



**Muguro v Kibuva (Environment and Land Appeal 46 of 2019)
[2023] KEELC 663 (KLR) (8 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 663 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 46 OF 2019
A NYUKURI, J
FEBRUARY 8, 2023**

BETWEEN

MARY MURUGI MUGURO APPELLANT

AND

ESTHER KAVULI KIBUVA RESPONDENT

*(Being an Appeal from the judgment of the Hon. Chief Magistrate, C.C. Oluoch
dated 31st May 2019 in the Chief Magistrate Court at Mavoko Law Courts)*

JUDGMENT

Introduction

1. The Appellant in this Appeal, being dissatisfied with the judgment of Hon. C C Oluoch, Chief Magistrate at Mavoko, delivered on 31st May 2019, appealed against the said judgment by a Memorandum of Appeal dated 3rd October 2019, on the following grounds;
 - a. That the learned Chief Magistrate erred in law and fact in declaring that the Plaintiff is the legal and lawful owner of Title No. Mavoko Town Block 3 (Waswa)/4072 by disregarding the fact that the Plaintiff has never owned the title before and all relevant legal facts.
 - b. The learned Chief Magistrate erred in Law and fact by making an order that Title No. Mavoko/Block 3 (Waswa)/4072 issued on 8th April 2010 to the Appellant Mary Murugi Muguro (the first Defendant) be cancelled by the Land Registrar Machakos and title deed be issued to Esther Kavuli Kivuva (Plaintiff) now the Respondent, as Esther purchased an allotment certificate for Plot No. 505 Waswa which plot has no relationship with the Appellants Title Deed No. Mavoko/Block 3 (Waswa)/4072 regularly and lawfully registered in the name of the said Appellant at Land Registry Machakos as per evidence and investigation done by PC George Karanja a Police Officer who testified as PW3.



- c. The trial Magistrate erred in law and fact to assume that
 - i. That the certificate of allotment for Plot No. 505 transferred to the Plaintiff by one Collins Odhiambo was Title to property now described as Mavoko/Block 3 (Waswa)/4072.
 - ii. That conditions in the said allotment letter has been complied with and in particular the conditional payments.
 - iii. The documents held by Collins Odhiambo were complete as to secure a plot and relied on photocopies not signed and without the company seal.
- d. The learned Magistrate erred in law and fact by ignoring the entire evidence of the Appellant who purchased the Title No. Mavoko/Block 3 (Waswa)/4072 from Waswa Development Co. Ltd and that the same was transferred to her by the vendor into her names at the land registry as per investigations recorded by police and evidence of PC George Karanja who did not trace the original file with all original documents at the police station and that the summons mentioned by PC Karanja in the proceedings were not produced as to proof that the Appellant had been summoned. The Appellant proved her case but the trial Magistrate erred by concluding that she never proved her case when during the hearing the Appellant gave evidence to the effect that she misplaced the receipts for payment and sale agreement after she obtained the title deed in her names.
- e. The learned trial Chief Magistrate erred in law and fact in assuming the following;
 - 1. That the allotment held by Collins Odhiambo originating from Waswa Development Society was a document for ownership.
 - 2. That Collins Odhiambo had completed making the necessary required payments to purchase the land when it emerged during the hearing that he never paid the purchase and transfer fees.
 - 3. That the terms of payment in the allotment letter has not been fully complied with as per his evidence and that the transaction between him and the Plaintiff was uncomplete as to secure land afterwards.
 - 4. Collins Odhiambo transferred his uncomplete documents of ownership of Plot No. 505 on 14th May 2010 whereas the Title Mavoko/Block 3 (Waswa)/4072 had already been issued on 8th April 2010.
 - 5. The document held by Collins Odhiambo were uncomplete and the subsequent transfers to Esther Kavuli (Respondent) were incomplete as they admitted the same were not signed, sealed or executed.
 - 6. The trial Magistrate erred in law and fact to rely on the case law of contract whereas there was no contract between the Respondent and the Appellant Mary Murugi Muguro at all at all.
- f. The trial Chief Magistrate erred in law and fact to assume that there was no contract between the Appellant and the 2nd Defendant Waswa Investment Co. Ltd.
- g. The trial learned Magistrate finally erred in law and fact by disregarding the evidence of the Appellant clearly contained in the proceedings and in particular;



