REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC APPEAL CASE NO. 1 OF 2020

PATRICK MULEYI.....APPELLANT

VERSUS

SELINA NAMBUYE NABALOKHA .....1ST RESPONDENT

ROSEMARY NABANGALA (Suing as the Legal representatives of the Estate of

RICHARD NABALOKHA MULEYI) ..... 2ND RESPONDENT

(Being an appeal arising from the Judgment of HON. L. N. KINIALE – PRINCIPAL MAGISTRATE delivered on 14th January 2020 in SIRISIA PRINCIPAL MAGISTRATE'S COURT, SIRISIA Civil Case No. 32 of 2018)

J U D G M E N T

SELINA NABUYE NABALOKHA and **ROSEMARY NABANGALA** (the 1st and 2nd Respondents herein) suing as the legal representative of the Estate of **RICHARD NABALOKHA MULEYI** (the deceased herein) moved to the Subordinate Court as plaintiffs and sought Judgment against the defendant **PATRICK MULEYI** (the Appellant herein) in the following terms: -

(a) A declaration that the deceased is the rightful owner of the land parcel known as plot NO 92 CHEPTAIS MARKET.

(b) A permanent injunction to restrain the Appellant acting either by himself and/or through his servants, agents and/or family members from entering, taking possession of, developing and/or in any other manner whatsoever dealing with that piece of land known as plot NO 92 CHEPTAIS MARKET.

(c) Costs of the suit.

(d) Interest on (c) at Court rates.

(e) Any other or further relief.

The basis of the Respondent's claim was that they are the widows of the deceased and have been granted a **Limited Grant ad Litem** for purposes of filing this suit and that the deceased was the absolute owner of the parcel of land known as plot **NO 92 CHEPTAIS MARKET** (herein the suit plot). That the Appellant without any colour of right, legal excuse and/or justifiable cause whatsoever had taken possession of the suit plot and was in the process of destroying the building thereon.

By a defence dated 6th November 2018, the Appellant denied that the deceased, who was his brother, was the registered proprietor of the suit plot. He added that he is the duly registered proprietor of the suit plot which he developed in the late 1970's and therefore any alleged trespass thereon was a farce and meant to paint him in bad light. He urged the Court to dismiss the Respondents' case with costs.

The dispute came for hearing before **HON. L. N. KINIALE (PRINCIPAL MAGISTRATE)** on 11th April 2019. Having heard the parties and their witnesses, the trial Magistrate made the following disposal orders vide a Judgment delivered on 14th January 2020: -

"The plaintiff's claim therefore partially succeeds as the Court declares that both the defendant and the deceased jointly owned plot NO 92 CHEPTAIS MARKET and the defendant had no colour of right to evict the deceased's widows from the said parcel of land or their premises. Both parties are to occupy their specific portion of land and advised to sub – divide the plot so that each party is responsible for payment of rate of their respective plot.

In respect to costs, the plaintiffs' suit is has partially succeeded in which case the costs shall follow the event. The plaintiffs' will get half their costs.

In view of the totality of the evidence adduced and evaluated above, the Court enters Judgment in favour of the plaintiffs as above in terms of prayers a, b partially and c.

The defendant to pay the plaintiff half the costs of the suit."

Aggrieved by that Judgment, the Appellant promptly sought to have it vacated and filed an appeal on 30th January 2020 in which he raised the following nine (9) grounds: -

1. The learned trial Magistrate erred in law and fact when she failed and/or ignored to frame the issues for determination and the reasons for her findings.

2. The learned trial Magistrate erred in law and fact when she deliberately misdirected herself on the evidence, facts and material produced in Court thereby introduced or referred to stranger documents and facts that were neither pleaded or adduced in Court.

3. The learned trial Magistrate erred in law and fact when she constructed her own case, argued it and entered Judgment that was not sought by any of the parties to the suit.

4. The entire Judgment is contradictory, inconsistent and plainly wrong analysis of the evidence that was adduced.

5. The learned trial Magistrate simply rushed to a conclusion that the plaintiffs' evidence was verifiable and truthful without disclosing the evidence.

6. The learned trial Magistrate was obviously biased towards the defence and even when analyzing the defence case, she used demeaning words which definitely showed impartiality and unfairness.

7. The learned trial Magistrate erred in law and fact when she held that the plaintiffs produced rates clearance receipts and demand for rates when no such documents were produced by the plaintiffs and even no demands from the Council were produced.

8. The learned trial Magistrate erred in law and fact when she falsely concluded that the evidence in Court showed joint ownership yet all parties claimed to have bought from different parties and never said they jointly owned the suit plot NO 92 CHEPTAIS.

