



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CIVIL APPEAL CASE NO. 09 OF 2019**

**EDWARD NGARI MUSA.....APPLICANT/APELLANT**

**VERSUS**

**SHADRACK NYAGA NJERU.....RESPONDENT**

**JUDGMENT**

1. The Judgment in this matter was to be delivered on **24<sup>th</sup> March, 2020**. This could not be done because of complications brought about by the Corona Virus Crisis. Upon issuance of the apposite notice to the parties, the Judgment will be delivered in open court today. This is because this court lacks the necessary technological facilities to deliver the Judgment electronically. However, all precautions have been taken to ensure compliance with all measures necessary to obviate the spread of the Corona 2019 virus.

2. The Memorandum of Appeal in this case reads as follows:

**MEMORANDUM OF APPEAL**

The Appellant being dissatisfied with the judgment of the Chief Magistrate Court at Chuka pronounced on 24th June, 2019 by J. M. Njoroge, Chief Magistrate in Civil Case No. 127 of 2014 appeals to the ELC Court against the whole judgment and puts the following grounds:

1. The learned chief magistrate erred in law and in fact when he found that the respondent is the owner of the suit land which land the respondent didn't even know its acreage and to what extent has the respondent encroached.
2. The learned Chief Magistrate erred in both law and fact when he found that the appellant had encroached on the suit land and hence should vacate the suit land within a period of three (3) months.
3. The learned Chief Magistrate erred in law and in fact when he found that the appellant was trespasser on the suit land.
4. The learned Chief Magistrate erred in law and in fact when he entered judgment against the appellant whereas the land indicated in the sketch map of LDT IGA/01/04 is not known and drawn to any scale.
5. The learned Chief Magistrate erred in law and in fact by failing to find that the appellant had filed a complaint against fencing of sections of his land parcel by the respondent, and unfortunately, the land Dispute Tribunal was disbanded before the matter could be heard and determined. That the appellant was also not a party to the fencing that was done by the court bailiff and the respondent who did not bother to consult the appellant as the neighbor of the respondent.
6. The learned Chief Magistrate erred in both law and in fact by finding that the Appellant and or parents, and or relatives were present during the mapping out of the suit land boundaries and they laid no claim on the suit land whereas the tribunal proceedings were conducted outside the locality of the parties so it is like there was some of level of secrecy.
7. The chef magistrate erred in law and in fact in finding that the Respondent is entitled to the costs and interest of the suit whereas the respondent had not proved his case on a balance of probabilities as expected of him in Civil Cases.

Reasons wherefore the appellant prays for orders:

- a) That the judgment in Chuka Civil Case No. 127 of 2014 be set aside,
- b) That costs of this appeal and that of Chuka Civil Case No. 127 of 2014 be borne by the Respondent.

**Dated at Embu this 22<sup>nd</sup> day of August, 2019**

**P. M. KAHIGA & CO.**

**ADVOCATES FOR THE APPELLANT.**

3. The appeal was canvassed by way of written submissions.
4. The Appellant's written submissions are reproduced fully herebelow without any alterations whatsoever:-

**THE APPELLANT'S SUBMISSIONS TO THE APPEAL**

**BACKGROUND OF THE APPEAL IN BRIEF**

Your Lordship,

The Appellant herein was sued by the Respondent herein along with two other Defendants before the Chuka Chief Magistrate's Court in Chuka CMCC No. 127 of 2014 which was heard and concluded on 24<sup>th</sup> July 2019. The Appellant herein was aggrieved with the Trial court's verdict precipitating the instant Appeal vide his Memorandum of Appeal dated 22<sup>nd</sup> August 2019 and filed same day.

Upon filing this Appeal the Appellant learnt that the co-defendants had also filed their own Appeal before this Honourable court as Appeal no. 8 of 2019 and sought for consolidation of the two appeals but the Application was disallowed.

The Respondent's suit before the trial court against the Appellant vide his Amended Plaintiff dated 30.03.2016 (*see page 104 108 of the record*) primarily sought eviction orders against the Defendants therein (the Appellant herein was the 3<sup>rd</sup> Defendant) who had allegedly independently encroached on some unspecified portions of the Respondent's un-demarcated land and sought the following orders;

1. An Order that the Defendants do move out of the suit land as indicated in the sketch map of LDT IGA/01/04 TRIBUNAL or in default they be forcibly evicted with their agents, servants, assigns and any other person acting on their behest together with their property and possessions.
2. An injunction restraining the defendants by itself, its servants, agents or otherwise from remaining on or continuing to use, occupy and or trespassing on the suit property until the case is heard and determined.
3. The defendants to vacate and hand over Vacant possession of the land to the Plaintiff.
4. Eviction of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants from the suit property.
5. Mesne profits
6. Costs and interest of the suit.

