REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO 03 OF 2017

FORMERLY MERU ELC CIVILA APPEALCASE NO. 54 OF 2011

M'BITA NTIRO.....1ST APPELLANT

VERSUS

MBAE MWIRICHIA.....1ST RESPONDENT

COUNTY COUNCIL OF MERU SOUTH.....2ND RESPONDENT

JUDGMENT

(Being an appeal from the Judgment of N. N. Murage, R. M. in Chuka SRM's Civil Case No. 18 of 2003 delivered on 8th April, 2011)

1. The Memorandum of Appeal is reproduced in full herebelow:

MEMORANDUM OF APPEAL

The appellant being dissatisfied with the findings and judgment of P. N. Ngare R. M. dated the 8th April, 2011 in Chuka Principal Magistrate's Court Civil Case No. 18 of 2003 appeals to this honourable courts and sets forth the following grounds inter-alia;

1. The learned trial magistrate erred in law and fact by holding that he couldn't discern from the evidence on record who the owner of plot No. 17 Kibugua Market was despite there being humble (sic) evidence to that end that the same belonged to the appellant.

2. The learned trial magistrate erred in law and fact by failing to hold that originally plot No. 17 Kibugua Market belonged to the appellant and not Jason Mwirichia despite convincing evidence on record.

3. The learned trial magistrate erred in law and fact when he misguided himself that he couldn't find any evidence to show that the appellant and Jason Mwirichia and in agreement built what later turned to be plot No. 17 Kibugua market when both the appellant (sic) and the respondent (sic) evidence and exhibits were clear on this fact.

4. The learned trial magistrate erred in law and fact by failing to notice that the appellants exhibit 4A and 4B (rent receipt from 2nd respondent council over plot No. 17 Kibugua market) had been removed and replaced with trained (sic) and occupation receipt in bid to conceal vital evidence that had proved that plot N. 17 Kibugua market was the property of the appellant before it was subdivided into plot No. 17 A and 17 B Kibugua market.

5. The learned trial magistrate erred in law and fact by failing to put into account all the exhibits on record (both the appellant and the respondent) and their general purport and their implacable (sic) to the suit and more particularly on the appellant's case.

6. The learned trial magistrate erred in law and fact by failing to make an order that the respondent do avail to the appellant or the court ie a copy of allotment letter of Plot No. 17 Kibugua market (1960) 2. The then Meru County Council Min. No. 4/76/ ((A) 33 of 1976, 3. Application by the plaintiff reading (sic) to minute No. Meru County Council Min. NO. 4/76 (A) (a) 33 of 1976 in which Jason Mwirichia was joined as a joint allottee of plot No. 17 Kibugua market. 4 Meru County Council Min. No. tpdm/11/2000 (q) (q) 1.5 application form for division and transfer of plot No. 17 Kibugua market by the plaintiff in the year 2000. 6. Licensees for the year 1999, 2000, 2002 and 2003. 7. Register for allotees in which plot No. 17 Kibugua market appears. 8. Proceedings on purported case at Kibugua market between M'Bita Ntiro and Jason Mwirichia (deceased) despite the appellant giving notice to produce the same thus rendering the whole suit to be a mistrial.

7. The learned trial magistrate erred in law and fact by misdirecting himself that the appellant did not prove fraud against the

respondent despite persuading, convincing and biding evidence of prove of fraud on the part of the respondent.

8. The evidence on record doesn't support the learned magistrate's findings and judgment (sic) if anything the evidence support (sic) the appellant (sic) case.

Reasons wherefore the appellant proposes to the honourable court that;

a) This appeal be allowed with cost to the appellant

b) The finding and judgment of the learned trial magistrate be set aside

c) The court do order retrial of the whole suit.

d) If prayer (c) above is allowed the court do order the respondents to produce all the documents mentioned in ground 6 above during retrial.

DATED AT CHUKA THIS 5TH DAY OF MAY, 2011

AMENDED THIS 7TH DAY OF DECEMBER, 2016

I.C. MUGO & CO. ADVOCATES

FOR THE APPELLANT

2. This appeal was canvassed by way of written submissions.

3. The appellant's submissions are reproduced herebelow:

APPELLANT'S FINAL SUBMISSIONS

1. My lord the appellant being dissatisfied with the findings and judgment of P. N. Ngare R.M dated 8th April, 2011 in Chuka Principal Magistrate's Court Civil Case No. 18 of 2003 appeals to this honourable court and set forth grounds of appeal. The grounds are set out in the memorandum of appeal at page one of the record of appeal. We shall be visiting each of the grounds of appeal later in these submissions.

