



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 08 OF 2019

PATRICK KITHAKA BORICL.....1ST APPELLANT

MISHECK MWANIKI NJERU.....2ND APPELLANT

VERSUS

SHADRACK NYAGA NJERU.....RESPONDENT

JUDGMENT

1. The Judgment in this matter was to be delivered on **24th 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 Appeal reads as follows:

MEMORANDUM OF APPEAL

The appellants being dissatisfied with the judgment of Chief Magistrates at Chuka delivered on 24th July, 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 trial magistrate erred in law and in fact when he held that the appellant's relatives ought to have joined the tribunal proceedings in LDT/IGA/01/04 between the respondent herein and one Christopher Njeru whereas the appellants' relatives were not parties to the case in court and without taking considerations that the appellants herein were not a party to the said tribunal case. The learned trial (sic) disregarded the appellants' evidence that the tribunal proceedings were conducted outside Kiaritha and therefore they had no information or knowledge of what was transpiring in these proceedings.

2.The learned trial magistrate erred in both law and in fact by finding that the appellants be evicted out of land included in sketch map of LDT/IGA/01/04 whereas the alleged sketch plan is not drawn to any scale and the respondent did not adduce any evidence as to how much land is contained in the said sketch plan and to what extent has the appellant encroached if at all he has trespassed on his land. The learned (sic) basically failed to find that the map cannot be interpreted on the ground and therefore the land being claimed is unknown.

3.The learned trial magistrate erred in both law and in fact by entering judgment in favour of the respondent herein and ordering eviction of the appellants whereas the area encroached is unknown and the respondent did not even know when the appellant encroached his land and to what extent.

4.The learned trial magistrate erred in law and in fact when he found that the respondent has proved his case on balance of probabilities and disregarding the appellants evidence and submissions that the (sic) in fact it is the respondent who has fenced their portions of land and they have not trespassed on the respondent's land parcel.

5.The learned trial magistrate erred in law and in fact by failing to find that the respondent's suit was incompetent ad dismiss it as the respondent had not obtained consent in writing from the land adjudication officer as the land the subject of these proceedings was still under adjudication which was contrary to provisions of section 30(1) of the land adjudication Act.

6.The learned trial magistrate erred in law and in fact when he found that the appellants had occupied the disputed part and when the appellant had adduced evidence that they are not in occupation of the disputed land parcel.

7. The learned trial magistrate erred in law and in fact when he entered judgment in favour of the respondent whereas his evidence was not clear and shrouded in ambiguity and the respondent had therefore not proved his case on a balance of probabilities as expected of him.

REASONS WHEREFORE the appellant prays for orders:-

- a) That the judgment in Embu Civil Suit No. 127 of 2014 be set aside.
- b) That this appeal be allowed in entirety.
- c) That costs of this appeal and costs of the lower court be awarded to the appellants.

Dated at Embu this 20th day of August, 2019

MUTHONI NDEKE & CO.

ADVOCATES FOR THE APPELLANTS

3. The Appeal was canvassed by way of written submissions.
4. The appellants' written submissions are reproduced in full herebelow without any alterations whatsoever:-

APPELLANTS WRITTEN SUBMISSIONS TO THE APPEAL

ON BACKGROUND OF THE APPEAL

The appellants herein were the defendants in Chuka CMCC case no.127 OF 2014. That there was another defendant called EDWARD NGARI. The respondent herein was the plaintiff.

The amended plaint by the respondent is found on pages 107 to 111 of the record of appeal.

The respondent sought the following orders against the appellants.

- 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 person acting on their behest together with their property and possessions.*
- a) 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.*
- b) The defendants to vacate and hand over vacant possession of the land to plaintiff.*
- b) Eviction of the 1st, 2nd and 3rd defendants from the suit property.*
- c) Mesne profits.*
- d) Costs and interest of the suit.*

The matter proceeded before the chief magistrate honorable Njoroje and the following orders were issued against the appellants.