The Facts of the Respondent's claim were that he had sued one Christopher Njeru before the Land and Disputes Tribunal vide LDT IGA/01/04 for trespass on his land to which the Tribunal reached its verdict in his favour and thereafter the tribunal went ahead to draw a sketch map of the Respondent's land (please see page ..... ) as the land was un-demarcated. The verdict of the Tribunal was later adopted as judgment of the court vide L.D.T Case no. 19 of 2004 and thereafter on the Plaintiff's motion the court issued orders for enforcement of the Tribunal's orders to evict the said Christopher Njeru from the suit land with the help of Quick line Auctioneers which was done and the Auctioneers actually fenced off the Respondent's land as per the Sketch Map.

However the Respondent /Plaintiff claimed that when the Auctioneers went to fence off his land they found the three Defendants having encroached on some unspecified portions of his land, which the auctioneers left unfenced apparently because there was no court order against the Defendants. It is this unspecified portions of land that the Respondent sought to evict the Defendants from.

In his rejoinder the Appellant (the 3<sup>rd</sup> Defendant) informed the court that he was in occupation of his own land and had been in occupation of the same way before the LDT proceedings which constitutes family ancestral land passed on from his grandfather to his father and now to himself and at no time did he encroach on the Respondent's land. That his land neighbors the Respondent's land. That his land was not subject of the LDT proceedings and he was not a party to the said proceedings.

It was the Appellant's contention that the Respondent did the fencing off of his land with the help of Quick line Auctioneers in the absence of the Appellant and took advantage of the same to fence off portions of the Appellant's land to the extent of 4 ½ acres. That upon discovery of the mischief by the Respondent, the Appellant's father did lodge a complaint against the Respondent before the LDT for fencing off portions of his land but the Tribunal was disbanded before the case took off. The Appellant also challenged the Sketch map relied on by the Respondent for being vague and ambiguous as it failed to disclose the acreage of the Respondent's land and is not drawn to any scale.

From the evidence adduced at trial it was clearly evident that;

- a. The area in which the suit land is situate is un-demarcated and still under adjudication
- b. The parties to the suit all own land independently neighboring each other around the suit land which they were in occupation of long before the LDT case.
- c. The Defendants were not parties to the LDT proceedings.
- d. The 3<sup>rd</sup> Defendant was not involved in the fencing off of the Plaintiff's land.
- e. That the Defendants were not relatives.

Upon hearing all the parties to the trial suit the Honourable court in its Judgment issued the following orders;

1. That the Defendants do move out of the suit land as included in the Sketch map of LDT/IGA/01/04 Tribunal , in default they be forcefully evicted with their property and possessions.
2. That the eviction of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants from the suit property be effected on or before the expiry of a period of 3 Months form the date hereof
3. That the Plaintiff shall have the costs and interest of the suit.

Your Lordship, these are the orders that the Appellant seeks to set aside and we propose to argue some of them jointly as they are co-related as follows;

Your Lordship, at the onset we wish to draw your the attention to the fundamental breach of the mandatory legal requirement on the part of the Respondent due to failure to obtain consent in writing from the land adjudication officer before instituting his claim over un-adjudicated land as required in law as was extensively highlighted by the Appellant in his submissions before the trial court in line with **Section 30** of the Land Adjudication Act. Surprisingly the Honourable trial Magistrate in total disregard of the Appellant's submissions completely failed to attend to this fatal omission in his judgment.

**Section 30 of the Land Adjudication Act provides;**

**(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this act.**

**(2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.**

**(3) Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty –eight days after the refusal, appeal in writing to the Minister whose decision shall be final.** (Emphasis supplied)

As seen from the record it has been variously admitted by the parties therein that the land the subject matter of these proceedings is situated under section B of Kamwimbi adjudication section to which adjudication process has not been concluded to date. One such admission is made by the Respondent in his evidence in chief (*please see page 21 of the record*) that ***“ I did not have a title deed as the area is not demarcated”***

We submit that this was a gross oversight by the trial court as the said statutory provision above is couched on mandatory terms, it follows that the failure to obtain the said consent and the absence of evidence of completion of the register in that section automatically rendered the suit fatally incompetent, that the respondent's claim should not have seen light of day, it ought to have been dismissed.