2. As a matter of law and practice this being the first appellate court to deal with this appeal the court has a duty to go through the record and form its own opinion vis a vis that of trial magistrate in the judgment appealed against. We submit that if your lordship goes through the evidence on record the court is bound to make the following findings:

i) That on the balance of probability the appellant actually established and proved his case. Both witness of the appellant and those of the respondent clearly show that plot No. 17 A Kibugua market at one point in time was owned jointly between the late appellant M'Bita Ntiro and the late Jason Mwiricha the father of the 1st respondent. The origins of the plot in issue and how it was allotted is scanty from both parties. However the following actions and omissions clearly show that plot No. 17A Kibugua market was co-owned by the late appellant and one Jason Mwirichia. A good example to this is the contribution in construction materials and sharing the rest alternately up to 2003 when the 1st respondent stopped the appellant from taking rent when it was his turn.

ii) The appellant established and proved that plot No. 17 A Kibugua market was co-owned between the appellant and the late Jason Mwirichia by producing two very important receipts to wit the land rate payment receipt for 1982 and 1983. These were the only land rates receipts in the hands of the appellant. The rest disappeared from the hotel by design in that it is not possible that no land rates were paid to the council save for the year 1982 and 1983. The two receipts are marked as exhibits 2a and 2b. Unfortunately the trial magistrate held that these receipts were trade licenses when they were (sic) and they are not. By producing exhibit 2a and 2b it was then clear that plot No. 17 A Kibugua market was co-owned between the late M'Bita Ntiro the substituted appellant and Jason Mwirichia the father of the 1st respondent. These two receipts from the council were enough to prove that the plot was co-owned as above stated.

iii) As opposed to the trial magistrate's findings that the evidence of PW2 and PW3 (sons of the appellant) evidence was hear say (sic) we urge the court to make a finding that this was untrue. Exhibit 4a and 4b were books whose entries showed clearly that the late M'Bita Ntiro and the late Jason Mwirichia owned plot No. 17 A Kibugua market jointly. The books were produced by PW3 a son of the late appellant. Many entries were in his own handwriting. Other entries are in reference to Jeremy Murithi DW4 a tenant who denied that he had not paid any rent to the appellant. The entries show that he dealt with the appellant openly. PW4 assisted his aging father the appellant to collect money. The trial magistrate was therefore wrong to treat the evidence of PW3 and PW4 as hearsay. The court will also observe that the late Jason Mwirichia produced a map of the plot that was drawn in 1957 but allegedly approved by the relevant authorities in 1986. The court will make a finding that this map is stage managed and there wasn't any such a map.

iv) After the court keenly analyses the evidence on record it is also bound to make a finding that the 2nd respondent were

(sic) out to sabotage the whole hearing and interfere with the course of justice. This was a very simple case to prove but the acts and omission of the 2nd respondent interfered with the course of justice. The appellant made an application to have the county council of Meru South to produce the allotment register of Kibugua market and they knowingly and willingly refused to submit to the court the said register. The register would have clearly shown what had transpired to plot No. 17 A Kibugua market when it was not subdivided and who was the original allottee, when it was subdivided and who made the application and who was registered with plot No. 17 A Kibugua market after the subdivision. This court has powers even today to order even before judgment is delivered the 2nd respondent be ordered (sic) to deliver to the court the allottee register of Kibugua market that captures plot no. 17 and 17 A Kibugua market. If this register is produced it will show clearly that originally plot No. 17 Kibugua market was owned by the appellant who later caused it to be subdivided into plot no. 17 A AND 17 B Kibugua market, he retained plot N. 17 B Kibugua market and he was registered with plot no. 17 A Kibugua market together with Jason Mwirichia.

v) The court will also make a finding that justice was obstructed when the 2nd respondent and county council of central Imenti refused to avail to the court minute number 4/76/17 (A) (a) 33 which would have clearly showed that it is the appellant who applied for the subdivision of plot No. 17 into 17 A ad 17 B and not the late Jason Mwirichia. This would also have been clear indication that plot NO. 17 A Kibugua market was co-owned by he substituted appellant and the late Jason Mwirichia.

vi) In light of the foregoing and in the interest of justice and fairness the court may wish to order that the county government of Tharaka Nithi the successor of County Council of Meru South do bring to court the allottee register of Kibugua market capturing 1980 to 2003 and the county government of Meru do produce the register of minutes and in particular minute number 4/76/17 9A) (a) 33. If these documents are produced before court the court need not even go to look for other evidence to show that plot no. 17 A Kibugua market was co-jointly owned by the late M'Bita Ntiro and the late Jason Mwirichia.

vii) Your Lordship the court will also find that the evidence on record does not support the judgment delivered by the trial magistrate. The evidence on record we submit is overwhelmingly inclined towards the appellant's case. The trial magistrate on (sic) judgment was against the plaintiff without giving reasons why he believed the defence case. The judgment is bent on attacking the appellant's evidence and not the appellant's evidence against the respondents' evidence.

viii) The tautology of the evidence on record is that the appellant proved his case against the respondent's and he is supported by both the appellant's witnesses and the respondent's and he is supported by both the appellant's witnesses and the respondent's witnesses save for one witness DW4. We will urge the court to form its own opinion after going through the evidence on record as required in law and make a finding in favour of the appellant.

