



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Maki & another v Gituro & 2 others (Environment and Land Appeal E001 of 2021) [2023] KEELC 16167 (KLR) (7 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16167 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E001 OF 2021**

EM WASHE, J

MARCH 7, 2023

BETWEEN

DAVID MEITIKINI MAKI 1ST APPELLANT

GLADYS NARILKULMURAN WUAPARI 2ND APPELLANT

AND

RUTH MUNDA GITURO 1ST RESPONDENT

**DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER,
TRANSMARA DISTRICT 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

(An appeal against judgment delivered in KISII ELC CASE NO. 10 OF 2017 on 1st April 2021.)

JUDGMENT

1. The 1st and 2nd Appellants herein (hereinafter referred to as “the Appellants”) filed a Memorandum of Appeal dated 29th of April 2021 (hereinafter referred to as “the Appeal”) seeking the following Orders thereof; -
 - a. The Appeal herein be allowed and the judgement and decree dated 1st April 2021 be set-aside wholly.
 - b. That the Court do order the Plaintiff’s suit to be dismissed.
 - c. The Court be pleased to enter judgement in favour of the Appellant as per the Counter-Claim.
 - d. That the costs of this Appeal and costs incurred in the sub-ordinate Court be borne by the 1st Respondent.



- e. Such further and/or other reliefs as the Court may deem necessary.
2. The grounds upon which the above prayers have been premised are as follows; -
 - i. The Learned Trial Magistrate erred in law when the same failed to properly evaluate evidence and material placed before him thus reaching erroneous decision.
 - ii. The Learned Trial Magistrate erred in law by failing to appreciate that the 1st Respondent's case was not proved to the requisite standard in so far as the 1st Respondent's witness relied on hearsay evidence which has no probative value.
 - iii. The Learned Trial Magistrate erred when he failed to appreciate the piece of evidence that the 1st Respondent had never lived on the suit property and the same was equally not available to prosecute his case before the magistrate's court.
 - iv. The Learned Trial Magistrate erred when he failed to appreciate that occupation and use of the suit property was a fundamental requirement and the 1st Respondent having never stepped onto the suit land, the burden of proof on how she purportedly acquired the suit land in exclusion of the Appellants rested on her, taking into cognizance that her husband was an adjudication and/or demarcating officer, as per the provisions of Section 112, 116 of the *Evidence Act*.
 - v. The Learned Trial Magistrate erred in law when the same failed to comprehend the applicability of Section 26 of the *Land Adjudication Act*.
 - vi. The Learned Trial Magistrate erred in law when he entered judgement in favour of the Plaintiff and dismissed the Appellants counter-claim.
 - vii. The Learned Trial Magistrate erred in law when he misapprehended the issues canvassed before him and misapplied the law thereby reaching erroneous decision which is contrary to law.
 - viii. The Learned Trial Magistrate erred in law and in fact by entertaining a suit without the requisite jurisdiction.
3. The present Appeal emanated from a judgement of a Plaint filed on 19th of October 2016 by the 1st Respondent (hereinafter referred to as "the Plaint") and assigned Kisii ELC Case No 10 of 2017.
4. The prayers in the Plaint were seeking the following reliefs; -
 - a. A declaration that the purported objection proceedings, touching on and/or concerning Plot No 758, Nkararo Adjudication Section, was fraudulent, illegal, null and void.
 - b. An Order cancelling and nullifying of the entries arising from and/or occasioned by the fraudulent objection proceedings, carried out and/or commissioned by the 1st Defendant in collusion with and/or connivance of the 3rd Defendant herein and re-instatement of the name of the Plaintiff as the legitimate owner of Plot.No. 758, Nkararo Adjudication Section.



