REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ELC APPEAL NO. 19 OF 2020

ELIUD WAWERU KAROKWA.....APPELLANT

VERSUS

IRENE WANJIKU GITHENDUI.....RESPONDENT

(Being an appeal from the Judgement and Decree delivered on 19th September, 2018, by Hon. E. Wambo (RM) in Murang'a Chief Magistrates Court Civil Suit 288 of 2014)

JUDGEMENT

The Appellant herein **Eliud Waweru Karokwa,** was the Plaintiff in **Muranga CMCC 288 of 2014**, while the Respondent **Irene Wanjiku Githendui,** was the Defendant/Respondent in the said suit.

By a Plaint dated **1st August 2014**, the Plaintiff (Appellant) brought a suit against the Defendant/Respondent and sought for; -

a. An order directing the Defendant to vacate Plot No. D 122, Sagana Town, and to reinstate it into the condition it was before she entered it.

b. If she does not willingly comply with the order to vacate, an order for her eviction.

c. Kshs. 13,500.00 plus interest.

d. Costs of the suit plus interest.

The Plaintiff (Appellant) averred that he is the lawful owner of leasehold interest in **Plot No. D 122,** in **Sagana Town,** having acquired the interest through lawful purchase. He further averred that he had been utilizing the said plot without interference until the month of **May 2014**, when the Defendant (Respondent) without any lawful or reasonable cause or excuse entered the said plot and damaged Plot beacons, boundary markers, and hedges. That the Defendant went ahead to construct a fence along the boundary and she started to cultivate on the said plot. Further, that as a result of the actions of the Defendant(Respondent) the Plaintiff(Appellant) suffered loss and damage which he particularised as totalling to **Kshs. 13,500/=**, which the amount he claimed as damages.

The suit was contested and the Defendant(Respondent) filed a **Memorandum of Appearance** dated **7th August 2014**, through the Law Firm of **Kahuthu & Kahuthu Advocates**. The Defendant subsequently filed her Statement of Defence dated **23rd August, 2014**. She denied all the allegations set out in the Plaint, and further averred that **Plot No. 262,** is not **Plot No. D 122**, and **Plot No. 262,** was allocated and registered on **19th May 1989**, to **Njogu P. Nganga,** who retained possession until he sold it in **2014**, to the brother of the Defendant one **Isaac Njau Githendui**. That the Defendant has beneficial use of the said land from **12th March 2014,** when she was allowed by her brother to cultivate and use it. That the Defendant is the lawful beneficial user of **Plot No. 262**, in **Sagana Town** with the permission of her brother **Isaac Njau Githendui**, and the Plaintiff was claiming ownership of the same plot as **Plot No. D122.**

Further, that the Plaintiff has attempted to interfere with **Plot No. 262,** in **Sagana Town** which is not **Plot No. D122,** by attempting to remove the fence erected around the plot. That she only entered **Plot No. 262,** Sagana Town, which she assisted her brother to purchase from **Njogu P. Nganga.** That **Njogu P. Nganga**, has since **1989**, been in full possession of **Plot No. 262,** and that **Plot No. D122,** Sagana Town does not exist.

The matter proceeded by way of viva voce evidence. The Plaintiff testified for himself, and called **two** witnesses closed his case. The Defendant gave evidence and also called two witnesses to support her case.

PLAINTIFF'S (APPELLANT'S) CASE

PW 1 Eliud Waweru Karokwa testified that sometime in 2011, he got word from **Simon Wamagata** that **John Gitau Kangethe,** was selling a plot in Sagana Town. That after expressing his interest in the said plot, he met the said **John Gitau Kangethe**, in Sagana and he was shown the land documents and the land itself. That the said plot had beacons and there was no alteration on it. That after visiting the said Plot, he paid **John Gitau Kangethe Kshs. 180,000/=** being the purchase price for the said plot. That after payment of the purchase price, he pursued transfer and the same was done. That at the time of purchase, the land was vacant and the Defendant, was not on the land. That it was not until **2014**, that he met the Defendant who was cultivating his land. That he reported the matter to administration and when no action was taken, he filed the matter in Court. That on confronting the Defendant on the trespass, she alleged that she had bought the land as well. That as result of the trespass, the Defendant (Respondent) cut down his fence and removed beacons and he now claimed the amount of Kshs. **13,500/=** as compensation for the loss suffered.