3. Your Lordship we shall now try to submit on each of the ground of appeal as posted in the memorandum of appeal dated 5th May, 2011 found at page one of the record of appeal.

i) The first ground of appeal was to the effect that, "the trial magistrate erred in law and fact by holding that he couldn't discern from the evidence on record who the owner of plot No. 17 Kibugua market was despite there being humble (sic) evidence to that end that the same belonged to the appellant". The substituted appellant who was 108 years old by the time he was testifying told the court how he was allocated plot No. 18 later renumbered as plot no. 17 Kibugua Market. He testified that letters of allotment as of that time were not being given but he was quick to point out that an officer by the name Njiru is the one who allocated and showed him the plot. PW2 Murianki Mwithiga was the mason who constructed the plot and he was clear that both the substituted appellant and the late Jason Mwirichia were constructing jointly. PW3 was John Njagi M'Bita the substituted appellant's son. He testified the much he knew about the plot and he produced exhibits 2a and 2b land rate receipts and two hard covers books that contained transactions between M'Bita Ntiro, Jason Mwirichia and tenants to the plot. He used to collect rent on behalf of his father the substituted appellant. The trial magistrate had humble (sic) evidence to show that plot No. 17 A Kibugua market was jointly owned by the substituted appellant and the late Jason Mwirichia. Why the trial magistrate found it otherwise is not explainable legally or logically. We invite the court to look at the appellant's and the respondent's witnesses. There is a running theme that plot No. 17 A Kibugua market at one point belonged to the substituted appellant and at one point in time mysteriously Jason Mwirichia was registered as the sole allottee without any explanation as to how the substituted appellant's name was removed from the register.

ii) The second ground of appeal was that, "the learned trial magistrate erred in law and fact by failing to hold that originally plot no. 17 Kibugua market belonged to the appellant and not the late Jason Mwirichia despite convincing evidence on record." We have pointed earlier that exhibit number 2 (a) and 2 (b) was produced by PW3 as land rate payment receipts. How it turned up to be occupational license receipt remains a mystery. PEXH 4 (a) and 4 (b) were two hand cover books that contained entries of transactions between the substituted appellant and the late Jason Mwirichia as far as renting plot No. 17 A Kibugua market and sharing rent of the said plot is concerned. The respondents in the proceedings of 1997 before the market committee which lacked jurisdiction) claimed plot No. 17 A Kibugua market from the appellant. The committee recommended to the council that the name of the appellant be removed from plot no. 17 A Kibugua market. This shows that the committee was biased against the appellant.

iii) The third ground of appeal was that, "the learned magistrate erred in law and fact when he misguided himself that he couldn't find any evidence to show that the appellant and Jason Mwirichia and in agreement built what later turned to be plot N. 17A Kibugua market when both the appellant and the respondent's evidence and exhibits were clear on this fact." First exhibit 2 (a) and 2 (b) were clear that originally plot no. 17 Kibugua market belonged to he substituted appellant. These exhibits were produced as land rate receipts by PW3. We were surprised that the trial magistrate referred to them as occupational license receipts. Secondly exhibit number 4 (a) and 4 (b) are hard cover books where many transactions relating to plot no. 17 A (hotel) between substituted appellant and the late Jason Mwirichia. They were recorded by many people who included PW3. This was humble (sic) evidence to show that the substituted appellant had a stake in plot No. 17

A Kibugua market. More to this PW2 a mason an old man who had no reasons to cheat told the court that he built the plot and the materials were being supplied by both the substituted appellant and the late Jason Mwirichia. The respondents have not shown anything in evidence to the effect that they constructed the plot. Those who offered evidence were not aware of this fact. DW1 particularly has given nothing but hear-say evidence as regards ownership of plot No. 17 and/or 17A Kibugua market.