- c. An Order of eviction against the 1st and 2nd Defendants, their agents and/or servants from Plot.No. 758, Nkararo Adjudication Section.
 - d. Permanent injunction restraining the 1st and 2nd Defendants either by themselves, agents, servants and/or anyone claiming under the said Defendants from entering upon, re-entering. Taking possession, trespassing onto, cultivating, grazing on, building structures, interfering with and/or in any other manner dealing with Plot No. 758, Nkararo Adjudication Section and/or any portion(s) thereof.
 - e. General damages for trespass.
 - f. Costs of this suit be borne by the Defendants.
 - g. Such further and/or other reliefs as the Honourable Court may deem fit and expedient so to grant.
5. The Plaintiff was duly served on all the Defendants therein but only the 1st and 2nd Defendants filed their Statement of Defence on the 15th of May 2017 (hereinafter referred to as “the Defence”).
 6. The hearing at the Trial Court then began on the 6/08/2020 with the testimony of Joseph Mwangi Chumba as PW1.
 7. PW1 introduced himself as a businessman and farmer who resides within Nkararo location.
 8. PW1 informed the Trial Court that he was a holder of a registered Power of Attorney and would testify on behalf of the Plaintiff therein.
 9. The registered Power of Attorney dated 6/11/2017 was then adduced in Court as Plaintiff’s Exhibit 1.
 10. PW1 further testified that he was aware that Plot. No. 758 within Nkararo Adjudication Section (hereinafter referred to as “the suit property”) was the property of the Plaintiff therein.
 11. PW1 stated that the Plaintiff was allocated the suit property through an Adjudication Record that was prepared in the year 1990.
 12. However, upon allocation of the suit property to the Plaintiff, the area known as Nkararo faced some clashes and the Plaintiff sought refuge elsewhere.
 13. However, the suit property was still vacant and belonged to the Plaintiff.
 14. Later on, the Plaintiff undertook a search of the records relating to the suit property after titles had been issued and discovered that the suit property was registered in the name of the 1st and 2nd Defendants therein.
 15. PW1 informed the Court that the Plaintiff had never leased or sold the suit property to any of the 1st and 2nd Defendants.
 16. On further investigations, the Plaintiff discovered that the 1st Defendant purportedly lodged an objection against the allocation of the suit property to the Plaintiff something in 2008.
 17. However, the Objection was never served on the Plaintiff and the same was undertaken without her participation.
 18. As a result of this alleged objection, the Adjudication Record of the suit property was altered by deleting the name of the Plaintiff and replacing it with that of the 1st Defendant.



19. As if that was not enough, the 2nd Defendant lodged another objection against the 1st Defendant and upon conclusion of this second objection, the 1st Defendant's name was deleted and replaced with the 2nd Defendant's name.
20. PW 1 testimony was that the 1st Defendant did not have any authority to transfer the suit property to the 2nd Defendant as he did not have any proprietary interests therein capable of being legally transferred.
21. According to PW1- the person who was allocated the suit property was the Plaintiff therein.
22. Consequently therefore, the Defendants actions either jointly or severally defrauded the Plaintiff of her lawful property and the same should therefore revert back to her.
23. PW 1 then at the conclusion of his evidence in chief produced the following documents as evidence in support of his case.
 - i. Duly certified copy of the Adjudication Record.
 - ii. Duly certified copy of the adjudication records in respect of Plot. No. 758, Nkararo Adjudication Section.
 - iii. Copy of tracing map showing Plot.No. 758, Nkararo Adjudication Section.
 - iv. Copy of (sic) objection proceedings and decision affecting Plot.No. 758, Nkararo Adjudication Section.
 - v. Copy of Revenue Receipt No. 8769096 dated 29th October 2016 pertaining to purchase of objection proceedings.
 - vi. Copy of Letter by the Land Adjudication office dated 28th July 2016.
 - vii) Copy of consent letter issued by the District Land Adjudication officer, Transmara West Sub-County.
 - viii) Copy of the Demand Notice dated 15th July 2016.
24. On cross-examination, PW1 informed the Court that he has been a resident of Transmara since 1974 although originally hails from Kiambu.
25. PW1 further stated that he was related to the Plaintiff by virtue of being a wife to a Cousin.
26. PW 1 further stated that it's the Cousin who is a husband to the Plaintiff.
27. PW1 informed the Court that the Plaintiff was from Ukambani and currently lives in Githurai 44.
28. PW 1 also informed the Court that he was the one that instituted this suit and have been practically handling all the issues appertaining to the suit property.
29. PW 1 indicated that he has his own parcel of land which he resides and had not been a resident on the suit property.
30. PW1 testified that the suit property was occupied by the Plaintiff and her husband although they had since relocated from Transmara.
31. According to PW1, the only thing that was brought to his attention were some summons from the Adjudication officer informing him that the 1st Defendant had lodged a caution of the suit property.