9. The learned trial Magistrate misunderstood the arguments in Court and forcefully argued a case for the plaintiffs that had not been disclosed in their evidence and by so doing, she ignored overwhelming evidence by the defence showing the history of the plot and it's ownership todate and wrongly held that the defence documents had no plot yet it was the contrary.

The appeal has been canvassed by way of written submissions. These have been filed by **MR SICHANGI** instructed by the firm of **J. W. SICHANGI & COMPANY ADVOCATES** for the Appellant and by **MR WERE** instructed by the firm of **WERE & COMPANY ADVOCATES** for the Respondent.

I have considered the grounds of appeal, the record and submissions by Counsel.

This being a first appeal, my duty is to re – evaluate all the evidence that was adduced in the trial Court and make my own conclusions. In the case of **OLUOCH ERIC GOGO .V. UNIVERSAL CORPORATION LIMITED 2015 eKLR**, that duty was re – stated as follows: -

"As a first appellate Court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of SELLE & ANOTHER .V. ASSOCIATED MOTR BOAT CO LTD & ANOTHER 1968 E.A 123, my duty is to evaluate and re – examine the evidence adduced in the trial Court in order to reach a finding, taking into account the fact that this Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect ….."

In the case of **SELLE & ANOTHER .V. ASSOCIATED MOTOR BOAT COMPANY LTD 1968 E.A 123**, the then Court of Appeal for East Africa held as follows with respect to a first appeal: -

"An appeal to this Court from a trial by the High Court is by way of a re – trial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must re – consider the evidence, evaluate it itself and draw it's own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (ABDUL HAMMED SAIF .V. ALI MUHAMED SHOLAN 1955 EACA 270."

In **PETERS .V. SUNDAY POST LIMITED 1958 E.A 424,** Sir **KENNETH O'CONNOR** stated thus: -

> ***"It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate Court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate Court might itself have come to a different conclusion."***

Section 78(1) of the **Civil Procedure Act** provides that the powers of an Appellate Court are: -

> ***(a) "to determine a case finally;***
>
> ***(b) to remend a case;***
>
> ***(c) to frame issues and refer them for trial;***
>
> ***(d) to take additional evidence or to require the evidence to be taken;***
>
> ***(e) to order a new trial."***
>
> **Sub – Section (2)** goes on to state that: -
>
> ***(2) "Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein."***

This Court shall therefore be guided by the above precedents and legal provisions, among others, in determining this appeal.

Before I delve into the appeal itself, I must address two issues which were neither raised in the trial nor in the Memorandum of Appeal but which the Appellant has canvassed through his submissions. These issues are the Respondents' locus standi to file the suit and also that the suit was infact statute barred. This is how the Appellant's Counsel has submitted on those issues: -

> ***"LOCUS STANDI***
>
> ***My Lords, the plaintiff's case ought to have collapsed with the confession of PW 3 WYCLIFFE BARASA WASILWA that he never transferred title to the deceased todate. The deceased died before obtaining title to the alleged plot. So the plaintiffs have no title or locus even to agitate the suit. We fault the honourable trial Court's findings where she argued there was joint ownership."***

And on limitation, Counsel submitted thus: -

> ***"LIMITATION OF ACTIONS***
>
> ***Your Lordship***
>
> ***The facts as pleaded and from evidence adduced by parties the suit was outrightly barred under the Limitation of Actions Act. The deceased RICHARD MULEYI in respect of whose Estate the suit was brought is said to have bought the plot from WYCLIFF BARASA WASILWA in 1978. Neither him or his family sued the defendant till his demise in the year 2000. From the year 1978 to the year 2000, it is over 20 years. The deceased upon his death on 15th April 2000 the Administratixes of the Estate took out letters on 26th October 2018 and filed the suit on 30th October 2018. From the time of his death, the suit was filed after 18 years. From the time he is alleged to have bought the plot in 1978 it is over 30 years. The whole action is now statute barred. The twelve years' period lapsed. There was no competent suit before the Honourable trial Court."***

In response to those submissions, Counsel for the Respondent's response was that those two issues were not raised at the trial nor on appeal and are simply meant to ambush the Respondents. Counsel added that in any event, the Respondents are the legal representatives of the deceased and further, that the cause of action arose in 2018 and not 30 years ago.