iv) The fourth ground of appeal is that, "the learned magistrate erred in law and fact by failing to notice that the appellant's exhibit 4 A and 4 B (rent receipt from 2nd respondent council over plot No. 17 Kibugua Market) had been removed and replaced with trade and occupation receipt in bid to conceal vital evidence that had proved that plot No. 17 Kibugua Market was the property of the appellant before it was subdivided into plot No. 17 A and 17 B Kibugua Market)." PW2 produced two receipts which were marked PEXH 2 A and 2 B. PW2 was clear that the receipts were in reference to land rates. These were the only land rent (sic) from the council that were available. The rest of the land rate receipts which were in the hotel went missing. The two that were produced by PW2 were accidentally retained by the appellant. The land rate receipts are very crucial to the ownership of the plot. We were surprised to find that the two land rate receipts had been removed from the court file and substituted with occupational license receipts all in bid to defeat the course of justice. (See proceedings and judgment at page 66 paragraph (D). Also see PW1's evidence in proceedings and judgment at page 55 of R.O.A at paragraph b.

v) The fifth ground of appeal was to the effect that, "the learned magistrate erred in law and fact by failing to put into account all the exhibits on record (both the appellant's and the respondent's) and their general purport and their applicable (sic) to the suit and more particularly on the appellant's case." If the learned magistrate put into account PEXH 2 A and 2B, 4A and 4B and DEXH 12 (proceedings before market committee 1997) the trial court would have come out with a finding that plot NO. 17 A Kibugua market was jointly owned between the substituted appellant and the late Jason Mwirichia. In particular PEXH 2A and 2B and 4A and 4B formed very cogent evidence as to how the substituted appellant and the late Jason Mwirichia constructed, owned and operated the same as a hotel. While (sic) the trial magistrate dismissed these exhibits is unexplainable.

vi) The sixth ground of appeal was to the effect that, "the learned magistrate erred in law and fact by failing to make an order that the respondents do avail to the appellant or to the court 1. A copy of allotment letter of plot No. 17 (A) Kibugua market (1960) 2. The then Meru County Council minute No. 4/76/17/(A) (a) 33 of 1976. 3. Application by the plaintiff leading to minute No. Meru County Council min. no. 4/76/17 (A) (a) 33 of 1976 in which Jason Mwirichia was joined as a joint allottee of plot No. 17 A Kibugua market 4. Meru County Council min no. tpdm/11/2000 (q) (q) 1.5. Application form for division and transfer of plot No. 17 Kibugu market by the plaintiff in the year 2000, 6. Licenses for the year 1999, 2000, 2002 and 2003, 7. Register of allottees in which plot NO. 17 A Kibugua market appears and 8. Proceedings of purported case at Kibugua market between M'Bita Ntiro and Jason Mwirichia (deceased), despite the appellant giving notice to produce the same thus rendering the whole suit to be a mistrial." The substituted appellant sought the foregoing documents by his motion dated 1st August, 2005. The 2nd respondent knowingly, willingly and deliberately refused to avail the documents plus duplicates of council land rates receipts which have been paid since plot No. 17 was allotted. Had the 2nd respondent produced these documents the matter would have been determined without full trial (emphasis ours). For example minute number 4/76/17/(A) (a) 33 would have showed (sic) that it is the appellant who applied for plot no 17 A to be subdivided so that Jason Mwirichia was included as joint allottee. Another example is that if the 2nd respondent had produced the register of plot no. 17 A Kibugua market it would have been a foregone conclusion that the substituted appellant was the original allottee of plot no. 17 A Kibugua market and that the late Jason Mwirichia was joined as a joint allottee after the subdivision had been effected pursuant to minute no. 4/76/17 (A) (a) 33. We submit that intentionally the 2nd respondent refused to provide this evidence which made the trial to be a mistrial. It is for this reason that we propose to this court to call for these documents and look at them before delivering judgment in this appeal. By so doing justice will have been served.

vii) The seventh ground of appeal was to the effect that, *"**the learned magistrate erred in law and fact by misdirecting himself that the appellant did not prove fraud against the respondent despite persuading, convincing and biding (sic) evidence of prove of fraud on the part of the respondent."*** Your lordship we submit that the appellant proved fraud on the part of the 2nd respondent and one Jason Mwirichia. DW2, 3 and 4 do admit on cross examination that at one point in time plot no. 17 A Kibugua Market was at one point in time in the names of the appellant and Jason Mwirichia. They cannot however tell in what circumstances the name of the appellant was removed from the register of allottee. The proceedings of 1997 at Kibugua market were in reference to plot No. 17 Kibugua market as opposed to 17 A Kibugua market. The judgment was not delivered in presence of the appellant. The appellant did not know when the 2nd respondent removed his name from the register of allottee of Kibugua market and for what reasons. The committee that conducted the proceedings of 1997 had no powers donated to it by any known law of the land to determine ownership of a plot and recommend to the council to remove a person from the register of allotteess. May be if here (sic) was a market committee it was only to deal with law and order and not ownership of plots. Plots are allotted by the council. It's only the council that had power to allot the plot.

viii) The eight ground of appeal was to the effect that, "the evidence on record doesn't support the learned magistrate's findings and judgment if anything the evidence support (sic) the appellant's case." We still stand by our earlier submissions that the evidence on record cannot support the judgment delivered by the trial magistrate. The evidence is more in support of the appellant's case rather than the respondent's case. The judgment itself is void of merit. It does not pose the issues for determination and the analysis is purely a criticism of the appellant's case rather than an holistic approach to the total evidence on record. The judgment does not meet the threshold of a legal judgment.