We invite, Your lordship to be guided by the decision in the case of **Thomas Kinyori Hussein & 3 others v Mokha Mghanga & 2 others [2018] eKLR** where the court dismissed the Plaintiff's suit in its entirety for want of Consent from the adjudication officer.

Further that the trial court in fact lacked jurisdiction to entertain the Respondent's suit, by dint of Section 30 of the Act above the court is debarred from entertaining any proceedings concerning the land whose adjudication is underway.

It is settled law that a court's jurisdiction flows from the Constitution, or legislation, or both.

In the celebrated case of **Owners of Motor Vessel Liliat “S”-Vs-Caltex Oil Kenya Limited (1989) KLR 1**, it was held that jurisdiction is everything and once a court has no jurisdiction, it has no power to make one more step. The court has to down its tools.

Additionally, the Supreme Court of Kenya (SCK) in **Republic –vs-Karisa Chengo and 2 Others Petition No. 5 of 2017** restated the same position. It held inter alia;

**“...As we know, jurisdiction goes to the root of any litigation. This position was forcefully reiterated in the *locus classicus* decision of Nyarangi, JA in *The Owners of Motor Vessel Lilian “S”-VS-Caltex Oil Kenya Ltd (1989) KLR 1* that “jurisdiction is everything.” **Without it a court cannot make a move. Lack of jurisdiction thus renders a court’s decision void as opposed to it being merely voidable. When an act is void, it is a nullity ab initio.**” (Emphasis ours)**

It follows that on the ground of jurisdiction alone, the trial court ought to have downed its tools in the circumstances.

#### **APPEAL GROUNDS NOS. 1, 2, 3 and 4**

We submit that the trial court erred in law and in fact in relying on the Sketch map as drawn by the LDT Tribunal to confirm the Respondent’s ownership status of the suit land as the said map is not drawn to any scale and does not specify the exact acreage of the Respondent’s land.

The Respondent failed to specifically plead and prove the extent to which each of the Defendants including the Appellant herein had allegedly encroached on his land, in absence of that clarity the trial Court erred in finding that the Appellant had trespassed and encroached on the Respondent’s land and proceeding to issue the eviction orders. The trial court ignored the Appellant’s contention that the Respondent had actually fenced off portions of the Appellant’s land. Execution of the eviction orders against unspecified portions of land considering the Appellant’s land borders the Respondent’s land and both lands are un-demarcated exposes the Appellant to the risk of being evicted further from portions of his rightful land by the Respondent which he seeks protection against from the Honourable court.

The Tribunal’s Sketch map (*please see page 46 of the record*) heavily relied on by the Respondent in support of his claim is clearly indicated that it is not drawn to any scale, it does not state what is the exact acreage of the Respondent’s land. The Respondent himself does not seem to be sure what the exact acreage of his land is he has variously stated that his land measures 56 acres and on other occasion he says it’s about 60 acres. We submit that a vague and ambiguous sketch map as this one cannot found a claim for eviction

The Respondent concedes that the Auctioneers did fence off his land in execution of the Tribunal orders guided by the Sketch map along and left out the Appellant’s land unfenced, this confirms that indeed the Appellant is in occupation of his rightful land which he ought not be evicted from. The Appellant submits that, the Respondent’s claim is a ploy to hoodwink the court to aid him in grabbing portions of the Appellant’s land further which must not be entertained.

#### **APPEAL GROUND NO. 5**

The Appellant further faults the Trial Magistrate for failing to put into consideration his evidence in respect to the fact that the Appellant had actually filed a complaint to the LDT Tribunal in the year 2010 over the fencing of portions of his land by the Respondent way before the filing of the lower court case by the Respondent (*please see page 70 and 219 of the record*). The Appellant takes great exception to the fact that he was not involved in the fencing off of the Respondent’s land despite being an immediate neighbor, if indeed the Respondent conducted the fencing off in an open and transparent manner nothing would have been easier than to call his immediate neighbors to witness the same.

To this end the Appellant maintains that he has not encroached on the Respondent’s land in any way, that in fact it is the Respondent who fenced off portions of the Appellant’s Land.