32. However, PW 1 could not recall the date of when the summons were served on him.
33. PW 1 also indicated that the 1st Defendant resided far away from the suit property and had not at any one time resided on it as alleged.
34. PW 1 admitted that the Plaintiff's husband was an Adjudication Officer working within Transmara Lands Office.
35. PW 1 informed the Court that at the moment, it was the 2nd Defendant who was using the suit property since the year 2018.
36. PW 1 stated that the reason the Plaintiff and her family left Transmara was because of the clashes that occurred.
37. According to PW1, the adjudication process of Nkararo Adjudication Section was closed in the year 1990.
38. Lastly, PW 1 stated that the Plaintiff was not in good health although the husband was well although he did not have documentary evidence to confirm the Plaintiff's illness.
39. In Re-examination, PW 1 denied that he has never been arrested over any crime.
40. Secondly, PW1 stated that there has been no report which has shown that there were any fraudulent activities undertaken by the Plaintiff to acquire the suit property.
41. PW 1 indicated that the Plaintiff was unwell.
42. Further to that, PW 1 admitted that the Plaintiff's husband was a demarcation officer in Transmara.
43. Nevertheless, PW1 further testified that there no law that prohibited the Plaintiff from acquiring and/or being allocated land anywhere.
44. Similarly, PW 1 confirmed that he was served with summons relating to a caution placed on suit property.
45. However, PW 1 wondered how someone can place a caution on his own property.
46. Upon conclusion of this re-examination, the Plaintiff closed its case.
47. The Defence began their case on the 29/10/2020 with the evidence of Davit Metikini Maki as DW1.
48. DW1 informed the Court that he was also the 1st Defendant in the suit filed by the Plaintiff.
49. DW 1 testified that he hails from Eldoldosho Sub-Location and undertook farming as his occupation.
50. DW 1 further stated that he has been in occupation of the suit property since the year 1973.
51. DW 1 testified that he was registered as the rightful owner of the suit property.
52. DW 1 explained to the Trial Court that the main reason he was allocated the suit property was because of his occupation.
53. According to DW 1, the Adjudication of Nkararo Adjudication Section began sometime in 1985 and the demarcation officers found them on the ground.
54. The demarcation officers then took their names and the details of the areas they occupied.
55. However, when the Adjudication Register was presented for inspection by the public, DW 1 noticed that their names were not there.



56. Consequently thereof, DW 1 lodged objection proceedings No. 539 and dated 5/11/2008 to challenge the Plaintiff's allocation of the suit property.
57. DW 1 informed the Court that he would rely of the proceedings of the objection hearing as well as the Adjudication Register contained in his bundle of documents.
58. DW 1 stated that the Adjudication process within Nkararo Adjudication Section was still ongoing and no title deeds had been issued.
59. DW 1 then produced a bundle of documents which were from Page 24 to 71 as Defence Exhibit 1.
60. DW 1 further stated that they have never had any case with the Plaintiff herein.
61. According to DW 1, the objection was duly filed within the stipulated time.
62. In addition to the above, DW 1 alleged that the Plaintiff herein has never stayed and/or occupied the said suit property.
63. It was therefore strange to find that the Plaintiff has been allocated the suit property and duly issued with an Adjudication Record.
64. DW 1 stated that the Plaintiff was the wife of the Adjudication Officer and that is why her name was inserted in the Adjudication Record thereby bring in the issue of fraud.
65. Nevertheless, DW 1 testified that the objection proceedings against the Plaintiff were filed and heard when the Plaintiff's husband was still in office.
66. DW 1 concluded his evidence by indicating that he followed the correct procedure in acquiring the suit property in his name.
67. In cross- examination, DW 1 reiterated that he had been in occupation of the suit property since 1973.
68. However, DW 1 did not have any documentary evidence to confirm his occupation of the suit property.
69. In addition to the above, DW 1 confirmed that he does not stay of the suit property at this moment.
70. Nevertheless, DW 1 stated that at the time when adjudication started in 1985, he was on the suit property.
71. Nevertheless, he again did not have any documentary evidence to confirm his occupation at the time of adjudication.
72. According to DW 1, the process of demarcation within Nkararo Adjudication Section was closed in the year 1990.
73. DW 1 stated that his name was cancelled in the Adjudication Register although the date was not indicated.
74. DW 1 indicated that he does not know the Plaintiff and had nothing to show that she had been served with the Objection proceedings.
75. Nevertheless, DW 1 insisted that the Plaintiff was not a resident of Nkararo Area.
76. DW 1 unfortunately did not have a register of the residents of Nkararo Adjudication Section to confirm whether or not the Plaintiff was a resident thereof.
77. DW 1 insisted that the Plaintiff's husband was the demarcation officer although he did not have any evidence to prove the same.



