



**Mbengi & another v Muribia (Environment & Land Case  
E012 of 2021) [2022] KEELC 3289 (KLR) (8 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3289 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT & LAND CASE E012 OF 2021**

**CK YANO, J**

**JUNE 8, 2022**

**BETWEEN**

**PHINEAS MBENGI ..... 1<sup>ST</sup> APPELLANT**

**NICASIO KIRIMI NKUNE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LINUS MURIBIA ..... RESPONDENT**

**JUDGMENT**

1. The appellants herein Pheneas Mbengi and Nicasio Kirimi Nkune having been aggrieved by the judgment of Hon. J. M. Njoroge Chief Magistrate in Chuka CMCC No. 23 of 2011 delivered on 6<sup>th</sup> October, 2021 filed the appeal herein and set forth the following grounds:
  - i. That the Learned Magistrate erred in both law and fact by disregarding the evidence of the Appellants and other defence witnesses without giving good and reasonable justification.
  - ii. That the Learned Magistrate erred in both law and fact by giving undue weight and consideration on the Plaintiff's evidence and his witness thereby arriving at an erroneous findings and conclusions.
  - iii. That the Learned Magistrate erred in law and in fact by totally disregarding the Appellants' evidence and submissions to the effect that whereas the plaintiff had no approved development plans for his plot the 3<sup>rd</sup> Defendant, manifestly, had duly approved development plans for his property.
  - iv. The Learned Magistrate erred in law and fact by applying the law retrospectively thereby upholding the Plaintiff's arguments to the effect that there was neither advertisement nor public participation prior to allotment of plot No.62 to the 2<sup>nd</sup> defendant and hence arriving at wrong findings.



- v. The Learned Magistrate erred in both law and fact by relying on PW 2's testimony and statements to the effect that the plaintiff's shop had approved plans in 1980-1982 when he built the shop yet no such documentary evidence was produced in court.
  - vi. The Learned Magistrate erred in law and in fact by either failing, refusing and/or altogether neglecting to give due recognition and consideration to the veracity of the DW's (a government official) evidence thereby omitting to factor and include for consideration vital information that would have guided the court into arriving at a more concise finding.
  - vii. That the Learned Magistrate erred in both law and fact on finding that the Plaintiff's shop was either blocked and/or obstructed while it is evidently clear that the Plaintiff's premises sufficiently provided and catered for from the front and back (rear) as is required and provided for.
  - viii. That the Learned Magistrate erred in both law and fact by relying on speculations to arrive at wrong findings and judgment.
  - ix. The Learned Magistrate erred in law and in fact by allowing the Plaintiff's claims on the basis of the Plaintiff's misleading and fatally unreliable evidence and by relying on extraneous considerations and inferences and/or misapprehension of the law thereby arriving at an erroneous decision against and without considering the facts and evidence on record.
  - x. The Learned Magistrate erred in both law and fact by failing to acknowledge that the Clerk to The County was an authorized official obligated to sign all documents for and on behalf the council.
  - xi. That by relying on extraneous considerations and inferences the learned magistrate erred in law and fact because by relying on such inferences the same had high chances of misleading the court to arriving at wrong findings, determination and/or decision.
  - xii. The Learned Magistrate misdirected himself into using wrong principals of the law in arriving at an erroneous decision I total disregard of the highly credible evidence tendered by the Appellant in support of his case.
  - xiii. The Learned Magistrate erred in law and fact by failing to find that equity and the balance of convenience and logic weighed in favor of the Appellant and which omission led to a wrong decision.
  - xiv. The Learned Magistrate erred in law and fact by failing to appreciate, consider and find that the Appellant's claim was actuated in bad-faith and utmost malice.
2. The appellants pray for the appeal to be allowed and for the Respondent's case and/or claim in the lower court to be dismissed with costs.
  3. The Respondent vide a plaint dated 14<sup>th</sup> April, 2011 and amended on 31<sup>st</sup> August, 2015 had sued the Government of Tharaka Nithi County and the Appellants seeking the following orders:
    - a. An order directing the 1<sup>st</sup> Defendant to revoke the allotment of market stall No. 62 Rubate Trading Centre and a declaration that the allotment and allocation of market stall No. 62 was unlawful and an affront to the principles of natural justice.
    - b. A permanent injunction restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant either by themselves, their agents, servants or any person acting on their behest from constructing or continuing to



construct market stall No. 62 Rubate Trading Centre on the face of plot No. 20B Rubate Trading Centre.