On Cross examination, **PW 1** stated the he did not produce any documents to show the transfer of the suit land to him. That the minutes he produced were not false and he got the **Beacon Certificate** from the Vendor of the land.

PW 2 John Gitau Kangethe, testified that the plot was allocated to him and **Wilson Mwaura** by **Kirinyaga County Council** in **1989.** That he sold **Plot No. D 122,** Sagana Town to **Eliud Waweru (PW 1)** and he was paid the entire purchase price. That they were issued with beacon Certificates in **1990,** by **Kirinyaga County Council,** dated **19th November 1990.** That the Beacon Certificate was issued after beacons were placed. That in 1990, he cultivated on the plot and also planted a live fence on it. That the property was resurveyed in 2006 at a cost of **Kshs**. **800/=** and the survey tallied with the earlier survey. That in 2011, he sold **Plot No. D 122, Sagana Town** to **Eliud Waweru** and he gave Eliud possession of the said Plot. That after selling the land, he complied with the transfer process and the same was mutilated on **28/6/2011**, signifying the sale.

PW 3, Simon Wamagata Wambugu, testified that he was aware that **Eliud** bought **Plot No. D 122,** Sagana Town from **John Gitau**. That he witnessed the sale agreement at the time of purchase on **25th July, 2011.** That he knew the plot even before the purchase as it had been shown to him by **John Gitau**. That he knew Irene Wanjiku for 6 yrs.

DEFENDANT'S (RESPONDENT'S) CASE

DW 1 Irene Wanjiku Githendui, testified that she is the Defendant and that **Plot No. 262,** belonged to her brother **Isaac Njau Githendui**. That her brother bought the said plot and left it in her possession. That she knew where the suit property was and it had Napier grass and a live fence.

On cross examination, she stated that her brother bought the plot in **March 2014,** and she also built a house and planted Napier grass in 2014. That there were beacons on the land and she did not remove them. That there were beacons on the land when she took possession of it.

DW 2 Perminus Njogu Nganga, testified that **Plot No. 262**, was his and it was given to him by **Kirinyaga County Council** in 1989. That he used to plough the land but had not fenced it. That the land was registered by Kirinyaga County, and he had the plan. That he sold the Plot to **Isaac Githendui,** and they did a transfer at the County Council offices. That he did not know **Plot No. 122.** That he had the allotment letter for **Plot No. 262**, dated **19/5/1989**. That he did the transfer and paid ground rent of **Kshs 2600/=** in 2014. That **Plot No. 262** is not **Plot No. 122.**

DW 3 Isaac Njau Githendui, testified that he bought **Plot No. 262** Sagana Town from **Perminus Njau Gicheru,** on 12th May 2014. That he was shown the map for Sagana Town and he visited the actual plot. That after purchase, he did a transfer of **Plot No. 262**, to his name. That they paid transfer fees of **Kshs 2600/=** and Land Rate of **Kshs 8490/=** for **Plot No.262.** That upon payment of the transfer fees, they were told that transfer would be done later. That the said transfer is yet to be effected to date, but they still pay land rates. That he got ownership of **Plot 262,** Sagana Town and has fenced it. That **Plot No. D 122,** Sagana Town was not known to him and it was not his.

Thereafter, the parties filed their written submissions and on **21st February 2018,** and the trial Court entered judgment in favour of the Defendant (Respondent) plus costs and stated as follows;

> **"This Court is of the humble view that the Plaintiff has on a balance probability failed to prove his claim against the Defendant as indicated above, I therefore dismiss the Plaintiff's case with costs to the Defendant."**

The Appellant was aggrieved by the above determination of the trial Court in favour of the Respondent herein and has sought to challenge the said Judgment through the Memorandum of Appeal dated **19th October, 2018** and sought for orders that;

> **1. The said Judgment be set aside and be substituted with a Judgment allowing the Appellant's claim in the Plaint.**
>
> **2. Costs of this Appeal and in the Court below be awarded to the Plaintiff against the Respondent.**
>
> **3. Such further orders be made as are just.**

The grounds upon which the Appellant sought for the Appeal to be allowed are;

> **1. The Learned Magistrate erred in his appreciation of documentary evidence produced by the Appellant and thus ignored or misconstrued their true significance.**
>
> **2. The Learned Magistrate erred in his reasoning that the Appellant ought to have enjoined Njogu P Nganga and Isaac Njau Githendui while the suit was based on an alleged trespass committed by the Respondent and not the two persons named.**

3. The Learned Magistrate erred in his reasoning that the Appellant ought to have sued the County Government of Kirinyaga when it is true that the County Government had not trespassed on the Appellant's Plot.

