



**Nzeva & 2 others v Songolo (Environment and Land Appeal
6 of 2022) [2024] KEELC 739 (KLR) (13 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 739 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL 6 OF 2022**

LG KIMANI, J

FEBRUARY 13, 2024

BETWEEN

SYELIWA KALALA NZEVA 1ST APPELLANT

PETER KALALA 2ND APPELLANT

MBITI KALALA 3RD APPELLANT

AND

WILSON NZII SONGOLO RESPONDENT

JUDGMENT

1. The Appellant appeals to this court from the judgment and decree of the Hon. Y.A Otieno Resident Magistrate sitting Mwingi Senior Resident Magistrate’s Court Civil Suit No.231 ‘B’ of 2007 through the Memorandum of Appeal dated 17th May 2012 and sets forth the following Grounds of Appeal:
 1. That the Learned Resident Magistrate erred in law and fact in not considering the law relevant to the issues arising in the matter.
 2. That the judgement of the Resident Magistrate Learned Magistrate is wrong in principle and is founded on the consideration of extraneous and irrelevant matters.
 3. That the judgement of the Resident Magistrate was flawed.
2. The Appellants pray that the whole judgment of the trial Court be set aside and the Appellants be allowed unrestricted access to the subject parcel of land together with the costs of the appeal.
3. Before proceeding with the appeal it is important to note that the Amended Memorandum of Appeal filed on 16th November 2023 was struck out by the court on the same date for the reason that the same was filed out of time. The Appellants' Counsel filed an application dated 18th April 2023 seeking leave to amend the Memorandum of Appeal. Leave was granted on 25th July 2023 subject to filing of the



said Amended Memorandum of Appeal within seven days from the date of the ruling. Counsel did not file the Amended Memorandum of Appeal on time but filed the same on 16th November 2023 despite extension of time for a further seven days having been granted on 31st October 2023. The court then struck out the Amended Memorandum of Appeal and gave a judgment date. Consequently, the Memorandum of Appeal that is validly on record and subject of this judgement is the one dated 14th June 2012.

4. The suit before the trial court was instituted by the Respondent herein vide the plaint dated 19th November 2007 where the Plaintiff claimed to be the lawful owner of the land in dispute, Land Parcel No. 2123 Nzawa Adjudication Mwingi District. He claimed that the boundaries thereof were marked by the land officers on the 8th of November 2007. He states that he purchased the said parcel of land on or about April 1980 from one Kalala Ngii Nzeve (Deceased) who later transferred the land to him.
5. The Plaintiff accused the defendants of interfering with the fence laid by the land officers, allowing their cattle into the suit land, and cutting trees. He stated that he complained to the Ministry of Lands and Settlement. The Plaintiff and the Defendants were summoned by the land officers to fix the boundaries jointly on 8th November 2007 and the Plaintiff planted Euphorbia plants as a boundary but the Defendants destroyed it. The Plaintiff sought a permanent injunction to restrain the defendants from the suit land, quiet and/or vacant possession of the suit land and costs of the suit.
6. The Defendant filed a defence dated 17th December 2007 where they denied the Plaintiff's claim and in particular, he delved with a farm belonging to the Plaintiff and claimed there was no fence. The Defendant's further claimed that the Plaintiff did not buy land parcel No. 2123 or any other parcel from Kalala Ngii Nzeve and neither was the land transferred to him. They admitted that land parcel No. 2008 recorded in the name of the deceased Kalala Ngii borders parcel No. 2123 but it is not clear how the Plaintiff acquired parcel No. 2123 and the Defendants averred that the said parcel was acquired through stealth and fraud.
7. The suit was heard and the trial magistrate delivered judgment on the 8th of May 2012, holding that the Plaintiff and his witnesses' evidence was cogent and reliable, having produced a copy of the sale agreement, the adjudication record and a letter authorizing him to file a suit from the Lands office. The trial court noted that no evidence was led by the defence to prove that the suit land belonged to them. Judgement was entered in favour of the Plaintiff and orders were granted as sought.