#### **APPEAL GROUND NO. 6**

The Appellant also challenges the findings of the trial court that the Appellant or his parents were present during the mapping out of the Respondent’s land and apparently none of them laid a claim to the suit land. It unclear how the Honourable court came to this conclusion against the Appellant as it is not on record that the Appellant was present during the fencing off the Respondent’s land. The Appellant takes great exception to the fact that he was not involved in the fencing off of the Respondent’s land despite being an immediate neighbor, if indeed the Respondent conducted the fencing off in an open and transparent manner nothing would have been easier than to call all his immediate neighbors to witness the same. The Appellant further reiterates that the Respondent took advantage of his absence to grab portions of his land.

To this end the Appellant maintains that he has not encroached on the Respondent’s land in any way, that in fact it is the Respondent who fenced off a whole 4 ½ acres of land belonging to the Appellant.

#### **APPEAL GROUND NO. 7**

We submit that the Respondent fatally failed to prove his case on a balance of probability and was therefore not worthy of the award of costs and interests and further that the Trial Magistrate erred in law and fact in granting the same. We submit that the Respondent was not deserving of the award of costs and interests and prays for the same to be set aside.

In view of the foregoing, we submit that the Respondent’s suit was fatally defective for want of consent from the Land Adjudication officer it ought to have been struck out, further that the Respondent fatally failed to prove his case on a balance of probability and was thus undeserving of all the orders issued by the trial court. That a sketch map not drawn to scale cannot support a claim for

eviction. That execution of the orders as issued over un-demarcated and un-adjudicated land paves way for abuse and anarchy by the Respondent against the Appellant and implore on this Honourable court to find in favour of the Appellant by allowing the Appeal as prayed.

AUTHORITIES;

1. **Republic –vs-Karisa Chengo and 2 Others Petition No. 5 of 2017**
2. **Thomas Kinyori Hussein & 3 others v Mokha Mghanga & 2 others [2018] eKLR**
3. **Owners of Motor Vessel Liliat "S"-Vs-Caltex Oil Kenya Limited (1989) KLR 1**

**DATED AT EMBU THIS .....30<sup>TH</sup> ..... DAY OF.....DECEMBER,.... 2019**

**P.M KAHIGA & CO.**

**ADVOCATES FOR THE APPELLANT**

5.The Respondent's written submissions are reproduced in full herebelow:-

#### **RESPONDENT'S WRITTEN SUBMISSION**

**For the Kind attention of the Honourable Justice P.M Njoroge.**

##### **I. BACKGROUND**

1. **BEFORE** court is an Appeal that principally challenges the decision that was made in favour of the Respondent after a full hearing where each party to the suit in the lower court testified. We therefore wish to set the facts leading to the impugned judgment as herein below.

2. **VIDE** an amended Plaint dated 30<sup>th</sup> March, 2016(the amended Plaint appears on pages 107 to 111 of the record of appeal. The Respondent herein prayed for;

a. An Order that the Defendants do move out of the suit land as indicated in the sketch map of L.D.T IGA/01/04 TRIBUNAL or in default they be forcibly evicted with their agents, servants, assigns and any persons acting on their behest together with their property and possessions.

b. An injunction restraining the Defendants by themselves, servants, agents or otherwise from remaining on or continuing to use, occupying and/or trespassing on the suit property until the case is heard and determined.

c. The Defendants to vacate and hand over vacant possession of the land to the Plaintiff.

d. Eviction of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from the suit property.

e. Mesne Profits.

f. Costs and interest of the suit property.

3. **PURSUANT** to leave granted on 26<sup>th</sup> September, 2018 the Respondent filed his substantive witness statement dated 9<sup>th</sup> October, 2018. (the statement appears on pages 123 to 127 of the record of appeal.)

4. **ON** 21<sup>st</sup> November, 2018 the Respondent testified. Subsequently on 2<sup>nd</sup> April, 2019 and 22<sup>nd</sup> May, 2019 the trial continued and the case was closed. The testimonies appear on pages 215-223 of the record of appeal)

5. **JUDGMENT** was rendered on wherein the trial court was persuaded by the Respondent's version and facts and entered judgment in favour of the Respondent. (A copy of the judgment appears on pages 224-231 of the record of Appeal.)