4. The Learned Magistrate erred in ignoring the history of Occupation and of the suit land and thus concluded that he could not ascertain where on the ground the Appellants Plot No. D 122 Sagana Town was situated.

5. The Learned Magistrate erred in his reasoning on the effect of double allocation (if any) as this should not affect the true ownership of the Plot.

6. That the Learned Magistrate erred in placing on the Appellant an unreasonably high burden of proof, which is against the law and resulted in a miscarriage of justice.

7. That the Magistrate's decision is against the weight of the evidence on record.

On **15th November, 2021,** the Court directed that the Appeal be canvassed by way of written submissions and the Appellant through the **Law Firm of Waiganjo Gichuki & Co Advocates,** filed his written submissions dated **17th November 2021,** on **23rd November 2021,** and submitted that the trial Court had jurisdiction to deal with the matter as at the time of filing, the law in force was the **Magistrates Court Act, Cap 10 Laws of Kenya**. The Appellant further submitted that based on the evidence he availed at the trial Court, he had proved on a balance of probability that he was the owner on **Plot No. D122**, Sagana Town and therefore it follows that he had established a case of trespass against the Respondent. The Appellant urged the Court to allow the Appeal and grant the orders sought in the Plaint.

The Respondent filed her written submissions dated **12th November 2021** on **15th November 2021** through the **Law Firm of Kahuthu & Kahuthu Advocates,** and submitted that the initial cause of action where the dispute arose is **Kirinyaga County** and therefore the nearest jurisdiction should have been **Baricho** or **Kerugoya Law Courts** as the property in question is in Sagana Town. It was further submitted that the Appeal should fail as the Appellant was on a fishing expedition and has sued a licensee. Further, that the Appeal was based on falsehood and was unnecessary.

It was the Respondent's further Submissions that indeed the Appellant had failed on a balance of probability to prove his case and therefore the Appeal should be dismissed with costs.

The Court has considered the evidence adduced in the lower Court as well as the submissions thereafter by parties. The Court recognizes that it neither saw nor heard the witnesses and must therefore give allowance to that. The Court has also carefully considered the findings of the trial Court, and the Submissions of Counsels and finds as follows; -

As this is a first Appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act. See the case of *Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212 where the Court of Appeal held inter alia, that:-***

> ***"On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"***

Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial Court, analyze the same, evaluate it and arrive at an independent conclusion, but always remembering, and giving allowance for it as the trial Court had the advantage of hearing the parties.

In the case of **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

> **"A member of an appellate Court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.''**

Further, as the Court determines this Appeal, it will take into account that it can only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. **See the case of *Mbogo vs Shah (1968) EA at Page 93,*** where the Court held that:-

> ***"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

Having now carefully read and considered the Memo and Grounds of Appeal, Record of Appeal, the written submissions by the parties, and the Judgment of the trial Court, the Court finds that the issues for determination are: -

a) Whether this Court has Jurisdiction on this matter

b) Whether the Respondent trespassed on the Appellant's Land

c) Whether the Appeal is merited.

d) Who will bear the cost of this Appeal?

1. <u>Whether this Court has Jurisdiction on this matter</u>

It is the Respondent's contention that the Court does not have Jurisdiction to deal with the instant suit as the cause of action where the alleged trespass occurred is in **Kirinyaga County**, and hence the original suit should have been filed in **Baricho** or **Kerugoya Law Courts**, as the property in question is situate in **Sagana Town.**

As correctly submitted by the Respondent's, jurisdiction is everything and it has to be determined at the first instance. See the case of" **<u>The Owners of the Motor Vessel 'Lillian S'…Vs…Caltex Oil (Kenya) Ltd 1989 KLR 1,</u>** where the Court held that: -

> ***"…. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. … A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".***

Further in the case of **<u>Ndimu…Vs…Ndimu & Another (2007)1EA 269,</u>** the Court held that;

> ***"A question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue straightway''***.