Evidence at the Trial Court

8. During the trial, PW 1 Wilson Nzii Songolo, the Plaintiff in the trial court testified that the 2nd and 3rd Defendants are the son and stepson of the 1st Defendant respectively. He stated that he had bought the suit land No. 2123 Nzawa adjudication section in 1980 from Mzee Kalala and his wife, the 1st Defendant. They entered into a written agreement and called the surveyor to fix the boundary and recorded the land in his name. They recorded each time he made a payment on the purchase prices.
9. He claimed that he 1st Defendant started interfering with the land and on 3rd March 2004 she complained to the Lands office that the suit land Parcel 2123 belonged to her. The Plaintiff was summoned to the said office where 1st Defendant was ordered to stop interfering with the land. They visited the land parcel in December 2007 accompanied by land officers to determine the boundary, and as a result, he planted sisal plants and euphorbia trees. He found that they had been uprooted after two days, the defendants had also been cutting trees, grazing their animals burning charcoal on the land and leases land to 3rd parties. Despite demand notices to the defendants, they have continued to use the land. He therefore prayed for an order of eviction of all the defendants as well as costs of the suit.



10. Upon cross-examination, he denied having written the agreement recently and stated that each of them had a record of the sale transaction. He also stated that they later wrote another agreement on 20th December 1980 but only his witness signed the agreement. He denied that he was lending money to the 1st Defendant. He noted that the 1st Defendant started interfering with the land after the seller died in 2003. He confirmed that the land adjudication was done in 1984. He confirmed that there were witnesses to the sale agreement and the 1st Defendant put a thumbprint.
11. Boniface Toto (PW 3) testified that he was a witness to the sale of the suit land on 20th December 1980 and that the Plaintiff is his uncle. He confirmed having seen the sale agreement in court and that the purchase price was paid of Kshs. 1,400.00. He confirmed that the 1st Defendant was present when the agreement was made.
12. Musyoka Ndue (PW 4) also testified to having been a witness of the sale of the suit land to the Plaintiff by Kalala on 20th December 1980 at a purchase price of Kshs. 7,200.00.
13. Joseph Ndung'u Kamau (PW 5) a Senior Land Adjudication officer at Mwingi stated that according to the records on the parcel 2123 Nzawa Adjudication Section, the recorded owner is Wilson Nzii Songolo, the Plaintiff. He produced a copy of the adjudication record. He stated that there were no recorded objections to the registration and that the registered owner was issued with consent to file this suit after complaining against the 1st Defendant interfering with the land. The land was demarcated in 1979 and completed in 1988.
14. On cross-examination, he said that he did not know who was involved in the demarcation exercise and that he did not know that the land had a previous owner. He however stated that they conduct arbitration for disputes even when time barred and they know it's not going to affect the registration to satisfy the concerned parties.
15. DW 1 Syeliwa Kalala the 1st Defendant gave her testimony stating that she is not trespassing on the Plaintiff's land and she denied that the Plaintiff bought land from her husband. She stated that she did not know that the Plaintiff had the land adjudicated to him.
16. DW 2, Mbaluka Kalala stated that he was born and brought up on the suit land and that he did not know that his father sold it in 1980, because they have been in continuous uninterrupted possession of the land.
17. DW3 Fredrick Mbiti Kalala testified and denied that his father sold the suit land to anyone. He stated that in 1980 when the land was allegedly sold, he was a grown man and that his father would have notified him of any sale. He further stated that in 2007, the Plaintiff came to the land accompanied by surveyors which he objected to and they left. DW 3 stated that he obtained consent to file another suit against the Plaintiff which is still pending in court. He added that the Plaintiff has never used the land or attempted to use it in any way.