4. In light of the ongoing your lordship and in particular or submission at paragraph 2 (i) to (viii) herein above we urge the court to make a finding and hold that the appellant had proved his case on the balance of probabilities as opposed to the judgment of the trial magistrate. We further urge the court to make such substituted orders against the court orders in the judgment. We in particular urge

the court to order that plot No. 17 A Kibugua market ought to be owned jointly between the substituted appellant and one Jason Mwirichia. The court should also order that costs in the lower court proceedings be paid by the respondent jointly and severally as opposed to the trial magistrate that the appellant was to pay and indeed paid costs in the lower court. The court should also order that the 1st respondent should pay Kshs.84,000 being the seven years from 2003 that the appellant would have received rent from plot no. 17 A Kibugua market.

5. In the event that the court is inclined not to make a finding that the appellant had proved his case on the balance of probability we urge the court to grant the orders proposed at the foot of the memorandum of appeal. First allow this appeal with cost, and judgment of the trial magistrate be set aside, order a retrial of the whole suit and the court do order the respondents to produce the documents mentioned in ground (6) in the memorandum of appeal if the court is of the view that the suit should go for retrial.

6. We rest our submissions and pray.

DATED AT CHUKA THIS 20TH DAY OF FEBRUARY, 2018

I.C. MUGO & CO. ADVOCATES

FOR THE APPELLANT

4. The 1st Respondent's submissions are reproduced herebelow:

1ST RESPONDENTS WRITTEN SUBMISSIONS

May it please your Lordship.

On behalf of the 1st respondent, we elect to humbly submit as follows:

My lord, we will endeavor to meticulously respond to each and every ground of appeal set forth by the appellant but before we do so, we would like to very humbly submit that, at the lower court, parties were granted the opportunity to produce evidence and call their respective witnesses and the judgment therein was determined ably and with a lot of sobriety. As a matter of law and principle, this honouble court has the wide discretion to review pleadings and evidence adduced, however, that discretion is meant to check whether the decision from lower court was not only judicious but the rule of law was observed pragmatically. We therefore beg to respond to each and every ground of appeal as follows:

ON GROUNDS 1, 2, AND 3:

Your lordship, the grounds being related and interconnected, we will respond to them together. It is indeed clear that the three grounds bring out the issue of ownership for discussion. However, at the lower court during trial, the appellant failed miserably to prove that he was the owner of plot no. 17 and neither did he prove that he was a joint owner of plot number 17 A. The appellant in his evidence in chief referred to MFI 1 which was an approved plan which was also adduced by the1st respondent. This sole document, a physical development plan was in the name of Jason Mwirichia, and was approved on 20th January, 1986. The rule of evidence is clear that "He who alleges must prove" and this maxim was in favour of the 1st respondent herein. The maxim has been grounded in law under Section 107 of the Law of Evidence. The same was enunciated by Justice Majanja in Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015]eKLR when he said that: "…As a general proposition 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 (1) of the Evidence Act (Chapter 80 of the Law of Kenya), which provides:

> ***"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 must prove that those facts exist…"***

No documentary evidence was produced to show that the appellant owned plot No. 17 A which lies in contention in this very present discourse. To say the very least, the appellant is proving to be greedy in that his ownership to plot no. 17B is undisputed yet he wants to lay claim of co-ownership of Plot No. 17 A, nothing could be further from the truth.

ON GROUNDS 4,5, AND 6:

Your Lordship, it is quite interesting how the fourth ground has been phrased to indicate that exhibits 4(a) and 4(b) were removed and replaced by design. This is a very serious allegation and the appellant should be put to task to prove the same as mere allegations cannot be used to change the course of justice in a bid to manipulate outcomes without justification. Your Lordship, we beg to rely on the case of Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR where Justice Majanja espoused thus: "…The burden of proof to prove fraud lay on the respondent. As regards the standard of proof, I would do no better than quote Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others NAI Civil Appeal No. 215 of 1996 (UR) where the court of Appeal, in considering the standard of proof required where fraud is alleged, stated that; The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.

Likewise in Rosemary Wanjiku Murithi v George Maina Ndinwa NYR Civil Appeal No. 9 of 2014 [2014] eKLR, the Court of

Appeal held that;

Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud…" It is therefore our humble submission that the Appellant did not oust that burden in its entirety.