Perhaps my Lord, before we delve into the issues forming the crux of the Appeal herein, it becomes apparent that the record and facts herein ought to be set straight. On a first appeal to High Court, the Court is enjoined to reconsider the evidence, evaluate it itself and draw its own conclusions though it has not seen nor heard the witnesses and should make due allowance in that respect. See **Kenya Ports Authority versus Kusforn Kenya Limited (2009) 2EA 212 as quoted with approval in Kimani Muhoro v John Waiganjo Mbuthia & Mark Gituku Gichuhi [2013] eKLR**

##### **II. FACTS & ANALYSIS OF EVIDENCE FROM THE WITNESSES DURING TRIAL**

6. **THE** Respondent who was(PW-1) took the Stand on 21<sup>st</sup> November, 2019. He adopted his witness statement dated 9<sup>th</sup> October, 2018 and the List and Bundle of Documents filed therewith.
7. **THE** Respondent further told court that the dispute involves a parcel (suit land) of land which is about quarter an acre in size but part of about 50 acres situate in Kiaritha Sub-location of Kamwimbi Location, Igambang'ombe Division of Tharaka-Nithi County. He stated that the suit land is family property and/or ancestral land.
8. **HE** told Court that his family has been in possession and occupation of the suit property since time immemorial. He told court the suit land is un-adjudicated. He further told Court that on or about the year 2004, one Christopher Nyaga purported to claim ownership of a portion of the suit land necessitating the filing of a case at the relevant Land Disputes Tribunal being case number IGA/01/04. He further informed court that the APPELLANT/Defendants' parents were witnesses at the Tribunal case.
9. **The** Respondent herein told court that after serious deliberations by the District Land Disputes Tribunal, a verdict was delivered on 22<sup>nd</sup> November, 2004, whereupon the Tribunal made a finding that he was the rightful legal proprietor of the disputed parcel of property. Being aggrieved with the decision of the District Land Disputes Tribunal, Christopher Nyaga mounted an appeal at the Eastern Provincial Land Disputes Appeals Committee sitting in Embu. Which Appeal was dismissed.
10. **IN** possession of the decision of the Land Dispute Tribunal, the Respondent herein informed court that he made an application to court (LDT case number 19 of 2004) and obtained a lawful decree which paved way for the enforcement of the Tribunals' orders.
11. **UPON** and during the enforcement of the Decree aforesaid, the Respondent, established that the APPELLANT had, with the help of unscrupulous and malicious individuals, encroached on the suit land. He told Court that with the decree as it were, he could not enforce the same upon the APPELLANT as they were not parties to the Land Dispute Tribunal case. This prompted him to file the instant suit in a bid to define, defend and protect his constitutional and inalienable right to own and hold property.
12. **The** Respondent summoned a witness. His name was Kamwara Giciu(PW-2). He took the stand on 3<sup>rd</sup> of April, 2019. He adopted his statement dated 10<sup>th</sup> August, 2015 and filed in Court on 10<sup>th</sup> August, 2015. His testimony appears on pages 219 of the record of appeal)
13. **PW-2** told court that he was the Chairperson of the Land Disputes Tribunal in Igambang'ombe Division up until 2010 when the Tribunal was disbanded. He told court that indeed he presided over the Land Disputes Tribunal during case number IGA/01/04 which was between the Respondent herein and one Christopher Nyaga Njeru. He informed court that indeed after serious deliberations, the Tribunal made a decision in favour of the Respondent herein.
14. **INTERESTINGLY**, he stated that during the hearings at the Tribunal, the APPELLANT parents took oaths and testified on behalf of Christopher Nyaga Njeru (the testimony appears on pages 219 line 15 of the record of appeal). He informed court that the APPELLANT parents never laid claim to the suit property or a portion thereof.
15. **PW-2** confirmed that indeed with the help of elders and in the presence of the parties and their witnesses thereto, they walked along the boundaries of the Respondent's property and finally drew a map of the suit property. He told court that the map was drawn by the Tribunal elders and it was never challenged at the tribunal. He completed his testimony by asserting that during the survey of the suit property the APPELLANT and/or their parents NEVER laid claim on the suit property at all.