1. That the Appellant took physical possession and that she is still in physical occupation to date.
 2. That the Appellant went to police and showed her Title Deed No. Mavoko/Block 3 (Waswa)/4072 as a result of which the police investigated the title and confirmed it was obtained genuinely and regularly.
 3. That Waswa Development Society which issued the allotment is not the same as Waswa Development Co. Ltd at all and that the two are different. No evidence was tendered or emerged that the society is the one that became the limited liability company.
 - h. The trial learned Magistrate erred in law and fact to conclude that the Respondent Esther Kavuli had proved her case contrary to the evidence in the proceedings.
2. Subsequently, the Appellant sought the following orders;
- a. That the appeal be allowed.
 - b. That the judgment dated 31st May 2019 and decree by Hon. C C Oluoch (Chief Magistrate) be set aside and the Respondent's suit be dismissed.
 - c. The cost of the appeal be borne by the Respondent.

Background

3. The background of this case is that by a plaint dated 30th April 2015, the Plaintiff who is the Respondent in this appeal, sought against the Appellant herein (the Defendant in the lower court) for the following orders;
 - a. Declaratory orders that the Plaintiff is the legal and lawful owner of all that property known as Title No. Mavoko Town Block (Waswa) 3/4072.
 - b. An order for cancellation and rectification of the title deed issued to the Defendant Mary Murugi Muguro, and an entry and issuance of title deed to the Plaintiff Esther Kavuli Kivuva under Title No. Mavoko Town Block (Waswa) 3/4072.
 - c. Permanent injunction restraining the Defendant, and or her agents, servants and or whomsoever from interfering, transferring, alienating, disposing, or dealing in whatsoever manner with the suit property Title No. Mavoko Town Block (Waswa) 3/4072.
 - d. Costs of the suit.
4. In the Plaint, the Respondent averred that on 25th June 2008, she purchased Land Parcel No. 505/114 Waswa Estate, Phase 1 Lukenya Branch, Machakos District, now known as Mavoko Town Block (Waswa) 3/4073 (suit property) from one Collins Odhiambo Otwire at a consideration of Kshs. 150,000/- which was paid in full.
5. It was further her case that upon execution of the sale agreement, the vendor handed over to her, his allotment letter, identity card, pin certificate and all other documents to facilitate change of name at the 2nd Defendant company. That the 2nd Defendant recognized the change of ownership of the suit property and issued the Respondent with the allotment letter and share certificate pending processing of title.
6. The Respondent also stated that she took possession of the suit property and erected a fence thereon only to realize upon obtaining a search certificate that on 8th April 2010, the title deed of the suit



property had been issued to the Appellant. The Respondent accused the Appellant of obtaining the suit property by fraud, illegality, concealment of material facts, misrepresentation and without due procedure. She particularized the particulars of fraud, illegality and collusion against the Appellant.

7. The Appellant, who was the 1st Defendant in the lower court filed her defence dated 15th May 2017, on even date. In her defence, which was a general denial of the Respondent's claim, she stated that she was the first registered owner of the suit property and alleged that one Collins Odhiambo Otwire was a stranger to her.