78. DW 1 could not also authoritatively confirm whether or not the Plaintiff's husband influenced the allocation process in favour of the Plaintiff or not.
79. DW 1 informed the Court that he has a son called James who was 40 years.
80. DW 1 reiterated that they began occupying the suit property in 1973 having moved from Shankoe Location.
81. DW 1 stated that he was born in 1957 and was 16 years old in the year 1973 when he began occupying the suit property.
82. In re-examination, DW 1 stated that two objection proceedings were filed in relation to the suit property.
83. The first objection was filed by DW 1 and upon successful hearing and determination by the Land Adjudication Officer, the suit property was allocated to him.
84. The second Objection proceeding was by the 2nd Defendant who is the daughter in-law.
85. According to DW 1, the second Objection was basically a transfer from himself to the 2nd Defendant.
86. The proceedings of both the first objection as well as the second objection were placed before the Court.
87. DW 1 insisted that he was in occupation of the suit property during the demarcation process.
88. DW 1 further testified that all parties were duly served with notices about the objection proceedings but the Plaintiff failed to attend the hearing.
89. DW 1 concluded his testimony by indicating that he has been on the suit property and the objections filed herein were done lawfully.
90. The second Defence witness was one Odapo Kilai.
91. DW2 informed the Court that he had prepared a witness statement and adopted the same as his testimony in chief.
92. DW 2 stated that he was familiar with both the 1st Defendant as well as the 2nd Defendant.
93. DW 2 informed the Court that the 2nd Defendant was the daughter in law of the 1st Defendant.
94. According to DW 2, the 1st Defendant had been occupying the suit property way before the demarcation of Nkararo Adjudication Section began.
95. DW 2 testified that the 1st Defendant is the one in occupation of the suit property.
96. DW 2 informed the Court that he was a retired Assistant Chief of the area and did not know the Plaintiff as a resident of Nkararo Adjudication Section.
97. DW 2 stated that the Plaintiff herein was the wife of a Lands official in Transmara District.
98. In concluding his evidence in chief, DW 2 stated that he had been born within Nkararo area and was very familiar with the place.
99. In cross-examination, DW 2 did not have any documentary evidence to confirm the 1st Defendant's occupation on the suit property.
100. However, DW 2 reiterated that the 1st Defendant had been in occupation of the suit property for many years.