It is our very humble submission that, during adducing of evidence, they ought to have discovered that the exhibits they had with them did not tally with the ones in court and the ones that had been served to the other parties. This is just a classic case of dancing musical chairs. The learned magistrate was correct to hold that exhibits 4 a and b did not oust the burden to prove any proprietary interests held by the appellant in plot no. 17 as they were mere trading licenses receipts. The other exhibits marked 1 (a) to (e) clearly showed that the Appellant owned plot no. 17 B and not 17 A as alleged by the appellant herein and which is the bone of contention in the suit.

ON GROUNDS 7 AND 8:

Your lordship, on the issue of fraud, the burden was not ousted by the Appellant as he did not prove any fraudulent transactions between the respondents as he had alleged by adducing evidence to show the same before the honourable court. The learned magistrate did not have alternative but to determine the matter as he did based on the documentary and oral evidence that was brought before him.

In conclusion your Lordship, it is clear that this instant appeal is not merited and all the grounds framed by the Appellant are on stilts which have no other cause but to come down crumbling like the walls of Jericho. In that regard, we urge your Lordship to dismiss this appeal with costs as it is without merit.

That is all!

DATED AT MERU THIS 20TH DAY OF APRIL, 2018

FOR: KIAUTHA ARITHI & CO.

ADVOCATES FOR THE 1ST RESPONDENT

5. The 2nd Respondent's submissions are reproduced herebelow:

2ND RESPONDENT'S SUBMISSIONS

My Lord, these are the humble submissions by the 2nd respondent in opposition to the Appellants appeal herein.

My lord, to begin with it is the 2nd appellants submissions that this matter was heard by the trial court to full conclusion when all the parties were ably represented by their advocates. Indeed the parties were granted an opportunity to call their witnesses and present available evidence before the trial court made a determination on merit. We shall therefore delve to respond to each ground as framed by the appellant as follows:-

GROUND 1,2 AND 3 are similar or interwined and we wish to submit on the same together.

My Lord, one cannot fail to appreciate the difficult position the trial court found itself in this matter. There was no proper documentary evidence owing to effluxion of time. The appellant alleged to have owned plot No. 18 later renamed 17. He again testified that he on his own volition included Jason Mwirichia to be a co-owner. The appellant is mean and economical by not disclosing why he would include a stranger to his property. My lord the appellant conceded in cross-examination that indeed they developed with Jason Mwirichia plot No. 17 Kibugua market which was subsequently divided into plot 17 A for Jason Mwirichia and plot 17 B for the Appellant.

GROUNDS 4, 5, AND 6

My Lord, once again these grounds are intertwined. It is the 2nd respondent's submissions that the Meru County Council which was the original owner before allotment had not handed over proper documentation of the subject matter herein to the County Council of Meru South. It was therefore difficult in absence of proper documentation for the 2nd appellant to assist the court. It was however obvious that the market committee under the County Council had deliberated over this matter between the parties and confirmed that Plot 17 A belonged to Jason Mwirichia and 17 B belonged to the Appellant. They are in occupation and use of their respective plots which they continue to utilize todate.

My Lord, the learned trial court therefore came up with a very informed possible judgment and decree in the circumstances which should not be faulted.

GROUND 7 AD 8

My Lord, we submit that contrary to the appellant's grounds of appeal the judgment of the learned trial court was sound in light of

evidence and materials presented before the court. The appellant did not prove any fraudulent dealings at all involving the 2nd respondent. In any case the 2nd respondent had nothing to benefit from the ownership of the plots to either party so long as the necessary rates and rents are remitted by the proprietors.

We urge your Lordship to consider the matter and disallow the appeal as without merit in the circumstances with costs.

DATED AT MERU THIS 3RD DAY OF APRIL, 2017

GIKUNDA ANAMPIU & CO.

ADVOCATES FOR THE 2ND RESPONDENT

6. The appellant replied to the written submissions proffered by the 1st and 2nd respondents in the following manner:

APPELLANT'S REPLY TO THE 1ST AND 2ND RESPONDENTS' WRITTEN SUBMISSIONS DATED 28TH APRIL, 2018 AND 3RD APRIL, 2017 (SIC) RESPECTIVELY.