The Evidence

8. PW1, Esther Kavuli Kivuva, the Plaintiff in the suit, testified that she acquired the suit property by purchase from Collins Odhiambo on 26th June 2008 at a consideration of Kshs. 150,000/-, which she paid in full. She stated that the agreement was before a lawyer. She stated that she took possession and was still in possession having fenced it after purchase. She confirmed that she received an allotment letter from Collins Odhiambo dated 28th November 2015, his ID card and PIN certificate. That she visited the 2nd Defendant (Waswa Investment Co. Ltd) who cancelled the name of Collins Odhiambo and replaced it with her name. That she also paid Kshs. 46,000/- as transfer and legal fees. She stated that Waswa Investment Co. Ltd issued her with a share certificate and a letter of allotment. That she only realized the title deed was in the Appellants name after conducting a search in 2012.
9. PW2, PC George Karanja, attached to DCI Athi River testified that in November 2017, he was investigating the ownership of the suit property and therefore sought from the Land Registrar for certified copies of the title deed, owners card and transfer documents. That the current owner was Mary Murugi Muguro. That she was summoned to the DCI to show how she acquired the suit property but did not show up and that therefore there were restrictions placed on the title by the DCI Central Nairobi.
10. PW3, Collins Odhiambo Otwire, stated that he was a farmer in Usenge Siaya but had previously worked with Nairobi City Council. He confirmed selling the suit property to the Respondent Esther Kavuli and stated that the allotment letter was issued to him by the Chairman of Waswa Investment Company on 28th November 1995. He stated that he was a member of Waswa Investment Company by virtue of his employment with Nairobi City Council and that members of Waswa Investment Limited had to be employees of the City Council and that they were paying for shares through the check off system. According to him, the name of the company changed to Waswa Investment Company from Waswa Development Company. He denied selling the suit property to any other person apart from the Respondent. He denied selling the land to Mary Murugi and denied giving her a transfer or allotment letter.
11. PW4, Jane Mitavi Nzilo, the Respondent's mother testified that she was the one who helped the Respondent purchase the suit property from Collins Odhiambo. She stated that after the purchase of the suit property, she fenced it and began cultivating it. She stated that the Appellant did not acquire the title lawfully, she produced a valuation report of the suit property. With that the Plaintiff's case was closed.
12. The Appellant testified as DW1. She adopted her witness statement filed in court. She testified that Parcel Mavoko Town Block (Waswa) 3/4072 belonged to her and that she was allocated the suit property. Her evidence was that Waswa Investment Company paid for the property. She said she was given clearance for transfer together with transfer documents and was subsequently issued with the title deed. She further alleged that she was a stranger to the Respondent and one Collins Odhiambo. On cross examination, she stated that she bought the suit property from Waswa Investment Company



and paid Kshs. 150,000/-. She claimed that she signed a sale agreement for the purchase of the suit property and stated that both the sale agreement and receipts for payment of the consideration were misplaced. That marked the close of the Defence case.

13. Upon hearing both parties, the trial court found that there was no evidence to support the 1st Defendant's (Appellant's) title as there was no agreement of sale which the Appellant alleged to have entered into or evidence of payment of the consideration. The trial court further found that the land referred to by both parties was one and the same property which is the suit property, and that the Plaintiff (Respondent herein) had proved her case on the required standard and entered judgment for her as sought in the plaint. It is that decision that provoked the instant appeal.
14. This appeal was canvassed by way of written submissions. On record are the Appellant's submissions filed on 6th May 2022 and the Respondent's submissions filed on 12th May 2022.