- 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 case or in default they be forcibly evicted with their property and possession.*
- b) Eviction of the 1st, 2nd and 3rd defendants from the suit property be effected on or after the expiry of a period of 3 months from the date hereof.*
- c) The plaintiff shall have the costs and interest of the suit.*

The respondent herein had a case with one **CHRISTOPHER NJERU** being LDT IGA/01/04. The tribunal drew a sketch map found on page 42 of the record of appeal. A decree was issued to that effect (see page 43 of the record), Quickline auctioneers evicted Christopher Njeru from the suit land as per the orders of the court (See orders in page 44 and 45 record of appeal).

That the respondent, Quickline Auctioneers and members of the tribunal fenced the land which they alleged was the one drawn in the sketch plan. In the process they fenced a portion of the 2nd appellant portion of land.

The 2nd appellant lodged a complaint to the Meru South land district tribunal against the respondent complaining that the respondent has fenced a portion of his land. (See the application to file a claim on page 73 of the record.)

The tribunal was disbanded before the complaint was heard.

The 1st and 2nd appellants are neighbours to the respondent though each one of them borders the respondent on different sides. The appellants are not related. They are only neighbors to the respondent.

The 1st appellant has no claim whatsoever in the land that was fenced by the tribunal as his land is out of that fence that was put by the tribunal.

The respondent's suit was for eviction whereas the appellants are out of the fenced land that was done by the tribunal and the auctioneer.

The respondent claim is that the auctioneer did not fence the land properly as they ought of done.

ON APPEAL

The appellants were dissatisfied with the Judgement of the learned chief magistrate and they have filed their grounds of appeal contained in pages 1 and 2 of the record of appeal. We propose to argue these grounds jointly as they are interrelated.

GROUND 1

We submit that the learned trial magistrate erred in law and in fact when he held that the appellant's relatives ought to have joined the tribunal proceedings in LDT/IGA/01/04.

In his Judgement see page 229 lines 19 to 25 the learned magistrate stated *that even if the appellants were not parties to the tribunal there close relatives did not claim ownership of the land during their testimonies.*

On (page 228 lines 20) the learned magistrate found that if the appellants and their relatives who testified in the tribunal had any claim over this land, they would have joined the proceedings as interested parties.

A close look at the evidence of the 1st appellant on pages 220 the 1st appellant clearly stated that his land is outside the fenced portion.

The 1st appellant is not claiming any land from the fenced portion by the respondent herein. He only says that the respondent dropped building stones on his land which is outside the fence.

We submit that it is on record that the case was between the respondent and *Christopher Njeru*. If the relatives went there they only went as witnesses and it is clear that the people of Kiaritha were not aware as the proceedings were outside Kiaritha.

Who would have known that the tribunal was to fence a portion of the 2nd appellant's land to warrant joining the proceedings? What the 2nd appellant did was correct in the circumstances i. e to lodge a complaint to the said tribunal which he rightfully. We submit that the trial magistrate misdirected himself on this fact.

GROUND 2 & 3

The learned magistrate erred in ordering eviction of the appellants whereas the sketch plan on LDT/IGA/01/04 is not drawn to any scale. The sketch map on page 42 is clearly indicated "THE MAP IS NOT SCALED."

In his evidence respondent states in page 216 that his claim is 56 acres. That the same is not indicated in the map.

The respondent further stated in court that the auctioneers who fenced the land did not fence well. That he did not include all his land. That the defendant encroached on ¼ acre that 2nd defendant ¼ acre and 3rd defendant ¼ acre.

We submit that the issue raised by the respondent that the appellants encroached his land not correct. This is because the map is drawn. It is not indicated how much land it contains. The auctioneers fenced the land accompanied by the respondent, security and members of the tribunal. After the auctioneers fenced the land and left the respondent filed the case herein on land parcel outside the fenced portions and which belongs to his neighbors on 3 sides.

My lord the question we raise is if the land is not drawn to any scale how can it be interpreted on the ground. Where is it indicated in the map that the land to be fenced is 56 acres.

My lord there is mischief on the part of the respondent in that he wants to forcefully grab his neighbors land parcels on the pretense that it is his land as per the sketch plan.

Remember this is an adjudicated land and the case was brought in court with an intention that the court awards him his neighbor's land

parcels so that during adjudication he is registered with these land parcels.