101. DW 2 could not state when the 1st Defendant was born but insisted that he had come to court to testify in support of the 1st Defendant.
102. DW 2 reiterated that the Plaintiff's husband was one of the officials at Transmara Land Officer.
103. Nevertheless, DW 2 did not have any records to confirm the same.
104. DW 2 informed the Court that he had retired in the year 2019 having been employed in the year 2001.
105. DW 2 stated that he had a list of all the residents of Nkararo Area although did not produce the same.
106. In re-examination, DW 2 stated that he had been an Assistant Chief for 19 years.
107. During this period of time, DW 2 did not meet the Plaintiff within the said location.
108. On the other hand, DW 2 stated that the 1st Defendant was residing on the suit property even before the demarcation process.
109. At the end of this re-examination, the Defence closed its case.
110. The Trial Court then directed the parties to file their written submissions and upon compliance with these directions, the judgement was pronounced on the 25/03/2021.
111. Section 65 of the *Civil Procedure Act*, Cap 21 expressly provides that Appeals from Sub-Ordinate Courts should be handled by the High Court and by extension the Environment & Land Court if the issues relate to land disputes.
112. Similarly, Section 13(4) of the Environment & Land Court Act, No. 19 OF 2011 grants jurisdiction for the Environment & Land Court to exercise appellate jurisdiction over decisions of the Sub-Ordinate Courts or local Tribunals in respect of matters falling within the jurisdiction of the Court.
113. In the case of *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123, the Court made the following observations; -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 either 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 in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).
114. It is clear therefore that this Court sitting as an Appellate Court should and must reconsider, evaluate and draw its own conclusions looking at the facts before it and the law generally.
115. Nevertheless, it must be cautioned that it did not have the opportunity to see and/or hear the testimony of the witnesses first hand.
116. The Court having reminded itself on the perimeters to observe during the hearing and determination of an Appeal, it will now proceed to identify the issues for determination based on the facts and evidence placed in the Trial Court and make its own independent conclusion thereof.



117. Upon perusing the Plaintiff, the Defence, the testimony of the parties herein, the documentary evidence produced at the trial, the submissions of the parties and the judgement thereof, the Court identifies the following issues for determination;
- a. Was the allocation of the suit property in the name of the plaintiff in the adjudication record no. 708258 lawful?
 - b. Was the objection proceedings filed by the 1st defendant against the plaintiff's allocation of the suit property lawful & regular?
 - c. What role and/or significance does occupation play during the demarcation and/or adjudication process?
 - d. Whether or not the trial court had jurisdiction to hear & determine the plaint filed by the plaintiff?
 - e. What is the final conclusion of the court as appertains the judgement of the trial court?
 - f. Who bears the costs of appeal & the trial suit?
118. The Court having outlined the core issues for determination in this Appeal it will now proceed to evaluate the evidence before it and draw its own conclusions thereof.

Was the allocation of the suit property in the name of the plaintiff in the adjudication Record No. 708258 lawful?

119. The Plaintiff's basis of instituting the Plaintiff in the Trial Court was the Adjudication Record issued to her on the 26th of October 1990.
120. The Plaintiff produced the said Adjudication Record No. 708256 related to the property known as Plot.No. 758 within Nkararo Adjudication Section within Transmara District.
121. The Appellants in the Plaintiff did not dispute the existence of this Adjudication Record No. 708256 in the name of the Plaintiff, but his testimony is that it was fraudulently issued.
122. The 1st Appellant's testimony is that first and foremost, the 1st Respondent was never a resident of Nkararo Adjudication Section and therefore not entitled to any allocation within the said Adjudication Section.
123. Secondly, it is the 1st Appellant's testimony he is the one who was in occupation of the suit property at the time of demarcation and adjudication of the suit property.
124. Thirdly, the 1st Appellant testified that the 1st Respondent who was the wife of a demarcation officer used her husband's office to be allocated the suit property yet she did not deserve the same.
125. The 1st Respondent rebutted these allegations by testifying through the Attorney that she was in occupation of the suit property at the time of demarcation and/or adjudication.
126. However, due to clashes within Transmara area, the 1st Respondent have to relocate from the suit property and has not been able to go back due to her health.
127. The Court has perused the Adjudication Record No. 708258 and confirms that the same was issued to the 1st Respondent on the 26/10/1990.



128. The said Adjudication Record No. 708258, was duly signed by the 1st Respondent as the land owner and the Chairperson of the Demarcation committee by the name of Panyako on the 26-10-1990.
129. The Appellants herein have not challenged the validity of the Adjudication Record No. 708258 on the face on the record.
130. It is therefore the Court's considered view that the 1st Respondent was legally allocated the suit property as per the Adjudication Record No. 708258 issued on the 26/10/1990.

Was the objection proceedings filed by the 1st defendant against the plaintiff's allocation of the suit property lawful & regular?