#### **APPELLANT CASE at the lower court**

16. **PATRICK KITHAKA BORICI/1<sup>st</sup> Appellant** was DW-1. He adopted his witness statement filed on 9<sup>th</sup> December, 2014. He stated that he was from the Gatiri clan. He stated that his great grandfather bought the suit land from the Ikou Clan. He told court that his land is adjudicated! He stated that he has not encroached on the suit land. Testimony appears on pages 220 of the record of appeal.
17. **WHEN** placed under cross-examination, 1<sup>st</sup> Appellant/DW-1 was evasive. He could not explain how 3 clans(his clan, 2<sup>nd</sup> APPELLANT clan and the 3<sup>rd</sup> Defendant therein) occupy a **quarter an acre** of the suit property. He admitted that his father was a witness to the Tribunal case. He admitted that the letters annexed to his list of documents to wit (the letter dated 12<sup>th</sup> August, 2009, letter dated 16<sup>th</sup> February, 2010 refer to the suit land as un-demarcated. **The aforesaid letters contradicted his assertion that the suit land is adjudicated.** He admitted that indeed the letters refer to his father and not himself. **He admitted that he does not possess any title documents.** He admitted that he had never instituted any legal proceedings against the Respondent/Plaintiff. He did not call any witness.
18. **MISHECK MWANIKI NJERU/2<sup>nd</sup> Appellant-**. He was the 2<sup>nd</sup> Defendant in the suit. He began by adopting his witness statement filed on 27<sup>th</sup> April, 2015.
19. **UPON** being subjected to cross-examination testimony of pages 222 of the record of appeal), he confessed that the land is un-demarcated as opposed to what is contained in his statement filed in court. He admitted he does not possess any title documents to the property allegedly his. He admitted that indeed his father was one of the witnesses at the Tribunal. He admitted that the letter dated 12<sup>th</sup> March, 2004, annexed to his list of documents does not refer to him but a different person. He could not ascertain when he came into possession of the suit property. He could not ascertain how 3 clans complete with their families could occupy a quarter of an acre. He admitted that he had never sued the Respondent/Plaintiff. He closed his testimony and he was stood down. The 2<sup>nd</sup> Defendant's case was closed without calling any other witness.

20. **EDWARD NGARI MUSAI**-. He was the 3<sup>rd</sup> Defendant in the suit. However, he conveniently chose to file his separate appeal being ELC appeal number 9 of 2019. He adopted his witness statement filed in court on 9<sup>th</sup> December, 2014.

21. **ON** cross-examination, he made startling remarks. He stated that he got ownership of the disputed parcel from his father. He admitted that there was no possibility that 3 clans living with their entire families would reside on a quarter an acre. He admitted that he does not possess any documentation to show ownership of the suit land. He confessed that he is not in POSSESSION of the disputed parcel of land. He admitted that the suit land is still under adjudication. He closed his case without calling any witness.

### **III. ISSUES**

Having reviewed the facts and evidence as adduced by the witnesses we submit that the principal issue that emerge for the court's consideration is:

a) *Whether the APPELLANT have a bonafide interest in the suit property and whether consequently the appeal has merit?*

**We wish my Lord from the onset to submit that the APPELLANT are vexatious and therefore the Appeal DOES NOT have merit**

We shall go step by step and collapse the grounds and urge the same as collectively,

22. **IT** is beyond peradventure that there exists a Land Dispute Tribunal being case number IGA/01/04 where a decree was issued by the Court in LDT case number 19 of 2004. The decree emanating therefrom made it absolutely clear that the parcel of land known as Kiaritha Sub-location of Kamwimbi Location, Igambang'ombe Division of Tharaka-Nithi County is the property of the Respondent and his family.

23. **MY** lord, it was upon the enforcement of the Land Disputes Tribunal's decision and/or the decree thereof that the Respondent encountered the APPELLANT as trespassers on his property. The core question is whether the Respondent is entitled to vacant and uninterrupted possession as the *bonafide* owner of the suit parcel of land.

24. **AT** the risk of gilding the lily, we are aware of the well-settled principle that he who alleges must prove what he alleges, and he must prove the allegation to the required standard; in this instance, the standard of proof is a balance of probability. This principle is set out by Section 107 of the Evidence Act which states as follows:

*Section 107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, (he) 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.*

25. **THE** High Court in Embu HCCA no 58 of 2013, *Dorcas Wangithi Nderi vs Samuel Kiburu Maina & Anor*, reported as (2015) eKLR stated as follows:

***The burden of proof in civil cases on a balance of probability was defined in the case of Kanyugu Njogu vs. Daniel Kimani Maingi (2000) eKLR that when the Court is faced with two probabilities, it can only decide on a balance of probability, if there is evidence to show that one probability was more probable than the other. (emphasis ours).***

26. **IT** therefore followed that the lower Court was obligated to make findings that are more probable with the evidence before the Court, that looking at the narration of events as presented by the Respondent and his witness; the Respondent asserted he had **expended over 15 years** to pursue his rights as the owner of the disputed parcel of land. The efforts he has taken to defend and protect his parcel of property including but not limited to lodging complaints with Land Tribunals, District Commissioners, the local administration and police among other remedial measures including the filing of the civil suit. For the Respondent it has been a long walk to justice. But because of the vexatious nature of the APPELLANT, this matter has had complexity in a long and chequered history.