The **Environment & Land Court** has its root in **Article 162(2) (b) of the Constitution** which provides as follows; -

> **"(2)** ***Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to: -***
>
> ***a. ……..***
>
> ***b. The environment and the use and occupation of, and title to, land.***
>
> ***(3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2).***

To give effect to **Article 162 (2) (b)** of the **Constitution**, Parliament enacted the **Environment and Land Court Act.**

Section 13 of the said Act provides as follows:

> **"(1)** ***The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.***
>
> ***(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes relating to environment and land, including disputes-a) Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;***
>
> ***b) relating to compulsory acquisition of land;***
>
> ***c) relating to land administration and management;***
>
> ***d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and***
>
> ***e) any other dispute relating to environment and land.***
>
> ***(3) –***
>
> ***(4) –***
>
> ***(5) –***
>
> ***(6) –***

7) – In exercising of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including –

a) Interim or permanent preservation orders including injunctions;

b) Prerogative orders;

c) Award of damages;

d) Compensation;

e) Specific performance;

f) Restitution;

g) Declaration; or

h) costs.

The Instant matter was originally filed by the Plaintiff at **Murang'a Chief Magistrates Court** and this Court has been seized of it on Appeal, after the Appellant herein was dissatisfied with the decision rendered by the trial Court. The Court has perused the proceedings of the Court of first instance and notes that the Respondent did not raise therein the issue of Jurisdiction. Therefore, it is curious that he choose to raise it now when the matter is on Appeal.

Having said that, this Court as per Article 162 (2) (b) of the **Constitution** as read together with **Section 13** of the Environment and Land Act has appellate jurisdiction to hear and determine all disputes relating to environment and the use and occupation of, and title to, land, then the Court finds that it has jurisdiction herein. See the case of **Lydia Nyambura Mbugua …vs…Diamond Trust Bank Kenya Limited & another [2018] eKLR** where the Court held that;-

"It will thus be seen from the above that it is the ELC and the empowered subordinate Courts, which have jurisdiction to hear disputes relating to matters in the Land Act and Land Registration Act. This jurisdiction will inevitably cover all instruments created within these statutes, which must also encompass charges, and generally all proprietary transactions. …"

The Instant suit is an Appeal from **Murang'a Chief Magistrates Court** and it relates to use of, title, and/ or occupation to land. Therefore, it is the Court's considered view that this Court has jurisdiction to determine the dispute before it which revolves around title to land.

2. Whether the Respondent trespassed on the Appellant's parcel of Land.

In the Plaint dated **1st August 2014**, the Appellant claims against the Respondent for trespass and specific damages of **Kshs. 13,500/=** for the damage caused by the by the Respondent during the said trespass. In addition, the Appellant prays that a vacation order do issue against the Respondent over **Plot No. D 122,** Sagana Town.

The Appellant further submitted that he is the lawful owner of **Plot No. D122**, **Sagana Town**, having acquired it from **John Gitau Kangethe & Nelson Mwangi,** which at the time of purchase was represented by **John Gitau.** In support of his case, he availed before the Court a Sale Agreement dated 25/1/2011, Extract of Minutes for a meeting held on 28/6/2011, a Beacon Certificate for **Plot No. D122**, Sagana Town, and Authority to Develop dated 25/10/90 for Plot No. D 122 Sagana Town.

The Appellant further submitted that he enjoyed quiet possession of **Plot No. D122**, **Sagana Town** until about **23/5/2014**, when he was informed that the Respondent had accessed his plot and was claiming ownership of the same.

The Respondent on the other hand averred that she was a beneficial owner of **Plot No. 262, Sagana Town**. She also averred that she had been allowed to use the said plot by her brother **Isaac Njau Githendui**, who was the registered owner of the said plot. That the said **Isaac Njau Githendui** acquired **Plot No. 262, Sagana Town** from **Njogu P. Nganga** in **March 2014.** It was her submissions that she had gained access to **Plot No. 262, Sagana Town**, and not **Plot D122,** Sagana Town.

Based on the above and the evidence adduced by both the Appellant and the Respondent, it is not in doubt that both parties had laid claim to different parcels of land. The Appellant laid claim on **Plot No. D122**, Sagana Town while the Respondent laid Claim to **Plot No. 262**, Sagana Town.

Trespass is described under ***Section 3 (1)*** **of the Trespass Act,** as follows;

"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

In **BLACK's LAW DICTIONARY 8TH EDITION**, a continuing trespass is defined as: -

> ***"A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property".***

The Court in **John Kiragu Kimani vs Rural Electrification Authority [2018] eKLR also in defining trespass relied on Clark & Lindsell on Torts, 18th Edition on page 923** which defines trespass as;

> ***"any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason"***

For Appellant to establish a claim for trespass he needed to establish firstly; that he owned the alleged piece of land or had possession of it. Secondly, he must proof that the Respondent intruded into the said land without his authority.