131. The 1st Appellant being aggrieved with the lawful allocation of the suit property to the 1st Respondent as per the Adjudication Record No. 708258 issued on the 26/10/1990, filed an Objection to challenge it.
132. According to the 1st Appellant's testimony and the proceedings on Page 107 of the Record of Appeal, it is clear that the Objection proceedings against the 1st Respondent were undertaken on the 21/11/2008.
133. The 1st Appellant in his evidence in chief as well as cross-examination confirmed to the Court that the demarcation and adjudication of Nkararo Section began sometime in 1985 and finalised in 1990.
134. Indeed, the 1st Respondent's Adjudication Record was issued on the 26/10/1990 which is the same time the 1st Appellant testified that Adjudication closed.
135. Section 26 of the *Land Adjudication Act*, Cap 284 provides as follows; -

“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.

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”

136. According to the above proviso of the *Land Adjudication Act*, Cap 284, the prescribed time within which anyone affected by the incorrectness and/or incompleteness of the Adjudication Record issued and/or published should be within 60 days thereof.
137. The 1st Appellants testimony that the Adjudication of Nkararo area was closed in the year 1990 implies his knowledge that the Adjudication Record is now open for inspection by the general public.
138. According to the 1st Appellant's testimony in chief contained on Page 31 of the Record of Appeal, the 1st Respondent's Objection No. 539 was dated 5/11/2008.
139. Based on the 1st Appellant's testimony, the first objection which was No. 539 and dated 5/11/2008 was filed about 18 years after the Adjudication Record was issued to the 1st Respondent.
140. Consequently therefore, the 1st Appellant's Objection No. 539 dated 5/11/2008 was filed almost 18 years outside the prescribed time provided under Section 26 of the *Land Adjudication Act*, Cap 284.



141. According to the *Land Adjudication Act*, Cap 284, there is no provision for extension of time within which to file Objection proceedings under Section 26 of the *Land Adjudication Act*, Cap 284.
142. However, Section Section 59 of the *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya) provides -
- “Where in any written law a time is prescribed for the doing of an act or taking of proceedings, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension (of time) is not made until after the expiration of the time prescribed.”
143. In the case of *Paul Njunge Chege & Another-versus- Mandaine Ene Ripoi Surum & 2 Others* [2012] eKLR, the Court held that for interest of Justice, a party who needed to institute Objections proceedings under Section 26 and 29 of the *Land Adjudication Act*, Cap 284 would move the Court for extension of time accordingly.
144. In this case, the 1st Appellant did not seek for any extension of time within which to file the Objection No. 539 dated 5/11/2008.
145. In conclusion therefore, this Court is of the considered opinion that the 1st Appellant’s Objection No. 539 dated 5/11/2008 was filed out of the prescribed time in law and therefore the Land Adjudication Officer did not have the jurisdiction to entertain the said Objection and/or make any determination as happened on the 21/11/2008.
146. Another issue raised by the 1st Respondent at the Trial Court was that the 1st Appellant never served the Objection.
147. The failure by the 1st Appellant to serve the 1st Respondent resulted to illegal proceedings and a decision that was irregular.
148. According to the 1st Appellant’s testimony during cross-examination, there was acceptance that no evidence of service upon the 1st Respondent had been placed before the Court.
149. Indeed, going through the Record of Appeal and in particular the Exhibits adduced by the 1st Appellant in the Trial Court, there is no affidavit of service placed before the Court confirming proper service of the Objection No. 539 dated 5/11/2008 on the 1st Respondent.
150. The clear lack of service of the Objection No. 539 dated 5/11/2008 rendered the subsequent proceedings by the Land Adjudication Officer irregular and unlawful.
151. The determination of Objection No. 539 dated 5/11/2008 was in essence unlawful and contrary to rules of natural justice and can not be allowed to stand before a Court of law.
152. The determination of Objection No. 539 dated 5/11/2008 pronounced on the 21/11/2008 is therefore irregular and illegal ab-nitio.

Was the 1st appellant in actual occupation of the suit property at the time of demarcation and/or adjudication process?

