall be sold before confirmation of the grant.

(c) -----

(d) -----

31. Under **section 3 of Cap 160**, “**personal representative**” is defined to mean “**the executor or administrator of a deceased person.**” In essence therefore, anyone who deals with the estate of a deceased person must of necessity be either executor or administrator of such an estate. As was held in the **Trouistik Union** case, **Section 82 of Cap 160** confers the power to deal with the estate of a deceased person on the personal representative and on him alone. There is no provision in that section for a legally recognized owner of a deceased’s estate; and I hasten to add that the only legal recognition of such a person is through compliance with **section 82 of Cap 160**. What then am I saying? I am saying that since the respondent’s father died the only person who could claim capacity to deal with his estate is the administrator of the estate. Such an administrator according to **section 3 of Cap 160** is one to whom grant of letters of administration has been made under the same Act.

32. The evidence is clear in this case that the respondent did not fit the definition of an administrator, for no grant of letters of administration had been made to him prior to commencing the proceedings that eventually gave rise to this appeal. The trial court, despite hearing evidence from the respondent that he had not taken out Grant of Letters of Administration in respect of his father, Bati Ooro, mistakenly said that the requirement that one takes out letters of administration as an executor or administrator before proceeding with or commencing proceedings in respect of a deceased’s estate is confined to proceedings in respect of a cause of action in tort. The learned trial court did not address its mind to the provisions of **section 82 of Cap 160** and accordingly missed the point. Counsel for the respondent also equally missed the point and his arguments do not therefore hold water. For the above reasons, I find that grounds 4, 5, 8, 10, 11 and 15 are firmly anchored on law and must succeed.

33. In grounds 6, 9 and 12, the appellant contends that since the suit land was born out of a first registration, then **section 143 (1)** of the **Registered Land Act** protected it against any attempts to rectify and/or nullify it. **Section 143 (1)** of the **Registered Land Act** provides thus:-

“143 (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

Counsel urged court to find and to hold that the findings of the trial court on this point could not be supported by the law.

34. It was also argued that the order of permanent injunction granted by the trial court was not supported by the principles set out in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358** as the same was allegedly granted in a vacuum. Reliance was further placed on **sections**

27 and 28 of the **Registered Land Act** and three Court of Appeal cases, namely:-

Nairobi City Council –vs- Thabiti Enterprises Ltd – Civil Appeal No. 264 of 1996 (unreported); **Provincial Insurance Company of East Africa Limited –vs- Mordekai Mwangi Nandwa, Civil Appeal No. 179 of 1995** (unreported) and **Joseph Marisin –vs- Joseph Kibilat Bargaliet, Civil Appeal No. 306 of 1979** (unreported).

35. In all the above cases, the Court of Appeal clearly stated the law on issues for determination to be that “**the only way to raise issues for determination by the court is through pleadings and it is only**

them that a claimant will be allowed to proceed to prove them”. See **Thabiti Enterprises case**. In the **Provincial Insurance Case**, the Court of Appeal reiterated the principle as stated above and also referred to the words of Scrutton, LJ in **Blay –vs- Pollard & Morris [1930] 1 KB 682** where he said:

“Cases must be decided on the issues on the record and if it is desired to raise other issues, they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleading, and in my opinion, he was not entitled to take such a course.”

36. In the instant case, it has been argued on behalf of the appellant that the respondent herein had only sought an order for permanent injunction, yet the trial court also issued an order of declaration of ownership.

37. In answer to the appellant’s contention that the trial court granted orders for which there was no pleading, counsel for the respondent submitted that there was a claim for 1.6 hectares in Kisii HCCC No. 396 of 1996. That suit was dismissed for want of prosecution and was never reinstated at any one point. In any event, there was no evidence on record to show that the said suit was consolidated with the lower court case so as to bring on board the claim for 1.6 hectares. Clearly then, the trial magistrate made an order for 1.6 hectares in favour of the respondent for which there was no pleading. In my considered view the trial court was not entitled to do so. Parties are bound by their pleadings, and no matter how sympathetic a judge may feel for a party whose pleadings are badly drawn or wanting in substance, the judge cannot take on the role of counsel for such a party. The duty of the judge is to determine the issues which are raised by the pleadings and no more.

38. The final issue that is for determination is one that is raised by ground 13 of appeal. The appellant contends vide this ground that the respondent’s claim against the appellant was time barred as provided by the **Limitation of Actions Act, Cap 22, Laws of Kenya**. The appellant contends that the respondent’s claim, which accrued on 5th October 1995 should have been brought to court in or before 2007, or within twelve (12) years. Reliance was placed on **section 7 of Cap 22** and also on the case of **Javed Iqbal Abdul Rahman & another –vs- Bernard Alfred Wekesa Sambu & another – Court of Appeal, Civil Appeal No. 11 of 2001** (unreported).

39. It was argued on behalf of the respondent that the filing of Kisii HCCC No.396 of 1996 stopped time for the respondent’s claim from running. According to the respondent, the time for his claim started to run from March 2009, when HCCC No. 396 of 1996 was dismissed for want of prosecution. **section 7 of Cap 22** reads thus:-

“7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

40. Taking all the circumstances of this case into account, and considering the law, I am persuaded that the respondent’s claim which arose on 5th October 1995 indeed suffered interruption by the filing of HCCC NO. 396 of 1996, and was thus not time barred by the time the Respondent came to court on 09th July 2010. In the circumstances, ground 13 of the appeal fails.

41. The appellant abandoned ground 7 of the appeal.

42. The upshot of what I have said about is that the trial court had no jurisdiction to try the dispute that was before it. I am also saying that the findings of the trial court cannot be supported by the evidence that was placed before the court. Consequently, this appeal succeeds. The judgment and decree of the trial

court dated 23rd November 2010 vide Oyugis PMCC No. 82 of 2010 be and is hereby set aside and in lieu therefore, I make an order dismissing the respondent's suit in the subordinate court. The appellant shall have the costs of this appeal and of the suit in the subordinate court.

43. It is so ordered.

Dated and delivered at Kisii this 20th day of January, 2012.

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Ochwangi (present) for Appellant

M/s Onyino (absent) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.