Submissions

15. Counsel for the Appellant submitted that the Appellant's testimony was comprehensive, that she purchased the suit property from Waswa Development Company and that thereafter the same was transferred to her. Counsel faulted the trial court on grounds that the court ignored the fact that the Respondent did not sue the original vendor and the allotting company and therefore that an allotment letter is not a title but that a title is superior in law. Further, counsel faulted the court that only copies of Collins Odhiambo's payslips were produced instead of original receipts.
16. According to the Appellant, she was the first registered proprietor and used the right process to own it. Counsel also faulted that trial court on grounds that the court did not inquire why the Plaintiff failed to avail the survey map from the company and that there was no nexus between Plot 505 and Mavoko Town Block (Waswa) 3/4072.
17. Counsel argued that Waswa Development Company Limited did not participate in the proceedings because they were not served. It was counsel's position that the court ignored the Appellant's evidence as the Appellant is the registered proprietor and resides thereon. Reliance was placed on the case of Elizabeth Pamela Nechesa vs. Rosalia Italia, Kakamega ELC Civil Suit No. 194 of 2017, for the proposition that the Appellant's registration of the suit property from the Government of Kenya had not been challenged. Counsel argued that the law is protective of title and cited the case of *Elijah Makeri Nyagwara vs. Stephen Mungai & Another* [2013] eKLR.
18. On their part, counsel for the Respondent submitted that the trial court's findings in favour of the Respondent was sound and based on evidence on record and the law. Counsel argued that it is now settled law that once the registered proprietor of title is under challenge, they must go beyond the title they hold, and prove legality of how the title was acquired procedurally and legally. Counsel referred the court to Section 26 (1) (b) of the *Land Registration Act*.
19. It was further submitted for the Respondent that where title is unprocedurally obtained without documents supporting the root of the title, the same will be impeached even if it is a first registration and the defence of innocent purchase will not be of relevance. Counsel pointed out that the Appellant was unable to produce a sale agreement in compliance with Section 3 (3) of the *Law of Contract Act*, transfer, Land Control Board Consent or evidence of payment of consideration in acquisition of the suit property or give any evidence to rebut the Respondent's case. Further, that the Appellant did not challenge the root to the Respondent's ownership of the suit property.
20. Counsel argued that the Respondent had demonstrated the root of her title by demonstrating a sale agreement dated 25th June 2008, payment of consideration of Kshs. 150,000/-, a transfer form signed



before the offices of Waswa Investment Company, the sellers ID and PIN Certificate, a new allotment letter and share certificate for the Respondent from Waswa Investment Company and valuation report and pictures to show actual physical possession of the suit property. Counsel maintained that a holistic scrutiny of the evidence shows that the Respondent proved her case on a balance of probabilities hence shifting the evidentiary burden to the Appellant to show that she obtained registration lawfully. Counsel relied on the case of *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] eKLR.

21. Counsel pointed out that the Appellant being confronted with the Respondent's evidence, filed a defence and witness statement with general denial and only maintaining that she holds the title without disclosing the process and documents used in the acquisition. Further, that having failed to produce the sale agreement, transfer, Land Control Board Consent or any other document to show how she acquired the suit property, the trial court rightly arrived at the conclusions made.
22. Contentions were made on behalf of the Respondent that the single issue for determination in this appeal is who is the lawful and legal owner of the suit property. Counsel argued that by virtue of Sections 107 and 109 of the *Evidence Act*, the Respondent having discharged their burden of proof, the evidentiary burden shifted to the Appellant to rebut the Respondent's case which the Appellant failed. Counsel relied on the case of *Esther Ndengi Njiru & Another vs. Leonard Gatei Mbugua* [2020] eKLR, for the proposition that a title obtained unprocedurally cannot supersede a land share certificate of a true owner of the land.
23. Counsel also placed reliance on the case of *John Muchiri Mbuthia vs. Rebecca Were Mutanda & Another* [2015] eKLR, to argue that once land is allotted under Section 7 of the *Land Registration Act* and conditions thereon complied with, the same is not available for sale, alienation or further dealing unless the allotting entity lawfully revokes the allotment.
24. On the issue of who is in possession of the suit property, counsel argued that the valuation report with the pictures produced by the Respondent was uncontroverted and confirmed that the Respondent was the one in possession and farming the suit property.
25. On whether Plot 505/114 was the same as title Mavoko Town Block (Waswa) 3/4072, counsel submitted that the evidence of PW1, PW2, the DCIO's letter and the survey map attached to valuation report proved that the land was one and the same and that there was no evidence to challenge that. Counsel pointed out that interlocutory judgment was entered against all the Defendants as they had been served and it is only the Appellant who applied to set it aside.
26. Reliance was placed on the case of *Ocean Estates vs. Pinder* [1969] 2 AC 19, for the proposition that where there is a question of rival title ownership, the court should be concerned with the relative strength of the title proved on the balance of probabilities and not weaknesses of the other party's case.

Analysis and Determination

27. Having considered the appeal, the submission and the entire record, the single issue that arises is whether the trial court was justified in concluding that the suit property belonged to the Respondent.
28. This being a first appeal, the duty of this court is to re-evaluate, reanalyse and reconsider the evidence on record and to make its own conclusions, but bearing in mind that it did not have the opportunity to see or hear the witnesses who testified in the matter and give due allowance for that.