The Appellants' Submissions

18. Counsel for the Appellant summarized the background to the suit and relied on the decision in the case of *Selle v Assorted Motor Boat Company 1968 EA Company 1968 EA 123-126* as a guide to courts sitting on appeal.
19. Counsel submitted that at the time of filing the suit, the Registered *Land Act* 1963 was one of the guiding statutes which provides in Section 32 that a title deed is the only prima facie proof of land ownership. They cited the case of *Festo Ogeda Agutu v Richard Odumbe & Another (2022) eKLR*,



- submitting that the Plaintiff in the trial court did not produce any register of the suit land with his name nor a receipt indicating payment of land rates.
20. It was also submitted by the Appellants that there were inconsistencies with the Plaintiff's testimonies during the hearing and relied on the case of *Richard Munene v. Republic* (2018) eKLR where PW 4 stated that the purchase price of the suit property was Kshs. 7,200.00 while PW 3 stated that the purchase price was Kshs. 1,400.00 and that there was a surveyor at the time of sale, but they did not produce a surveyor's report.
 21. He submitted that the Respondent did not produce a certificate of ownership as per Section 30 (5) of the *Land Adjudication Act*. They relied on the holding in the case of *Mohamed v Fadhil & 2 Others* (2022) KEELC 3278(KLR) (26 July 2022) (Judgment) where it was reiterated that when the root of the title is challenged the registered proprietor must prove the legality of the title.
 22. The Appellants also submit that it is a matter of public notoriety that before obtaining letters of administration, the deceased's kin cannot in any way deal with the deceased's property and relied on the cases of *Fredrick Wachira Ndegwa (substituting) Ndegwa Wachira (Deceased) vs Richards Wanjiku Ndanjeru & Another* (1997) eKLR and *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) (2022) KEHC 7 (KLR) (24th January 2022) (Judgment).
 23. The other contention that the Appellants have is that the Learned Magistrate relied wholly upon the Respondent's witness testimonies, documents and representations and failed to consider those of the Appellants, especially on the sale agreement, submitting that what constitutes a valid agreement for the sale of land is found in Section 3 of the *Law of Contract Act* as it was held in the case of *Luka Kibegwa Okara v Nyakeyo Ayega* (2020) eKLR. The Appellants note that there was no evidence tendered by the Respondent on payment of the purchase price being recorded each time it was paid as alleged during the hearing.
 24. It is also their submission that the Trial Magistrate should have considered other factors and not simply relied on the representations by the Land Adjudication Officer to establish ownership of the suit property and enumerated several other alternatives such as a deed or conveyance agreement, title search, survey report etc. since the legitimacy of the title was a primary question.

The Respondent's Submissions

25. Counsel for the Respondent who was the Plaintiff before the trial court gave a summary of the case before the trial court. It is their submission that the applicable law in this case is the *Land Adjudication Act* CAP 284 which has laid down procedures that the Appellants ought to have followed. It is submitted that the Respondent, as the registered owner of the suit land, obtained consent to file the suit, in compliance with Section 30 of the *Land Adjudication Act*.
26. The Respondent also noted that at the time of filing the suit, the title deed to the suit property was yet to be issued but that at the moment, title has been issued. They submit that upon issuance of this title deed, the adjudication register was closed and the appellants have no further claim to the Land Parcel herein.
27. Further, it was submitted by the Respondent that the Appellants did not comply with orders of stay of execution as they did not deposit the costs of the suit as ordered and thus it lapsed. The Respondent then proceeded to dispose of the suit property to a third party namely Mulei Muselela.
28. It is the Respondent's submission that the trial court in its judgment analyzed the evidence therein and the exhibits produced where it was established that the records produced showed that the suit land was registered in the name of the Respondent and therefore the trial Court was right in making its



decision and therefore did not consider extraneous and irrelevant matters in making its finding. The Respondent submitted that it was fully proven on a balance of probabilities that he is the legal owner of Land Parcel 2123 Nzawa Adjudication Section and urged the court to dismiss the appeal.

Analysis and Determination

29. As the first appellate court, this court has the duty to re-evaluate the trial while at the same time appreciating that the Trial Court is the one that had the opportunity of hearing the testimonies of witnesses and seeing the evidence. This duty was succinctly stated by the Court of Appeal in *Selle & Another V Associated Motor Boat Company & Others*, [1968] EA 123:

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

30. The Appellants have raised three grounds for appeal which the Court will consolidate and consider as two issues for determination as hereunder:

A. Whether the Learned Trial Magistrate erred in law and fact in not considering the law relevant to the issues arising in this matter