27. **THE** APPELLANT in their submissions keep rehashing facts. Bending and/or giving alternative facts. We submit My Lord that previous litigation has established that the land in dispute belongs to the Respondent and the matter should end there. The attempt by the APPELLANT to reverse this situation by twisting the evidence is futile.

28. **THERE** is a stage when litigation should come to an end and the APPELLANT seem to want to prolong this case, valueless though their wish is.

29. **THE** APPELLANT are trespassers. They have encroached onto the suit parcel of land without any color of right. They do not possess any documentation to assert their ownership of possession. The APPELLANT did not proffer any credible explanation on how they gained possession of the suit property. The APPELLANT' evidence was contradictory, it was false and it reeked of fabrication. The Appellant has through a backdoor introduced the element of section 30 of the 30 (1) of the land adjudication Act. That was not a question for determination, neither was it pleaded. Parties are bound by their pleadings. And submissions are not pleadings.

30. **IN** the text *Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at p923 and 927*, trespass to land is defined as follows :-

**"Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another."...."to place anything on or in land in the possession of another..."... "Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both. A tenant in occupation can sue, but not a landlord, except in cases of injury to the reversion. Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner."**

31. WE advert our mind to what the law states in such circumstances as herein. Section 25 of Land Registration Act 2012 provides as follows;

S.25 (i) **"The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, subject;**

**(a) to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.**

32. THE Law proposes that a proprietor of land, such as the Respondent herein, cannot be defeated except as provided under the Act. The Respondent as the proprietor of the suit land is clearly protected in law and the APPELLANT have no reason to trespass thereon and the law allows the Respondent to challenge the APPELLANT purported ownership on grounds of illegality, unprocedural acquisition or corrupt scheme as so challenged herein. See the case of **SAMSON KIPKOSGEI CHEPKONG'A V CHEPKONGA CHEBIEGO [2019] e KLR.**

33. IN consideration of the foregoing principles of law as juxtaposed with the factual analysis herein, then what would be the appropriate remedial measure? We therefore address court on the last limb of the Respondents submissions.

**The appeal lacks merit.**

34. IT is trite law that the remedial measure on a party whose property has been invaded by intruders and/or trespassers is to have the Court issue and order of eviction and permanent injunction to restrain any further acts of trespass. The Court reiterated the principle in **OCHAKO OBINCHU V ZACHARY OYOTI NYAMONGO [2018]e KLR.** The Court made the following dicta;

**"The plaintiff's evidence has not been challenged and on the basis of the unchallenged evidence, I am satisfied that the plaintiff has proved that the defendant entered the suit property unlawfully and ejected the plaintiff from his house, constructed on the property and occupied the property. The defendant having unlawfully entered the suit property without the permission of the plaintiff is a trespasser on the suit property and the plaintiff is entitled to judgment against him for eviction and for a permanent injunction to restrain any further acts of trespass.(emphasis ours)**

35. THE Respondent is also entitled to general damages. On general damages, courts have spoken abundantly. **IN NAKURU INDUSTRIES LIMITED -VS- S S MEHTA & SONS [2016] e KLR** court observed: -

**"In tort, damages are awarded as a way to compensate a plaintiff for loss he had incurred due to a wrongful action on the part of the defendant. The damages so awarded are intended to return the plaintiff back to the position he was before the wrongful act was committed. In cases where trespass to land results in damage then the computation of damages is on the basis of restitution of land. The value of the soil (or trees or fruits) which have been removed from that land are all factored as well as the cost of restoration of the land to the position it was in before the wrongful act was committed."**

36. HALSBURY 4<sup>th</sup> ed, Vol 45 at para 26, 1503 provides as follows on computation of damages in an action of trespass: -

- a. (a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
- b. (b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
- c. (c) Where the defendant has made use of the plaintiffs land, the plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.
- d. (d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights or the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
- e. (e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.