29. In the case of *Abok James Odera t/a A. J. Odera & Associates vs. John Patrick Machura t/a Machira & Co. Advocates* [2013] eKLR, the court delineated the duty of a first appellate court as follows;

This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.

30. Similarly, in the case of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR, the Court of Appeal held as follows;

An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

31. In the instant appeal, although the Appellant raised eight grounds of appeal, the same coalesce around two issues, namely;

- a. Whether the Respondent proved that the suit property belonged to her; and
- b. Whether the evidence of the Respondent was sufficient to impeach the Appellant's title.

32. In any suit filed in court, Section 107 of the *Evidence Act* places the burden of proof on the Claimant/Plaintiff. That Section provides as follows;

107. Burden of proof-

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

33. Therefore, the burden of proof as to the ownership of the suit property was placed on the Respondent herein. It was upon her to show not only that the suit property belonged to her, but also that the process she used to acquire the property was lawful. It is only after a Plaintiff has discharged the burden of proof placed on them, that the evidential burden of proof then shifts to the Defendant to rebut the Plaintiff's evidence. Section 108 of the *Evidence Act* provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given by either side. Section 109 of the *Act* provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

34. In the case of *Raila Amollo Odinga & Another vs. IEBC & 2 Others* [2017] eKLR, the Supreme Court held as follows;

132. Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the Plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.



132. It follows therefore that once the court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce “factual” evidence to prove his/her allegations of breach, then the burden shifts and it behoves the Respondent to adduce evidence to prove compliance with the law.
35. Having set out the threshold that was supposed to have been met by the Respondent herein, the question therefore is whether the Respondent discharged her burden of proof to the required threshold to shift the evidentiary burden to the Appellant. The evidence on record shows that the Respondent gave a detailed history of how she acquired the suit property. She stated that she bought it at a consideration of Kshs. 150,000/- from one Collins Odhiambo Otwire, a former employee of Nairobi City Council, who had obtained the same by purchasing shares from Waswa Investment Company through a payoff system from his salary. To support her allegations, the Respondent produced a sale agreement, a letter of allotment to Collins Odhiambo Otwire, the latter’s identity card and pin certificate, a transfer document, a letter of allotment in her name, a caution, an official search letters from the DCI and a valuation report.
36. In addition, the Respondent presented Collins Odhiambo Otwire as PW3, the witness, who collaborated the Respondent’s testimony and stated that he acquired the suit property from Waswa Investment Company which was allocating the land as shares to persons employed by Nairobi City Council. The Respondent’s mother PW4, confirmed that she is the one who introduced PW3 to the Respondent and that upon purchase of the suit property, she cultivated maize thereon and fenced it and that the Respondent has been in occupation thereof from the time of purchase in 2008 to date. She produced a valuation report showing that the value of the suit property was Kshs. 750,000/-. On the report, she attached photographs of the suit property which showed that the same had been fenced and there was a crop of maize growing thereon.
37. Having considered the totality of the Respondent’s evidence, it is clear that she proved that in 2008, she lawfully purchased the suit property which had been allocated as a share to PW3 and took possession thereof. She contacted the allotting company and was duly issued with the allotment letter. In my view, this evidence is sufficient and meets the threshold set out in both Sections 107 and 108 of the *Evidence Act*, so that if no further evidence were to be adduced after the Respondent’s evidence, then the Appellant would lose. As the Respondent gave evidence to prove lawful acquisition of the suit property, it is my finding that she discharged the burden of proof of ownership of the suit property and therefore the evidentiary burden shifted to the Appellant to rebut her evidence.
38. Considering that the Respondent alleged that the suit property was lawfully acquired by her and that the Appellant’s registration was unjustified, fraudulent and based on misrepresentation, the expectation of the law and the evidentiary burden placed on the Appellant required that the Appellant goes beyond waving the title to explain how she acquired it. This is in view of the fact that both parties conceded that the land was initially owned by Waswa Investment Company before the same was allegedly purchased by either side.
39. I have considered the Appellants statement of defence filed on 15th May 2017, as well as her testimony tendered in the trial court. While the Respondent stated how she lawfully acquired the suit property, and alleged that the registration of the suit property in the Appellant’s name was done fraudulently,



by misrepresentation and illegally, the Appellant's response both in her pleadings and testimony was a general denial of the Respondents evidence.