In **ALWI A. SAGGAF .V. ABED A. ALGEREDI 1961 E.A 767**, it was held that a new point which had not been pleaded or canvassed should not be allowed to be taken on appeal unless the facts, if fully investigated, would have supported it. In **VISRAM & KARSAN .V. BHATT 1965 EA 789** the former Court of Appeal held that where an issue which has not been pleaded or canvassed is raised for the first time on appeal, it should not be allowed to be argued unless the evidence establishes beyond doubt that the facts, if fully investigated, would have supported the plea of the party seeking to raise the new issue. The Courts have now taken the position that the appellate Court has a discretion in permitting a new point to be raised on appeal. However, such discretion must be exercised sparingly and the new point must not raise issues of fact and only if full justice can be done to the parties – see **SECURICOR KENYA LTD .V. E.A DRAPPERS LTD & ANOTHER 1987 KLR 338** and also **ATTORNEY GENERAL .V. REVOLVING TOWER RESTAURANT 1988 KLR 462**. In **KENYA COMMERCIAL BANK LTD .V. OSEBE 1982 LR 296** and also in **NYANGAU .V. NYAKWARA 1986 KLR 712**, the Court of Appeal held that it would allow a point to be raised for the first time on appeal where it was an issue going to jurisdiction.

In the circumstances of this case, I am not persuaded that the facts, if fully investigated, would have supported the new issues which the Appellant now wishes to raise. Neither am I satisfied that full justice can be done to the parties by bringing up those issues at this stage. And even if this Court allowed that those issues be raised, they cannot be sustained for the following reasons. Firstly, on the issue of locus standi, the Respondents filed as part of their documentary evidence a Limited Grant Ad Litem issued to them on 26th October 2018 in **BUNGOMA CHIEF MAGISTRATE'S SUCCESSION CAUSE No 399 of 2018** allowing them to file this suit. Their locus standi in this matter is therefore unquestionable. On the issue of limitation, it is clear from paragraph 7 of the plaint that the Respondents' claim against the Appellant was premised on trespass to the suit plot. It reads: -

> ***7 "The defendant without any colour of right, legal excuse and/or justifiable cause whatsoever forcefully taken possession of the plot and is in the process of destroying the buildings built thereon by the deceased and reconstructing his own."***

And although the Respondents have not stated when those activities were carried out, it is not in doubt that they amount to a claim based on trespass to land. Indeed, the Appellant appreciated as much because in paragraph 6 of his defence, he pleaded that: -

> ***6 "The defendant and by way of defence states that he developed the suit plot in late 1970's hence alleged trespass or encroachment is a farce and meant to paint him in bad light."***

Where a person unlawfully invades another person's land and constructs buildings thereon, that is a permanent invasion of the other person's rights which is a continuing trespass and cannot be barred by the statute of Limitation so long as the trespass continues. A continuing trespass is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as: -

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

And in **CLERKS & LINDSEL ON TORTS 16TH EDITION** paragraph 23 – 01, it is stated that: -

> ***"Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as the trespass continues."***

In the case of **ISAACK BEN MULWA .V. JONATHAN MUTUNGA MWEKE C.A CIVIL APPEAL No 6 of 2015 [2016 eKLR]** the Court described such a trespass in the following terms: -

> ***"Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim bases on an action for trespass committed in 2015 would be res – judicata simply because the same parties or their parents litigated over the matter in 1985. It is well settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts."***

It is therefore of no consequence that the deceased bought the suit plot in 1978 and this suit has been filed 30 years late as submitted by the Appellant's Counsel. Indeed, it is clear that even the doctrine of res – judicata will not aid a trespasser.

Having dispensed with those preliminary issues, I shall now turn to the merits or otherwise of the appeal.

In grounds 1, 2, and 3 of the Memorandum of Appeal, the Appellant has taken issue with the trial Magistrate for failing to frame issues for determination, misdirecting herself by introducing and referring to strange documents and constructing her own case, arguing it and entering a Judgment that was not sought by any of the parties.

There is no doubt that the framing of issues to be determined by the Court is an important step in the trial process. It guides the parties in the prosecution of their cases and aids the Court in understanding what is at stake and the eventual determination of the dispute. Ideally, issues should be framed at the commencement of the hearing of the suit. Indeed, under the pre – trial directions provided for in **Order 11** of the **Civil Procedure Rules**, among the issues to be considered under case management is for the parties and Court to identity the issues for determination. That is why there is a provision for the parties to prepare a check list as it sets out the parameters of the matters in controversy thereby saving judicial time. However, it cannot be correct, as suggested by the Appellant, that the framing of issues is the sole prerogative of the Court. The parties in a case also have a role to play. After all, it is their dispute and they understand it better. That does not however stop the Court from framing issues after hearing the evidence as adduced. That notwithstanding, the failure to frame issues is not fatal. In **NORMAN .V. OVERSEAS MOTOR TRANSPORT (TANGANYIKA) LIMITED 1959 E.A 131**, the then East African Court of Appeal addressed itself as follows: -

> ***"If, though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the Court, and the Court decides the point as if there was an issue framed on it, the decision will not be set aside on appeal on the ground merely that no issue was framed."***

The Court went on to add that: -

> ***"Nevertheless, the failure to frame the issues is an irregularity the question would appear to be whether, notwithstanding the failure to frame the issues, the parties at the trial knew what the real question between them was, that the evidence on the question had been taken and the Court duly considered it."***

And in **S. N. SHAH .V. C. M PATEL & OTHERS 1961 E.A 397**, the same Court held that: -

"Whereas there would have been considerable advantage in framing the issues before the evidence was called, issues had been joined upon the pleadings and it was not, therefore, obligatory upon the learned Judge to frame issues. The fact that he did not do so would be no justification for upsetting his decision."