The Appellant adduced evidence before the trial Court to show that he indeed is the owner of **Plot No. D122**. The said evidence was not controverted and/or rebutted. The Appellant also called two more witnesses and they all corroborated his evidence. This Court has no reason to doubt that the Appellant is the bonafide owner of **Plot No. D122**, Sagana Town and that he had possession of it since he purchased the same in 2011.

The second element to be established in a claim for trespass is unauthorised entry into another person's property without any reasonable excuse. The Appellant has alleged that the Respondent trespassed upon his land being **Plot No. D122**, **Sagana Town,** and cut down trees and removed the already put beacons and as a result. He claimed **Kshs. 13,500/=** as damages. The Respondent in her Defence alleged that she is the beneficial owner of **Plot No. 262, Sagana Town,** which is owned by her brother **Isaac Njau Githendui**, who is the registered owner of the said plot.

It is clear that both parties are claiming two different plots. The Plaintiff lays claim to **Plot No. D122**, **Sagana Town,** while the Respondent lays claim on **Plot No. 262**, **Sagana Town**. It appears, as the learned Magistrate in the Court of first instance put it, like there is either double allocation and/reallocation of the Plots.

Neither the Appellant nor the Respondent is a surveyor and therefore they are not experts. None of them led evidence before the trial Court about the exact locations of both **Plot No. D122**, Sagana Town or **Plot No. 262** Sagana Town. The Appellant has submitted that the reason he failed to join the office of the County Surveyor in the initial suit was because they were not claiming against them. This Court is however of the considered view that since the dispute involves two plots, all of which appear to have allotment numbers and the requisite documents, only a surveyor and an official from the relevant County office could aid this Court in determining the real issues in controversy.

Having said that, it is clear that the determination of this Appeal revolves around the question of whether the Appellant proved his case on the balance of probabilities or not.

The burden of proof was on the Appellant to prove his case on the required standard. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR,** the Court held that; -

> **"As a general preposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden…is cast upon any party, the burden of proving any particular fact, which he desires the Court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides that the burden lies in that person who would fail if no evidence at all were given by either side."**

The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the Court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, Court of Appeal held that:

> **"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 while discussing the burden of proof had this to say;-**
>
> **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."**

Further, **Section 109 of the Evidence 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.

It is evident that the onus was on the Appellant to prove that the Respondent had actually trespassed into his plot. This Court finds and holds that the Appellant failed on a balance of probability to discharge the said burden of proof. The Appellant failed to adduce sufficient evidence to show that the actual land that the Respondent had taken possession of was indeed **Plot No. D122**, **Sagana Town** and not **Plot No. 262**, Sagana Town.

3. <u>Whether the Appeal is merited.</u>

The Appellant had sought for the setting aside of the trial Court's Judgment and that Judgment be entered in his favor as sought in the Plaint. The trial Court held that the Appellant did not prove his case on the required standard of balance of probabilities. This Court has also arrived at the same conclusion. Consequently, the Court finds that the trial Court did not misapprehend the law nor the facts. For the above reasons, the Court finds and holds that the Appeal herein is **not merited.**

Having now carefully re-evaluated and re-assessed the available evidence before the trial Court and the **Memorandum of Appeal,** together with the **Written Submissions**, this Court finds and holds that the trial Magistrate arrived at a proper determination and therefore this Court in its appellate jurisdiction finds no reason to upset the trial Court's determination.

The upshot of the foregoing is that the Appellant's Appeal herein is found **not merited** and consequently the said Appeal is **disallowed** and **dismissed** entirely and the **Judgment** and **Decree** of the trial Court is upheld.

4. <u>Who will bear the cost of this Appeal?</u>

Ordinarily costs do follow the event. The Appellant's Appeal has been dismissed and the Respondent is the successful litigant. Consequently, the Respondent will have the costs of this Appeal to be borne by the Appellant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 8TH DAY OF FEBRUARY 2022.

L. GACHERU

JUDGE

<u>Delivered virtually;</u>

In the presence of

No Appearance for the Appellant

No Appearance for the Respondent

Kuiyaki – Court Assistant

L. GACHERU

JUDGE