31. The Appellants contend that the Learned Trial Magistrate failed to appreciate the relevant applicable law which in their view was the Registered *Land Act* 1963 (repealed) under Section 32 which provides that only a title deed is prima facie evidence of ownership of land. Counsel submitted that the adjudication record relied on by the court was not enough evidence of ownership. He challenged the Respondent on failure to produce a transfer of land form, Land Control Board consent, valuation report and other statutory documents to show that the suit land was transferred to him to prove that the root of the title to the suit land was not fraudulent.
32. Counsel for the Respondent on the other hand submitted that the law applicable to the suit land Parcel 2123 Nzawa Adjudication Section was the *Land Adjudication Act* CAP 284 and that if any party challenges ownership of any land under the said Act, they ought to follow the procedure provided by the law by filing a claim of ownership at the committee stage, arbitration board stage and appeal to the Minister. The Appellant failed to lodge their claim and they could not challenge the Respondent's ownership through the suit before the trial court or this appeal.
33. It is an uncontested fact the suit land falls within an adjudication area being Nzawa Adjudication Section. The area went through the adjudication process under the *Land Adjudication Act* CAP 284 and the suit land was given the number 2123 Nzawa Adjudication Section. The Land Adjudication Officer confirmed that the land was demarcated in 1979 and completed in 1988.
34. Adjudication is a process where rights and interests in land are ascertained and recorded before registration. The preamble to the *Land Adjudication Act* CAP 284 states that it is “An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land (formerly Trust land), and for purposes connected therewith and purposes incidental thereto.”
35. When land is under adjudication, persons with rights and interests go through the process of adjudication which includes ascertainment and registration of the said rights and interests. The process



also includes an elaborate dispute resolution mechanism which culminates in issuance of the title deed. In the Court's view, it is only after the title is issued that the Registered Land Act would apply.

36. Section 13(1) (2) and (3) of the Land Adjudication Act provides for the making of claims and pointing out of boundaries by persons who believe they have an interest in land within an adjudication section and states that:
1. Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this Act.
 2. Every person whose presence is required by the adjudication officer, demarcation officer, recording officer, committee or board shall attend in person or by a duly authorized agent at the time and place ordered.
 3. If any person who is ordered to attend fails to attend in person or by a duly authorized agent, the demarcation, recording, adjudication or arbitration, as the case may be, may proceed in his absence.
37. This process was available to the deceased Kalala Ngii Nzeve in his lifetime and also the defendants herein to claim the suit land during the land adjudication process by having their claim recorded and by pointing out boundaries to the suit land to the demarcation Officer. Indeed, the evidence adduced before the trial court seems to indicate that the deceased Kalala Ngii was aware of the adjudication process and actively participated in it since the Appellants in their statement of defence recognized that land parcel No. 2008 was recorded in the name of Kalala Ngii Nzeve and the said land borders land parcel No. 2123.
38. The court further observes that if the deceased had a claim of ownership over land parcel No. 2123, he had the opportunity to have it registered in his name at the time when parcel No. 2008 was registered in his name. Alternatively, he would have lodged a complaint over the registration of the Respondent as owner of the said parcel of land using the process laid down under the Land Adjudication Act.
39. The Act provides for lodging of complaints where more than one person lays a claim to a specific parcel of land. The Act goes further and sets up a dispute resolution mechanism starting with the appointment of the adjudication committee and the arbitration board. Section 19 (2) and (3) state as follows;
2. If there are two or more conflicting claims to an interest in land and the recording officer is unable to resolve the conflict, he shall submit the dispute to the committee to decide.
 3. The recording officer shall rectify the forms in accordance with any decision which the adjudication officer, the committee or the board may make in accordance with this Act.
40. A party dissatisfied with the decision of the adjudication committee can take the dispute to the arbitration board for determination under Section 21 (3) of the Act which provides that;
- “ Any person named in or affected by a decision of the committee who considers the decision to be incorrect may, within fourteen days after the decision, complain to the executive officer of the committee, saying in what respect he considers the decision to be incorrect.”
41. When the adjudication register has been completed, Section 25 of the Act provides that the adjudication officer certifies on the adjudication record and demarcation map, and sends the duplicate