40. The Appellant merely alleged that she had title to the suit property and that she was the first registered proprietor. She did not in her evidence in chief state how she acquired the suit property. It was only during cross examination that she alleged to have purchased the suit property, signed an agreement and paid a consideration of Kshs. 150,000/-. However, apart from her word, there was no evidence of such agreement or payment of consideration by the Appellant.
41. Holding a title without demonstrating its root is no longer tenable. To obtain legal protection, the legality of the process of acquisition of the property is key. Ownership must be anchored on lawful acquisition to attract legal protection. As the Appellant conceded that the suit property was first owned by Waswa Investment Company, she was obligated to show how she acquired the property from the said company. She cannot shield herself on the pretext that her registration was the first registration. In that regard, I must point out that the Appellant only produced a copy of her title document and a search certificate. These documents cannot prove whether or not her title was a first registration. The allegation of first registration could only be proved by a certified copy of the register and none was produced herein. In any event, the Appellant having conceded that the property was initially owned by Waswa Investment Company, means that the contention that she was the first registered proprietor would not be a shield in favour of the Appellant who acknowledged that before her, another entity had lawfully protected rights in the suit property.
42. Section 26 of the *Land Registration Act* No. 3 of 2012, provides instances that can allow impeachment of title as follows;
- The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenged, except –
- a. On ground of fraud, or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
43. As the Appellant was evasive in both her pleadings and witness statement on the question of whether she acquired the suit property by fraud, misrepresentation and illegality as particularized in the plaint, it is my finding that she failed to discharge her evidentiary burden on the lawful ownership of the suit property. The Appellant having failed to produce documents in support of her title, she failed to show that she lawfully acquired the same. It is my finding therefore that the registration of the suit property in the name of the Appellant without any supporting documents was fraudulent, unprocedural and unlawful, hence the Respondent successfully challenged the Appellant's title on grounds set out in Section 26 of the *Land Registration Act*.
44. The Appellant's submission that a title grants a better right than an allotment letter can only be relevant where the title holder can show that they were either the first to be allocated the property in issue or that the other party's allotment was cancelled which led to a subsequent allotment in their favour. This is because a property that has already been allocated is not available for subsequent allotment unless and until the earlier allotment is revoked. There being no evidence that the allotment to the Respondent was revoked, the Appellant's rootless title alone could not defeat an allotment where consideration was paid.



- 45. The argument by the Appellant that Plot Number 505/114 is not the suit property, is untenable because the Respondent produced a valuation report which had an attached map from Survey of Kenya showing Plot No. 4073 also shown as No. 114. The photos produced by the Respondent show that the Plot was in possession of the Respondent who had fenced and cultivated maize thereon. The trial court found that by the Appellant’s own allegation that the suit property could not be transferred by Collins Odhiambo to the Respondent, when she already had title to the same showed that she was referring to one and the same property. Having considered the pleadings, I note that while the Respondent stated that Plot No. 505/114 Waswa Estate Phase 1 Lukenya Branch, Machakos District was now known as Mavoko Town Block (Waswa) 3/4072, there was no denial in the defence or the witness statement that that was not one plot. The issue that the parties referred to different properties is not an issue flowing from the pleadings. The same was only raised in the submissions.
- 46. It is therefore my finding that the totality of the evidence clearly demonstrate that the trial court was justified in concluding that the Respondent was the owner of the suit property and the Appellant did not explain how she acquired her title.
- 47. In the premises, I find and hold that the appeal herein lacks merit and the same is hereby dismissed with costs to the Respondent.
- 48. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 8TH DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of;

Mr. Nyende for Respondent

No appearance for the Appellant

Josephine – Court Assistant