1. Your Lordship after going through the respondents written submissions the appellant wishes to bring to the attention of the court some pertinent issues that the respondents' submissions have deliberately avoided to comment on.

i) On ownership of plot No. 17 A Kibugua market. Admittedly the initial documentation relating to the allotment of plot no. 17A Kibugua market is scanty. Your Lordship we are talking of 1950s and 1960s during the colonial error when the plot was allotted. Interestingly enough your lordship the 1st respondent produced a map regarding plot no. 17 A Kibugua market which was approved by the relevant authority in 1996. This was only a ploy to show that the plot no. 17 A as a whole belonged to the 1st respondent. We urge the court to make a finding that this is a stage managed map.

ii) That the respondents' submissions' have completely kept mute over the books of record produced in court showing first how the father of the 1st respondent and the appellant contributed towards the construction of plot No. 17 A Kibugua market. Also the record books show how they utilized the plot after it was built. It is clear that they were dealing with a hotel and the appellant and the father of the 1st respondent used to carry out business alternatively. It also came to a time when each party could rent out his term. When the father of the 1st respondent took turn and rented the hotel to Murithi Jeremy DW4 he crucified and killed the arrangement and formula that the appellant and the father of the 1st respondent were using there before. The appellant was never allowed into the premises any more and this was done by the 1st appellant after his father died.

iii) In 1997 there was a case before the market committee. Looking at the statements by the father of the 1st respondent he was claiming plot No. 17 as a whole from the appellant. This was a clear indication that the father of the 1st respondent acknowledged that the appellant was the allottee of plot no. 17 as a whole as it was. The manner in which the committee session went on and how it was implemented by the council is clear fraud and dishonesty. The committee ordered the council to give the father of the 1st respondent plot no. 17 A Kibugua market when he was claiming plot no. 17 as a whole. This is a clear admission on the part of the 1st respondent's father that right from the first the plot was allotted and allocated to the appellant and there must have been some arrangements between the appellant and the father of the 1st respondent which made the father of the 1st respondent to be on board. As joint owners of plot no. 17 A and not 17 as a whole.

2.

i. On burden of proof the respondents have tried to demonstrate to this court that the appellant has not proved his case on a balance of probability. This is not correct. Our submissions in number 1 above are clear that the issue of ownership of plot could have been sorted out using the evidence on record. The trial magistrate however ignored all the circumstantial evidence (despite admitting that the evidence was scanty as regards the allotment and allocation of plot no. 17 as a whole). If the trial magistrate was diligent enough we submit he could have known the allottee of plot no. 17 through the subsequent actions by the appellant and the father of the 1st respondent. If the appellant had no business with plot no. 17 A Kibugua market why did he have to participate in the building as the books produced show how they contributed materials. Further if the appellant had no business with plot no. 17 A Kibugua market what explanation would be given as to how he used to conduct hotel business alternatively with the father of the 1st respondent. There must have been some arrangement between the appellant and the 1st respondent's father more particularly noting that they are related.

ii. Your Lordship by a notice to produce documents dated 15th October, 2003 the appellant sought the 2nd respondent to produce very important and crucial documents that were in the custody of the 2nd respondent and their predecessor the grand county council of Meru. This issue of production of documents by the 2nd respondent went on for a very long time so that the appellant was forced to abandon the notice when it became almost impossible to force the 2nd respondent to produce the documents. Your Lordship had the 2nd respondent produced the documents prayed for these documents would have determined the central question in the suit as to who the allottee of plot no. 17 as it was then and 17 A after it was subdivided. It would have also shown when plot no 17 was subdivided and at whose instance. We submit that the 2nd respondent deliberately and knowingly failed to produce the documents to defeat the course of justice. It is for this reason that we submitted that this suit was a mistrial. A party with pertinent and crucial documents refused to avail them to the

court making the court to arrive at a wrong verdict. As submitted had these documents been produced which include min no. 4/76 (A) (a) 33 of 1976 and register of allotment of Kibugua market facts and evidence regarding the chief question in the suit would have been in black and white and the court would not have found it difficult to make a finding that plot no 17 was allotted to the appellant and through the sited (sic) minute the appellant joined the father of the 1st respondent in plot no 17 A Kibugua market.

iii. Your Lordship the trial magistrate was not eager to serve justice. For a very long time the appellant kept on reminding the court that it is crucial that the 2nd respondent do produce minute no 4/76 (A) (a) 33 of 1976 and register of allotment of Kibugua market and duplicates of land rate payments. It seemed that the 2nd respondent was compromised by the 1st respondent. If the 2nd respondent wanted the truth to be brought before the court they should have been the 1st institution to produce the documents in their hands. We know for sure that receipts for payment of land rates prove the owner of a plot. The appellant produced two land rate receipts for 1982 and 1983 but for one reason or another at the end of the day they were exchanged with occupation licenses. The 2nd respondent cannot say that they have not been collecting rent for plot no 17 A Kibugua market. If they have been collecting then they have been issuing receipts. One is bound to say that they have been compromised by the 1st respondent and this is why they refused to produce duplicates of land rate receipts and the allotment register. This your lordship we submit constituted mistrial and probably this is why the respondents have not commented on our ground that the whole suit was a mistrial. The 2nd respondent refused to avail the documents so that the appellant's case could collapse. However with what was on record the court could have made a finding that plot no 17 was allotted to the appellant and using minute no 4/76 (A) (a) 33 of 1976 the appellant joined the father of the 1st respondent as joint proprietors of plot no 17 A Kibugua market.