- adjudication record to the Director of Land Adjudication and also displays the original adjudication register for inspection at a convenient place within the adjudication section. Notice that the adjudication register has been completed and may be inspected at that place during a period of sixty days from the date of the notice is also issued by the Land Adjudication Officer.
42. The Act gives a further chance for dispute resolution under Section 26 where persons who are dissatisfied by the entries to the adjudication register may file objections. The Section provides that;
1. Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.
 2. The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.
43. Section 29 of the Act provides for a further step in dispute resolution and determination of the question of ownership of land and allows appeals against the decision of the Land Adjudication and Settlement Officer to the Minister. The appeal is to be filed within sixty days after the date of the determination, and the Minister is required to determine the appeal and make such order thereon as he thinks just and the order shall be final.
44. Such an elaborate dispute resolution mechanism as that provided under the Act has led to court decisions finding that courts cannot substitute its own decision for that of the established bodies which are supposed to deal with complaints under the *Land Adjudication Act*. It is thus improper to invoke the jurisdiction of the court while not having invoked the mechanism provided under the Act.
45. In *Kinyamal Ole Tare v Sotua Sakana Muya* [2015]eKLR, the court held that:
- “...this court has no jurisdiction in these proceedings to interfere with or impeach the defendant’s title to the suit property on account of any error that was committed during the land adjudication process. A party with such grievance has to follow the dispute resolution mechanism set out in the *Land Adjudication Act* that I have outlined above...”
46. Again in the case of *Mohamed Ahamed Khalid (Chairman) and 10 others - v- Director of Land Adjudication & 2 others* (2013) eKLR Angote J held:-
- “The law that was applicable for the ascertainment of land rights and interests over trust land is the *Land Adjudication Act* Cap 284. The said Act has an elaborate mechanism of appeal in the event an individual is aggrieved by the decisions of the land adjudication and settlement officer, the land adjudication committee, the land arbitration board and the Minister’s appeal committee.”
- Indeed, before the Director signs the certificates of finality, the *Land Adjudication Act* provides that the adjudication register must be published which shall be followed with the hearing, determination and implementation of objections in respect to the Adjudication register.”



47. Further, in the case of Speaker of National Assembly -Versus- Karume (1992)KLR 21 the Court of Appeal held that:-

“Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

48. In the case of Tobias Achola Osindi & 13 others versus Cypriano Otieno Ogalo & 6 Others [2013] eKLR Okongo J made a statement on the power and authority given to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest.

“The whole process leading up to the registration of a person as a proprietor of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interest in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act.....

The Act has given full power and authority to the Land Adjudication Officer to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned.”

49. The Appellants did not place before the trial court any evidence to show that they or the deceased Kalala Ngii Nzeve commenced, participated in and/or exhausted the land adjudication dispute resolution mechanism with regard to the suit land by challenging the recording of the Respondent as the owner of the suit parcel of land before the recording Officer, the Adjudication Committee, Arbitration board and the Objection proceedings. In the Court's view, they cannot at this moment be heard to claim ownership of the land.

50. In the Court's view, an inference can be made of the conduct of the deceased Kalala Ngii in failing to claim the suit land during the adjudication process being that the deceased knew that the land did not belong to him.

51. The Land Adjudication Officer testified that the land was adjudicated in 1979 and completed in 1988. He stated that the letter dated 8th February 2005 objecting to ownership of the land by the Respondent was time-barred and that further complaints to their offices were also time-barred. It will be noted that under Section 26 of the Act Objections to the adjudication register are to be lodged within sixty days of the date upon which the notice of completion of the adjudication register is published.

52. Section 28 of the *Land Adjudication Act* provides that:

“Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register: Provided that, where the land is affected by an appeal under section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination, the register shall if necessary be altered in accordance with the determination.”



53. Pursuant to this, the Registered *Land Act* (repealed) provided in Section 11(2) that:

“Whenever an adjudication register has become final under section 27 of the *Land Adjudication Act*, the adjudication officer shall deliver the adjudication register to the Land Registrar or Assistant Land Registrar in charge of the registration district concerned, who shall prepare a register for each person shown in the adjudication register as a landowner and every other person shown in the adjudication register as being entitled to the benefit of any interest, lease, right of occupation, charge or other encumbrance affecting the land shall be registered as being so entitled, subject in every case to any restriction of the power of the proprietor or of any such person as aforesaid to deal with the land, and to any interest, lease, right of occupation, charge or encumbrance affecting the land.”