- c. An order directing the 3<sup>rd</sup> Defendant to demolish the part of market stall No. 62 Rubate market already constructed and in default the Plaintiff be authorized to demolish the said structure at the expense of 2<sup>nd</sup> and 3<sup>rd</sup> Defendant.
  - d. Adequately compensate the Plaintiff for the damage occasioned by the demolition of the verandah of Plot No. 20B Rubate Trading Centre by the 3<sup>rd</sup> Defendant.
  - e. Cost of this suit.
4. In the said plaint, the Respondent averred that in the year 1975, the Respondent and one Daniel Nyagawere jointly allocated Plot No. 20 Rubate Trading Centre by the then County Council of Meru South (the predecessor of the County Government of Tharaka Nithi) whereupon they subdivided the said plot so that Daniel Nyaga became the registered allottee of Plot No. 20A while the Respondent became the registered allottee of Plot No. 20B. It was pleaded that a Part Development Plan was approved by the aforesaid council whereupon the Respondent fully developed his plot save for the few rooms on the rear of the plot. The Respondent averred that he had been carrying on business in the said plot and paying both the council rates (rents) and trade and occupation license and was issued with receipts for the same. That between 1992 and 1997, the then County Council of Meru South allotted and allocated market stalls to individuals and which stalls blocked the Respondent's Plot No. 20 B, and upon complaint the allocation was revoked.
  5. It was the Respondent's contention that in the year 2009, the then County Council of Meru South allotted and allocated to Kangangi Kirigia and Erastus Njagi a market stall No. 62 Rubate Trading Centre and that the said plot remains in the name and style of the appellants herein to date. It was the Respondent's contention that the 1<sup>st</sup> Appellant herein constructed a stall which had adversely affected the Respondent as the registered allottee of Plot No. 20B Rubate trading centre. The Respondent particularized the adverse effect of the alleged construction. It was further alleged by the Respondent that the allotment and allocation of the market stall in front of his plot No. 20B and the subsequent construction was unjustified and unlawful in that he was not consulted yet the allotment and allocation directly effected him as the registered allottee of plot No. 20 B and that this was an affront of the principles of natural justice. The Respondent pleaded that the 1<sup>st</sup> Appellant herein being the registered allottee of market stall No. 62 Rubate Trading Centre was vicariously liable for the acts, omissions and commissions of the 2<sup>nd</sup> Appellant unless he demonstrated to court that he had passed ownership of the market stall to the 1<sup>st</sup> Appellant.
  6. In their joint statement of defence dated 8<sup>th</sup> May, 2011, the Appellants denied the Respondent's claim. They specifically denied that a Part Development Plan for Plot No. 20 Rubate Trading Centre was ever approved as alleged and put the Respondent to strict proof. It was pleaded that payment for rents and licences fees were not proof of development on the ground. The appellants averred that the County Council of Meru South had already approved transfer of market stall No. 62 Rubate market from the 2<sup>nd</sup> Appellant to the 1<sup>st</sup> appellant. They further pleaded and contended that nothing had been done on market stall No. 62 Rubate Trading Centre to occasion any adverse effect upon the Respondent or anyone else. They further contended inter alia, that plot No. 20B was clearly served by roads of access on two fronts; that the building erected on plot No. 20B was put up without approval of a Part Development Plan hence the roof and verandah allegedly demolished were a nuisance to other allottees especially the 1<sup>st</sup> Appellant; and that the Respondent had adequate space to properly develop on his plot to create space for his business, if any, without affecting rights of other allottees. The County Council of Meru South stated that the allotment of the market stalls in Rubate market was done



lawfully and in a manner that did not affect the Respondent's plot or at all, and that there was no duty placed upon the council and the appellants when allocating or being allotted any market stall or plot in the said trading centre to consult or inform the Respondent.

7. After hearing evidence from both the Respondents and the appellants, the subordinate court found that the Respondent had proved his case on a balance of probabilities and entered judgment against the Appellants with costs in terms of prayers (a), (b), (c) and (e). Being dissatisfied with the said decision, the Appellants filed the present appeal.