The respondent has never had any litigation with the appellant's herein. He did not go back to the tribunal or court which awarded him the decree to state that his land was wrongly fenced by quick line Auctioneers like he is claiming in the case herein.

- ***We ask ourselves how come he has fenced which was done by the tribunal and his auctioneer and now claims land which is outside the fence?***
- ***So what is this land that is the respondent claiming that is outside the fence?***
- ***To what extent can this sketch plan be interpreted without any scale?***
- ***The respondent in his evidence states that all his land was not fenced,***
- ***What was this land that was left out during the fencing and he was present all through the exercise?***
- ***Why didn't he protest during the fencing to the auctioneers bearing in mind that the appellant were not present during the fencing exercise and it was the respondent who guided the auctioneers where to fence?***

Is it noted anywhere by the tribunal that the fencing was improperly done. If indeed the appellants encroached the land in year 2008. As per evidence (see page 217 of the record) and fencing done in year 2010 (see page 216 of the record) Why didn't the auctioneer throw these people as per the court orders submitted above which mandated him to do so.

We invite your lord to send the deputy Registrar of this honourable court to visit the disputed land give this court a report. The court will be shocked to find that the respondent has totally misrepresented the facts to the court.

In fact if the court can peruse the photographs attached to the application for stay of execution it will realize that the 1st appellant's house is just next to the road. There is no fence. The fence is far from the 1st appellant house completely.

We submit that the learned Magistrate totally misdirected himself in awarding these orders to the respondent whereas the area he is claiming is not known or indicated in the sketch plan.

The sketch map the subject of these proceedings cannot be interpreted unless by people who drew it and are the ones who guided the auctioneer during fencing which the respondent now disputes.

We submit that the averments of encroachment of the land by the appellants after the fencing was done **was an afterthought**, and had ill intentions of grabbing the appellants land parcels which are outside the fence for the respondents selfish interest.

GROUND 4, 6 and 7

We submit that the learned trial Magistrate erred in law and fact by finding that the respondent had proved his case on a balance of probabilities and disregarded the appellants evidence and submissions that the respondent's case does not have merit in that they were not trespassed on the respondent's land parcel, that it was indeed the respondent who fenced a portion belonging to the 2nd appellant.

The learned trial magistrate also erred in failing to find that the appellants had not occupied the disputed land parcel which land parcel is not ever known.

The evidence by the respondent was surrounded by an ambiguity in that the size of the land is not known, the sketch plan is not drawn to any scale, and it is not clear why the auctioneers did not evict the appellants in the year 2008 if indeed they were in occupation of this land parcel.

We submit that the respondent did not prove his case on a balance of probability as provided for in civil cases.

In fact the respondent pleaded that encroachment was in year 2010 but in evidence no talked of year 2008. The evidence by the respondent witness who was a tribunal member was that the land is over 50 acres. That the defendant's occupied the land after the tribunal fenced it. Which are total contradictions by the respondent and his witness. (see page 219 lines 19 and 20)

GROUND 5

The learned trial magistrate failed to dismiss the respondent's suit for being incompetent as the respondent did not obtain consent writing from the land adjudication officer.

On page 216 the respondent in line 9 stated ***"I don't have a title as the land is not demarcated."***

On page 217 lines 4 & 5 the respondent stated ***"the adjudicator has not allocated the land. I have no consent by the adjudicator office"***

The 1st appellant in his evidence on page 220 line 14 he said that ***the land is un demarcated***. In fact the portion the respondent is claiming from the 1st appellant which he has built a shop is 1/8 acre.

Evidence of DW3 on page 222 lines 17 & 18 of the record the witness says that ***"the plaintiff fenced off my parcel 4 1/2 acres out of section 13 which is not adjudicated.***

The evidence of the 2nd appellant is found on page 221 and in line 18 and 19 of the record he states, ***the land has not been adjudicated.***

My lord despite the appellants having submitted on necessity of consent under the provisions of section 30 (1) of the land adjudication Act on pages 173 and 174 of the record, the learned trial magistrate did not make any reference to this provision of the law in his Judgement.