54. The Court wholly associates with the above authorities and legal provisions cited and finds that the Respondent followed the procedure laid down under the *Land Adjudication Act* and was recorded in the Adjudication Register as the owner of the suit land. The Appellant did not challenge the recording and the adjudication register and could not challenge the said registration by trying to obtain possession and unlawful entry into the land.

55. The Court is of the opinion that the Learned Magistrate did not err when holding that the Respondent had proven his case on a balance of probabilities by producing the adjudication record with his name registered as the proprietor among other documents as proof.

B. Whether the judgement of the Learned Magistrate is wrong and flawed in principle and is founded on consideration of extraneous and irrelevant matters.

56. In the judgement of the trial court, it was stated that the issue for determination was “whether the plaintiff’s claim has been proven on a preponderance of probabilities” The Court found that the Plaintiff and his witnesses’ evidence was cogent and reliable. The trial court relied on the sale agreement produced by the Plaintiff and in particular the Land Adjudication register confirming the Plaintiff as the owner of the suit land. The Court also noted the presence of the letter authorizing the Plaintiff to file the suit from the lands office.

57. The Appellant did not particularize matters the trial court considered and which in their views were extraneous and irrelevant to the case. In the court’s view, the evidence relied on by the trial court in arriving at his decision was solid and cannot be faulted.

58. In particular, and considering the suit land was within an adjudication area the presence of the adjudication register showing the Respondent as having been recorded as owner of the suit land was in the Court’s view evidence of the Respondent rights and interests having been ascertained and recorded in accordance with the *Land Adjudication Act*. The Respondent did not adduce any evidence to counter the entry in the register. This is in line with the provisions of Section 26A of the Act which provides for situations where no Objection to the register has been lodged. The section states that;

“(1) When the time for objection under section 26(1) has expired, the adjudication officer shall prepare a No Objection Register in respect of any land not subject to an objection, and deliver the same to the Director of Land Adjudication who shall—

- a. certify thereon and on the duplicate adjudication register that the adjudication of the land set out therein has become final; and



- b. forward the No Objection Register together with a copy of the duplicate adjudication register to the Chief Land Registrar for the purpose of registration under section.”

59. It is noted that the Learned Trial Magistrate did not rely on the evidence of the Respondent and his witnesses only. It was clearly stated in the judgment that the Court considered all the documents adduced in evidence and the oral evidence such as the agreement for sale, the adjudication record and the letters from the Land Office confirming that the Respondent was the registered owner of the suit property and authorizing him to proceed to file a suit against the Appellants herein.
60. The Court also considered the evidence adduced by the Appellants and found that; “No evidence was led by the defence to prove the alleged land in the registration by the plaintiff. The numerous previous complaints lodged in various government departments by the plaintiff against the defendant all resolved in his favour but further credence to the claim”.
61. As it was held in the Court of Appeal case of Mbuthia Macharia v Annah Mutua Ndwiga & another (Supra) quoted above, the Appellants had a duty to discharge their evidential burden to controvert the evidence of the Respondent and mere representations could not have been considered by the trial court as evidence.
62. In conclusion, the court finds that the Learned trial Magistrate did not err in determining the suit in favour of the Respondent against the Appellant and ordering a permanent injunction to restrain the Appellants from trespassing, clearing, fencing, grazing and entering on the land parcel No. 2123 Nzawa Adjudication. The Trial Magistrate did not err in granting the Respondent quiet and/or vacant possession of the suit parcel of land and in awarding costs to the Respondent.
63. Consequently, the court finds that this appeal lacks merit and the same is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI ON THIS 13TH DAY OF FEBRUARY, 2024.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court and virtually in the presence of-

Musyoki: Court Assistant

Kyalo holding brief for Wamunyolo for Appellants

Mwalimu holding brief for Mbaluka for the Respondent