Check the double-numbering above

37. In **Nakuru Industries Limited** (supra) the court cited the case of **Duncan Ndegwa V Kenya Pipeline HCC No. 2577 of 1990**

(Nairobi) where the court held:-

**“The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm.**

38. **UPSHOT** of the above is that judgment delivered by the Honourable Njoroge CM on in civil case no. 127 of 2014 is lawful and in tandem with the facts and we kindly urge my lord to be persuaded by the reasoning therein and the evidence on record in particular the testimonies by the witnesses.

39. **IN** the instant suit, whereas the Plaintiff did not adduce evidence on the worth of the property during and after the intrusion but during the trial there was common ground that the Defendants gained entry into the suit property sometime around 2008. Using the same as a constant we submit that the Defendants have been on the suit property for over a decade. We propose damages of Kshs 2,000,000.

40. Further, In **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR P. Nyamweya J .** held:-

**“...once a trespass to land is established it is actionable *per se*, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ trespass”**

**Who should bear the costs of this appeal.**

41. My Lord, it is trite law that costs follow the event. This is set out in **Section 27 of the Civil Procedure Act** and as was stated in the case of **Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd and Orix (K) Limited vs Paul Kabeu & 2 others**. We have demonstrated that the Appeal lacks merit and the same ought to be dismissed with costs.

## **CONCLUSION**

**AFTER** careful consideration of the record of appeal, pleadings, evidence, and the applicable law, we submit that the Appeal lacks merit. In fact, the **APPELLANT** are introducing new matters in particular on ground 4 and 5 of their appeal that we never pleaded or determined by the trial court. My Lord it has been a long walk and a perilous journey towards the seat of justice for the Respondent.

**DATED at NAIROBI this 14<sup>th</sup> Day of February, 2020**

**SIMBA & SIMBA**

## **ADVOCATES FOR THE RESPONDENT**

6. I have considered the pleadings, the submissions and the authorities proffered by the parties in support of their veritably incongruent assertions. As the principles enunciated by the authorities the parties have proffered have been fully elaborated upon in the parties’ submissions which have been reproduced in full in their written submissions, I do not find it necessary to regurgitate the authorities. They are all good authorities in their facts and circumstances. I have taken them into consideration when arriving at my determination in this appeal. I, however, opine that no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances.

7. This being a first appeal this court is entitled to evaluate the evidence tendered in the lower court and to arrive at its own decision. Having carefully gone through the proceedings in the lower court, I find that the appellant robustly participated in the impugned proceedings. If there was a claim that the lower court lacked jurisdiction, this issue should have been raised, without any modicum of delay in that court. The lower court would then have pronounced itself on this issue. I find that the issue of jurisdiction was not timeously and appropriately raised in the lower court.

8. The appellant alleges that the respondent did not obtain the consent of the adjudication officer before filing this case. It is true that section 30 of the Land Adjudication Act requires that the Land Adjudication officer’s consent be obtained before any case concerning land in an adjudication section is filed. However, in his plaint in the lower court, the respondent was seeking implementation of an order issued by the Tribunal established under the Land Disputes Tribunal Act. The Land Adjudication Officer was aware of these proceedings. The requirement that consent be obtained was meant not to fetter the adjudication officer with unknown conflicting orders. I find that consent was not required where the suit in question was meant to implement orders issued by a properly constituted tribunal or court. In the circumstances, I find it that the lower court had full jurisdiction to hear and determine the matters before it.

9. I do note that the issue of jurisdiction was not raised in the grounds of appeal. It was however obliquely raised in the appellant’s submissions concerning ground No. 7. I, have, however found it necessary to address it, as I have done above.

10. Having carefully gone through the proceedings in the lower court and also having perused the impugned judgment, it is my finding that the learned Chief Magistrate considered all pertinent issues and on a balance of probability arrived at a well-reasoned judgment. In the circumstances, I enter judgment for the respondent against the appellant in the following terms:

a) Grounds 1 to 7 in the appeal are dismissed.

b) Costs shall follow the event and are awarded to the respondent.

**Delivered in open Court at Chuka this 5<sup>th</sup> day of May, 2020**

in the presence of:

CA: Ndegwa

Shadrack Nyaga – Respondent

Appellant and his advocate - Absent

**P. M. NJORGE,**

**JUDGE.**