Section 30 (1) of the land adjudication Act states “***Except with the consent in writing 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.***”

We submit that the land the subject of these proceedings is under section B of Kamwimbi adjudication section and which adjudication process has not been completed.

The respondent did not obtain any consent in writing from the Adjudication Officer of that adjudication section as expected of him under the above quoted provisions of the land adjudication.

We submit that the provisions of section 30 (1) of the land adjudication Act is coached in **mandatory terms**. That the learned trial magistrate ought to here dismissed the suit for lacking the very important documents i.e. **consent from the land adjudication officer**.

We rely in the case of ***PETER MBOGO NGATHIKA VS & 6 OTHERS VS MBARA MWARIRE 72 OTHERS ELC CASE NO.34 OF 2016*** found on page 178 to 183 of the record where justice ***Y,M Angima*** struck out a suit where lit adjudication officer’s consent was not obtained by the plaintiff’s in the said suit.

We submit that in the absence of the said consent and evidence that the adjudication register has become final.

We submit that the respondent suit was incompetent and it was therefore erroneous for the trial magistrate to entertain it and fail to find it incompetent as lacking the land adjudication’s consent went to the root of the case.

The trial magistrate therefore disregarded the appellant’s submissions on this issue and proceeded to enter judgement in favour of the respondent in total disregard of the provisions of the law.

CONCLUSION

We submit that the appeal herein has merit, the respondent wants to grab the appellant’s land parcel which neighbor his through the backdoor by relying on an un scaled sketch plan to do this and we urge my lord to allow the appeal herein as drawn and set aside the Judgement in civil case no. 127 of 2014 before Chief Magistrate Court Chuka and allow the appeal herein with costs.

We so humbly submit

DATED AT EMBU THIS.....30TH DAY OF.....DECEMBER,2019

MUTHONI NDEKE & CO.

ADVOCATES FOR THE APPELLANTS

5. The Respondent’s written submissions are reproduced in full herebelow without any alterations whatsoever.

RESPONDENT’ 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 Complaint dated 30th March, 2016(the amended Complaint 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 1st, 2nd and 3rd Defendants from the suit property.

e. Mesne Profits.

f. Costs and interest of the suit property.

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

4. **ON** 21st November, 2018 the Respondent testified. Subsequently on 2nd April, 2019 and 22nd 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 Kusorn Kenya Limited (2009) 2EA 212** as quoted with approval in **Kimani Muhoro v John Waiganjo Mbutia & 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 21st November, 2019. He adopted his witness statement dated 9th 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 Appellants/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 22nd 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 Appellants 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 Appellants 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 3rd of April, 2019. He adopted his statement dated 10th August, 2015 and filed in Court on 10th 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 Appellants 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 Appellants 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 Appellants and/or their parents NEVER laid claim on the suit property at all.

Appellants CASE at the lower cour

16. **PATRICK KITHAKA BORICI/1st Appellant** was DW-1. He adopted his witness statement filed on 9th 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, 1st Appellant/DW-1 was evasive. He could not explain how 3 clans (his clan, 2nd Appellants clan and the 3rd 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 12th August, 2009, letter dated 16th 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/2nd Appellant-** He was the 2nd Defendant in the suit. He began by adopting his witness statement filed on 27th 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 12th 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 2nd Defendant's case was closed without calling any other witness.

20. **EDWARD NGARI MUSAI-** He was the 3rd 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 9th 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 Appellants 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 Appellants 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 Appellants 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 Appellants, this matter has had complexity in a long and chequered history.

27. **THE** Appellants 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 Appellants to reverse this situation by twisting the evidence is futile.

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

29. **THE** Appellants 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 Appellants did not proffer any credible explanation on how they gained possession of the suit property. The Appellants' 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 Appellants have no reason to trespass thereon and the law allows the Respondent to challenge the Appellants 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 4th 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 1st and 2nd 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 Appellants 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 14th 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 appellants 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 appellants allege 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. 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 appellants 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 **5th day of May, 2020** in the presence of:

CA: Ndegwa

Shadrack Nyaga Njeru – Respondent

Appellants not present but all advocates have consented to judgment being delivered via E-mail

P. M. NJOROGE,

JUDGE.