### **Submissions**

8. The appeal was canvassed by way of written submissions which were duly filed by both parties. In their submissions filed on 2<sup>nd</sup> March, 2022, the Appellants submitted inter alia, that they had demonstrated how plot No. 62 Rubate market was allotted and/or acquired. It was their submissions that the 1<sup>st</sup> Appellant acquired a good title that had good roots/basis because the issuing authority then, now the defunct County Council of Meru South had the requisite mandate and authority to alienate and allocate plots within its area of jurisdiction.
9. The Appellants faulted the impugned judgment for having serious errors. The Appellants submitted that the learned trial magistrate erred in granting orders on either a defective title and/or unauthorized developments/structures. The appellants pointed out that whereas both plots Nos. 20 B and 62 are a consequent of allotment/allocation by the defunct County Council of Meru South, the Respondent, unlike the Appellants, did not produce any legal documents to prove or demonstrate the process through which his property was acquired and further did not produce the requisite approval documents permitting him to undertake the developments on plot No. 20 B. The Appellants submitted that it was ironical for the Respondent to claim that the Appellants' Plot No. 62 lacked credibility on the grounds that it was never subjected to any advertisement and/or public participation yet the Respondent's plot No. 20 B was never subjected to the same process.
10. The Appellants submitted that the principle of public participation came about through *the constitution* of Kenya 2010 and that the law on public participation was enacted through the Public Participation Bill of 2018 while the two plots were allocated earlier, and submitted that the law does not operate retrogressively. That there was therefore no basis to condemn the allocation of Plot No.62 without subjecting the same condemnation on plot No. 20 B. The Appellants submitted that this discriminatory treatment renders the impugned judgment fatally erroneous. The Appellants also faulted the learned trial magistrate for disregarding the evidence of DW1, a Physical Planner with the County Government of Tharaka Nithi who testified inter alia, that the building on plot No. 20 B was not approved, and that the Respondent was on the wrong. That there was no evidence to support the Respondents allegation that Plot No. 62 was created from a road reserve, adding that the structure thereon was duly approved.
11. The Appellant submitted that the learned trial magistrate relied on wrongly framed issues for determination and arrived at a wrong decision. It was submitted that there was no justification for condemning the development on Plot No. 62 on the basis that Plot No. 20 B was allocated earlier, adding that the development on plot 20b ought to have been condemned for lack of approvals. The appellants submitted that the Physical Planner in his evidence confirmed that plot No.62 was duly allocated and the buildings standing hereon were approved. The appellants faulted the learned magistrate for being contradictory in his judgment. The Appellants further submitted that the trial court overstretched itself at the appellants' peril and prejudice by granting declaratory orders that were not pleaded and/or prayed for. It was the appellants' submission that the learned magistrate arrived at his findings, conclusions and judgment that was not supported by any reliable evidence. The



appellants cited the provisions of sections 108 and 109 of the Evidence Act and submitted that they were condemned unfairly by the subordinate court and their right to property under Article 40 of the constitution was violated. The appellants urged the court to allow the appeal with costs against the Respondent.