153. One of the Appellants grounds in the Appeal is that the 1st Respondent has never occupied the suit property.



154. The 1st Appellant informed the Court that he has been in occupation of the suit property since 1974 when he was only 16 years.
155. The 1st Appellant indicated that he is currently in occupation of the same through the 2nd Appellant who is the daughter in-law.
156. The Appellants submit that the allocation of the suit property to the 1st Defendant was based on the influence and/or fraudulent actions of her husband who was either a demarcation officer or Adjudication Officer within Transmara District.
157. The 1st Respondent on the other hand testified that she was in occupation of the suit property at the time of allocation.
158. However, due to clashes within the Transmara area, the 1st Respondent and her family relocated to Nairobi.
159. As fate would have it, the 1st Respondent became unwell and has not been able to come back to the suit property to continue with occupation.
160. The Record of Appeal does not contain any documentary evidence proving the 1st Appellant's occupation on the suit property during the demarcation and/or Adjudication of the suit property.
161. DW 2 who came to collaborate the 1st Appellant's occupation claims did not add much value either by identifying what was being done on the suit property or what developments were in place as at the time of demarcation and/or adjudication of the suit property.
162. The Court expected the 1st Appellant to at least present photographs of either the homes, some trees, any crops, or animals on the suit property as at the time of demarcation and/or adjudication of the suit property.
163. It is strange that having stayed on the suit property for over 40 years as alleged, the 1st Appellant was unable to tender any documentary evidence of his occupation or even better still, request a site visit by the Court to verify his occupation thereof.
164. Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows; -
- “(1) Whoever desires any court to give judgement 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.”
165. In conclusion therefore, the Court is of the considered view that the 1st Appellant has not provided sufficient evidence to prove his occupation during the demarcation process and/or adjudication process in 1985.
166. If there is any occupation currently being enjoyed by the 2nd Appellant, then such occupation is unlawful and illegal as the 1st Appellant did not have any lawful rights and/or occupation to assign to the 2nd Appellant therein through the second Objection determined on the 5/11/2014.



Whether or not the trial court had jurisdiction to hear & determine the plaint filed by the plaintiff?

167. The Appellants under Ground No. 8 raised an issue of jurisdiction of the Trial Court to hear and determine the Plaint filed by the 1st Respondent.
168. Unfortunately, the Appellants did not address the Court on this issue in their submissions filed on the 29th April 2021.
169. The 1st Respondent submitted that the Trial Court indeed had jurisdiction under Section 26 (3) and (4) of the *Environment & Land Court Act* as read with Article 169 (2) of the Kenyan *Constitution*, 2010.
170. In addition to the above, the 1st Respondent referred to Section 9 (a) of the *Magistrate's Court*, 2015 which lawfully conferred powers on gazetted Magistrates to hear and determine Environment and Land matters thereof.
171. Indeed, the above provisions of law delegate lawful powers and by extension statutory jurisdiction to particular judicial officers in the sub-ordinate courts to hear and determine issues relating to Environment and Land issues.
172. There is no evidence and/or submissions that have been made by the Appellants either alleging that the Trial Court was not gazetted to handle Environment & Land Court matters or was devoid of jurisdiction in terms of the subject matter before the Trial Court.
173. In conclusion therefore, this ground of appeal is not also proved and fails accordingly.

What is the final conclusion of the court as appertains the judgement of the trial court?

174. The Court having re-evaluated the facts, evidence and the law, it is of the opinion that the 1st Respondent was entitled to the judgement by the Trial Court and has not found any reasons to alter, set-aside and/or disturb the said judgement of the Trial Court pronounced on the 1st of April 2021.

Who bears the costs of appeal & the trial suit?

175. On this issue, it is settled law that costs usually follow the outcome of the proceedings.
176. The Appellants herein having failed to have the Trial Court Judgement pronounced on the 1st April 2021 set-aside and/or altered, then this Appeal fails with costs.
177. In conclusion therefore, the Court hereby makes the following Orders as appertains the Memorandum of Appeal dated 29th April 2021; -
 - a. The memorandum of appeal dated 29th april 2021 be and is hereby dismissed.
 - b. The costs of this appeal as well as the trial court proceedings will be borne by the appellants.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON THE 7TH OF MARCH 2023.

EMMANUEL.M.WASHE

JUDGE

In The Presence Of:

Court Assistant: Ngeno



Advocates for the Appellant: Wakiaga H/B Opondo

Advocates for the Respondent: Wafula