3. Your Lordship we urge this court to allow the appeal and order a retrial with a rider that the 2nd respondent do produce all the documents they have in their custody relating to plot no 17 Kibugua market which was later subdivided into 17 A Kibugua market and 17 B. By so doing your Lordship this court will have served justice.

4. We rest our submissions and pray.

DATED AT CHUKAT HIS 26TH DAY OF APRIL, 2018

I.C.MUGO & CO ADVOCATES

FOR APPELLANTS

7. I have perused the lower court's proceedings. I have also considered the pleadings proffered by the parties to buttress their veritably incongruent assertions.

8. The 1st respondent proffered one authority. It is the case of Evans Otieno Nyakwana (Appellant) AND Cleophas Bwana Ongaro (Respondent) - Homa Bay High Court Civil Appeal No. 7 of 2014 [2015] eKLR. It is a good authority of the principle that he who makes a claim has a duty to prove it.

9. The appellant did not proffer any authority.

10. I dismiss ground 1 of the appeal and find that there was no convincing evidence in the lower court's record for the learned magistrate to find that plot No. 17 Kibugua Market belonged to the appellant.

11. On the same basis as in paragraph 10 above, ground 2 is dismissed.

12. On the same basis as paragraph 10 above, ground 3 is dismissed.

13. Ground 4 constitutes a veritably unsubstantiated claim that some exhibits had been removed and been replaced with others. It is dismissed.

14. Ground 5 is couched in such general terms that it does not evince useful probative evidence. It is therefore dismissed.

15. Ground 6 claims that the learned magistrate failed to make an order to ferret out evidence for the appellant. Our system of resolving civil disputes is the common law adversarial system. In contradistinction to the civil law system which abounds in many Continental Europe Jurisdictions, Judicial Officers in our system do not actively participate in ferreting out evidence. Studious bystanders would frown upon judicial officers who will shun their impartiality and go out to assist litigants to find evidence to support claims they make before courts. A scenario where a judicial officer would do this would be a veritably phasmagoric one.

16. For the reason given above, ground 6 is dismissed.

17. Except for mere allegations, a careful consideration of the lower court's proceedings evinces no credible evidence that the appellant had proved his case against the respondents. Ground 7 is, therefore dismissed.

18. Similarly, ground 8 is dismissed for the same reason that has led this court to dismiss ground 7.

19. As the first appellate court I was entitled to peruse the pleadings and the evidence tendered by the parties in the lower court. I have made the necessary analysis. I do find that this court has no basis for interfering with the findings and the judgment made by the lower court.

20. In his submissions, the appellant says that the 2nd respondent refused to provide documents which would assist him in proving his case. Obviously, in civil cases, the onus is on the plaintiff or any other claimant to prove the position he or she postulates on a balance of probabilities. This position is anchored in law. I reproduce herebelow sections 107,108 and 109 of the Evidence Act which provide erudite guidance in this area. They state as follows

Section 107: **Burden of proof**

> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove 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.

Section 108: **Incidence of burden**

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109: **Proof of particular fact**

The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.

21. In this appeal, I find no situation that has shifted the burden of proof to any of the respondents. For example, the appellant cannot sue the 2nd respondent and then expect him to provide him with evidence which would enable the appellant to prove his case against it. The appellant has made, without proffering an iota of evidence, allegations such as that the markets committee of the defunct local authority which was replaced by the 2nd respondent, did not have jurisdiction to handle the ownership dispute between the parties. The appellant, also, did not proffer any probative evidence that the 1st respondent had compromised the 2nd respondent, as he claimed.

22. A perusal of the impugned judgment makes it pellucid that the learned trial magistrate had made it certain that the primary issue he was determining was who owned plot 17 A, Kibugua market.

23. It is clear from the grounds of appeal and from the submissions filed by the appellant that he admits that he had no overwhelming case against the respondents. This explains why he sought the assistance of the lower court and of the 2nd respondent in getting the evidence necessary for him to prove his case.

24. In the circumstances, I am not persuaded, on a balance of probabilities, that:

a) The finding and judgment of the Learned Trial Magistrate should be set aside.

b) I should order retrial of the whole suit.

25. This suit is, therefore, dismissed.

26. Costs will follow the event and are awarded to the respondents.

27. It is so ordered

Delivered in open court at Chuka this 4th day of July, 2018 in the presence of:

CA: Ndegwa

Mbae Mwirichia – Respondent

Other Parties - absent

P. M. NJOROGE,

JUDGE.