12. In his submissions filed on 4<sup>th</sup> March, 2022, the Respondent submitted inter alia, that from the evidence on record, it is clear that market stall No. 62 was allocated and allotted to the 1<sup>st</sup> Appellant in or around 2002. That whereas the 1<sup>st</sup> Appellant contended that all the necessary and legal procedures were followed during the allocation, allotment and development of the stall No. 62, the Respondent on the other hand contended and averred that the allocation and allotment was illegal, unlawful and procedural (sic). The Respondent submitted that before 1996, the allocation, allotment and development of plots was being supervised by the respective County Councils, and in this case the then Meru County Council. The Respondent's submissions is that plot No. 20 B was not subject to the Physical Planning Act of 1996 since the law could not apply retrospectively. That at paragraph 54 (transitional provisions) save the application of the Act to plots allocated, allotted, constructed and developed before 1996 when the Act was enacted. The Respondent submitted that the learned trial magistrate was properly guided by the pronouncement of Bosire J in the High Court of Kenya at Mombasa Civil Case No. 20 of 1988 [1989] eKLR where it was held that a local authority had no powers to allocate and allot a property in the face of another property.
13. The Respondent submitted that the trial magistrate did not make a finding that the Appellant's claim was actuated in "bad faith and utmost malice," and that ground 14 of the appeal should fail. The Respondent's counsel cited Order 2 Rule 6 which prohibits departure by a litigant from his/her pleadings, and submitted that the court should go by the appellants' pleadings in that a party is bound by its pleadings.
14. The Respondent submitted that the judgment of the trial magistrate touched virtually all aspects of the plaint, defence, submissions and authorities presented by the litigants. It was further submitted that the Respondent adduced irresistible evidence so much so that the trial magistrate was persuaded to enter a judgment in his favour, and therefore ground 2 should also fail. While disagreeing with the appellants' averments contained in ground 3 of the appeal, the Respondent referred the court to the provisions of Section 54 of the Physical Planning Act 1996 which saved properties constructed and/or developed before the commencement of the Physical Planning Act 1996 from the application of the Act. However, the Respondent submitted that the allocation, allotment and development of market stall No. 62 was against the law since the allotment took place around 2002. The Respondent submitted that it was a requirement by the Physical Planning Act 1996 that any allocation, allotment or development that was likely to affect already established properties must be advertised and the public called upon to lodge objections. The Respondent specifically cited section 19 of the said Act that obligated the director to advertise the regional Part Development Plan and call for objections from persons who may be adversely affected by such Part Development Plan. The Respondent contended that the Part Development Plan of an area must be subjected to public scrutiny and participation.
15. The Respondent further submitted that the evidence of DW1 had no probative value and therefore the trial magistrate was not obligated to put undue weight or consideration to his evidence. The Respondent's position is that the matter herein was over the legality, lawfulness or otherwise of the manner in which market stall No. 62 Rubate Market was allocated, allotted and developed, and had nothing to do with stall No. 20 B. The Respondent submitted that the learned trial magistrate rightly made a finding that stall No. 62 superimposed over plot No. 20 B which was allocated and allotted earlier in 1975. That the trial magistrate was specific to the point both in law and in fact, and speculated on nothing. The Respondent urged the court to find and hold that the clerk to the council had no



mandate to sign documents relating to Physical Planning which were to be approved by the director and minister concerned, and referred the court to section 8, 9 and 16 of the Physical Planning Act. It was the Respondent's submissions that the trial magistrate confined himself to the law and evidence in arriving at his judgment, and relied on the case of *Italian Engineering works –vs – Glory Car Hire Ltd [1989]* eKLR. It was submitted by the Respondent that the trial court was not obligated to be guided by the principles of equity, logic and convenience other than the provisions of the Physical Planning Act 1996 and the evidence on record. The Respondent further submitted that Plot No. 20B was controlled and managed by the then Meru County Council guided by the then existing law, the Local Government Act while stall No. 62 was subject to the Physical Planning Act 1996. That any omissions or error are the development of Plot No. 20 B could only be visited upon the then Meru County Council or Meru South County Council and later the County Government of Tharaka Nithi. That since the said bodies received land rates and occupational license is a clear indication that Plot No. 20 and by extension Plot No. 20B is legitimate, legal and lawfully allotted. The Respondent submitted that this appeal is a revote against clear provisions of the law, and an attempt by the appellants to usurp the powers of the legislature which the court should not accept. The Respondent urged the court to dismiss the appeal herein with costs.

### **Analysis And Determination**

16. I have considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. The main issues in this appeal are whether the court had jurisdiction to handle the matter; whether the Respondent established, as he pleaded, that the allotment and allocation of market stall No. 62 in favour of the individuals who sold it to the 2<sup>nd</sup> Appellant who in turn sold it to the 1<sup>st</sup> Appellant was unlawful and whether the learned trial magistrate was right in concluding that the allocation and approval of and on stall No. 62 was not procedurally done and or that the initial owners did not possess good title to pass to the Appellants. In other words, whether the learned magistrate was right in concluding that the allocation of stall No. 62 Rubate Trading Centre was unlawful, null and void ab initio.
17. The Respondent's case in the lower court was that he was the rightful allottee of and lawfully carrying on business on premises developed on stall No. 20 B. The Respondent's complaint was that between 1992 and 1997, the then County Council of Meru South allotted and allocated Market stalls to individuals and which stalls blocked the Respondent's stall No. 20 B and that upon complaint to the said County Council, the allocations were revoked. The Respondent contended that in the year 2009, the County Council of Meru South which was sued as 1<sup>st</sup> Defendant allotted and allocated stall No. 62 to individuals who sold it to the 2<sup>nd</sup> Appellant herein who in turn sold it to the 1<sup>st</sup> Appellant. The Respondent's contention was that the construction by the 1<sup>st</sup> Appellant on stall No. 62 had adverse effects on stall No. 20 B. The Respondent's submissions was that market stall No. 62 unlike stall no. 20 B, was subject to the provisions of the Physical Planning Act, 1996 (repealed). In the impugned judgment, the learned magistrate made a finding that the construction on stall No. 62 adversely affected on the Respondent's premises on stall No. 20 B. Relying on the provisions of the Physical Planning Act of 1996, the learned magistrate found that the allocation and approvals of and on Plot No. 62 was not procedurally done, and that the initial owners did not possess any good title to pass to the Appellants. It was his finding that the allocation of Plot No. 62 was null and void ab initio. In my view therefore, the dispute revolved alleged violation of the provisions of the Physical Planning Act 1996 (now repealed). Land use planning is concerned with the use and development of land.



18. The said Physical Planning Act provided the functions and powers of the Liaison Committee as follows:

“section 10(2) The functions of the Liaison Committees shall be:-

- a. To inquire into and determine complaints made against the Director in the exercise of his functions under this Act or local authorities in the exercise of their functions under this Act;
- b. To enquire into and determine conflicting claims made in respect of applications for development permission,
- c. To hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under this Act.”

19. Further, the Physical Planning (Building and Development) (control) Rules 1998 on its part states:

“Rule 28 (Appeals)

Any person aggrieved by the decision of the local authority under the foregoing rules may appeal to the respective liaison committee.”

20. From the foregoing provision of the Act and Regulations made thereunder, it is clear that the Physical Planning Act not only envisages a dispute such as the one before the subordinate court and now this court but also provided an avenue for which such a dispute ought to be resolved. It is clear that the Act did create a dispute resolution mechanism where the first part of call was the Liaison Committee set out under section 10(2) of the Physical Planning Act 1996.

21. The question of alternative forms of dispute resolution is well embodied in our constitution under Article 159 (2) (c) where it is clearly provided as follows:

“Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promoted, subject to clause (3).”

22. The question that begs for answer is whether the subordinate court had jurisdiction to entertain the matter were a statute provided a parallel dispute resolution mechanism. In the case of *Johnstone Ewoi Lotiir & another –vs- Jeremiah Ekamais Lomorukai & 4 Others [2017]* eKLR Odunga J stated:

“... where there is an alternative remedy provided by an Act of parliament which remedy is effective and applicable to the dispute before the court, the court ought to ensure that the dispute is resolved in accordance with the relevant statute. Accordingly, I agree with the decision in *Pasmore vs Oswaldtwistle Urban District Council [1988]* Ac 887 that where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy are deprived of any other means of enforcement. However, as was stated in *Republic vs Public Procurement Administrative Review Board & Another Ex partes Selex Sistemi Integration Nairobi HCMA No. 260 of 2007 [2008]* KLR 728, ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality...”

23. The constitutionality of the Liaison Committees has been tried and tested in the Court of Appeal in recognizing the Liaison Committee as an alternative form of dispute resolution mechanism in which



the court had this to say in *Murang'a Tea & Coffee Company Ltd vs Shikara Limited & Another [2015]* eKLR (Mombaa Civil Appeal No.54 of 2014):-

“...we are therefore satisfied that the learned judge did not err by striking out the Appellant’s suit and application which ought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159 (2) (c) and the very *raison d’être* of the mechanisms provided under the two Acts.”

24. I therefore find that, it follows the jurisdiction of the subordinate court, has by operation of statute, in this case the Physical Planning Act, been restricted. I find the Respondent’s failure to have the matter referred to liaison committee amounted to casting aspersions to a public body which was yet to undertake its duty and as such undermine its independence. In view of the provisions under section 10(2) of the Physical Planning Act, I am of the view that where an obligation is created by statute and a specific remedy is clearly given by the statute, the persons seeking the remedy are deprived of any other means of enforcement. I therefore make a finding based on the provisions of the Act herein – above mentioned, that the subordinate court lacked the jurisdiction to proceed with the matter which is the subject of the instant appeal on account of an ouster clause provided for in statute that prescribed an alternative means of resolving the dispute. In my considered view, the issues raised by the Respondent in this matter as pleaded in the plaint are grounded upon the provisions of the Physical Planning Act (repealed), and the rules made thereunder. The dispute ought to have been referred to the Liaison Committee and therefore it is my finding that the subordinate court lacked the requisite jurisdiction to deal with the matter and had no alternative but to down its tools. The Respondent’s claim before the subordinate court, in my view, was premature as he had not exhausted the alternative remedy provided by the Physical Planning Act. In my considered view, the dispute should have been resolved in accordance with the relevant statute, and therefore the suit was improperly before court.

25. Even assuming that the trial court had jurisdiction to deal with the matter, the question that pegs an answer is whether the conclusions he reached were well founded and sound. In *Vijay Morjara –vs- Nausingh Maddhusing Darbar & another [2000]* eKLR Tuno; JA (as he then was) stated:

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

26. In *Kinyanjui Kamau –vs- George Kamau [2015]* eKLR the Court of Appeal restated the principle that allegations of fraud must not only be pleaded but must be strictly proved. The court cited with approval the earlier statement by the court in *Ndolo –vs- Ndolo [2008]* 1 KLR (g 7 F) 742 as follows:

“...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases...”



27. With those principles in mind, what evidence did the Respondent present to prove that the allotment and allocation of stall No. 62 was unlawful and fraudulent? It is interesting that the Respondent in his testimony appeared to rely on the fact that his stall was allocated earlier in 1975 while the Appellants' were allocated later in 2009. It is also interesting that the Respondent in his testimony appeared to rely on payment of rates/rent and license fee to support his position that his stall was lawful unlike that of the Appellants. However, when cross-examined, the Respondent admitted that there were no approvals given for his stall/plot. He was categorical that he did not seek approval while building on his plot. Whereas the Respondent submitted that Appellants did not comply with the provisions of the Physical Planning Act of 1996 and that the same was not applicable to the Respondent since his plot was allocated before the said Act was enacted, there was evidence given by DW1, Duncan Mwenda Kithinji, a Physical Planner with the Tharaka Nithi County who testified that it was plot No. 20 B that had encroached on plot No. 62. DW1 testified that the development on plot No. 62 were approved and that the Respondent is the one on the wrong. It is therefore not clear as to why the learned trial magistrate disregarded the evidence of DW1 and concluded that the allocation of plot No. 62 was unlawful.
28. It is apparent from the foregoing therefore that beyond the Respondent's plea of unlawful and fraudulent allotment and allocation in the amended complaint, he offered no evidence whatsoever to support those pleas. Based on my review and evaluation of the record, no evidence whatsoever was tendered to support the Respondent's plea that the allotment, allocation and development of plot No. 62 was unlawful.
29. The Respondent's advocate in his submissions put a lot of reliance of the provisions of the Physical Planning Act 1996. Whereas the provisions of the said Act were aimed at safeguarding public interest, ensuring stable and orderly use of land and planning for development for all human settlements in both rural and urban areas in Kenya, I am not persuaded that failure to obtain approvals would lead to a finding that the allotment and allocation was unlawful. Moreover, in this case, the evidence on record confirmed that approval was given for plot No. 62 unlike plot No. 20 B. I am therefore not in agreement with the learned magistrate when he concluded that "the allocation and approvals of and (development) on plot No. 62 Rubate Market was not procedurally done, and that the initial owner(s) did not possess any good title..." The Appellants being the proprietors of stall No. 62 had indefeasible title under section 25 and 26 of the *Land Registration Act* unless proved that they acquired the same fraudulently, which is not the case herein. The trial court no doubt overstretched itself at the peril and prejudice of the appellants' legitimate expectation.
30. In the result, I find merit in the appeal and the same is allowed with costs to the Appellants. The judgment of the learned magistrate delivered on 6<sup>th</sup> October, 2021 in Chuka C.M Civil suit No. 23 of 2011 is hereby set aside and I substitute it with an order dismissing the Respondent's suit with costs.
31. It is so ordered.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 8TH DAY OF JUNE, 2022**

IN THE PRESENCE OF:

C/A: Ann

Ms. Kendi h/b for Kirimi Muturi for Appellants

I.C. Mugo for Respondent

**C. K. YANO,**

**JUDGE.**