Therefore, parties and their counsel also have a role to play in the identification of the issues for determination. It is not therefore fair to assail the trial Magistrate for failure to frame the issues for determination. In any event, from my reading of the impugned Judgment, it is clear to me that the trial Magistrate apprehended the issues that were before her for determination.

The trial Magistrate has also been assailed for referring ***"to strange documents"*** that were not pleaded or adduced in Court and ***"constructing her own case,"*** arguing it and entering a Judgment that was not sought by the parties. The ***"strange documents"*** that the trial Magistrate referred to have not been identified. In her Judgment, the trial Magistrate referred to the documents produced by the parties and which were clearly marked. She was not a party to the litigation and it is therefore not conceivable that she could have conjured up documentary evidence in aid of either of the parties herein.

The complaint that the trial Magistrate constructed her own case and entered a Judgment that was not sought by the parties is also without basis. At the beginning of her Judgment, the trial Magistrate summarized the remedies which the Respondents sought and at the end thereof, she granted what she thought were the appropriate orders some of them partially. If she erred in law and in fact in granting the remedies which she did, then that is the prerogative of this Court exercising it's appellate jurisdiction under **Section 13(1)** of the **Environment and Land Court Act**, to consider. I see no merits in grounds 1, 2 and 3 of the Memorandum of appeal. The same are hereby dismissed.

In ground No 6 of the Memorandum of Appeal, the trial Magistrate is alleged to have been ***"biased towards the defence"*** and having employed ***"demeaning words"*** which demonstrated ***"impartiality and unfairness."*** The term bias is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as: -

"A mental inclination or tendency; prejudice; predilection ….."

Judicial bias is defined in the same dictionary as: -

"A Judge's bias towards one or more of the parties to a case over which the Judge presides."

The term demeaning is defined in the same dictionary as: -

"Exhibiting less respect for a person or a group of people than they deserve, or causing them to feel embarrassed, ashamed or scorned."

By employing the words "impartiality and unfairness," I presume Counsel for the Appellant meant that the trial Magistrate displayed partiality towards the Respondents. I have gone through the entire proceedings in the trial Court and I am afraid I have not seen the use of any demeaning words by the trial Magistrate against the Appellant. Indeed, Counsel for the Appellant has not pointed out any such words that may be described as demeaning nor any conduct by the trial Magistrate that demonstrates that she was biased against the Appellant. It is not enough to merely make bare allegations of bias or partiality against a Judicial Officer. There must be reasonable grounds upon which an inference of bias or partiality can be drawn. No such grounds have been shown in this appeal. Ground No 6 must also be dismissed.

Ground No 7 assails the trial Magistrate for holding that the Respondents produced rates clearance receipts and demand for rates when no such documents were produced by them. There is merit in that ground of appeal. I have perused the evidence by the Respondent and the impugned Judgment. When the 2nd Respondent **ROSEMARY NABANGALA NABALOKHA (PW 1)** testified on 11th April 2019, she only produced the following documents: -

1. **The Limited Grant Ad Litem – PEX – 1.**
2. **Sale agreement PEX – 2.**
3. **Letters from the Council – PEX – 3.4 and 5.**
4. **Letter from County Clerk dated 21st November 2012 – PEX – 5.**

This is clear from her oral testimony at page 104 of the record of appeal. The 1st Respondent **SELINA NAMBUYE NABALOKHA (PW 2)** whose evidence appears at page 106 of the record of appeal did not produce any documents. Infact when she was cross – examined by **MR WERE** on the issue of receipts for rates, she said: -

"WYCLIFFE used to pay rates and not also used to pay rates. WYCLIFFE has rate receipts. I don't have any receipts. It is WASILWA who paid rates. That is our plot."

However, at page 122 of her Judgment, the trial Magistrate said the following on the issue of receipts: -

"The plaintiff produced an agreement of sale between the deceased and WYCLIFFE MASAKE as PEX 2 and rates receipts from

the County Government as PEX 7a, b, c, d the suit land which indicates PW 2 also was in possession of the said parcel of land."

That was clearly an error of fact because the Respondents never produced any such receipts. Indeed, their documentary evidence only went upto No 5. That ground is therefore well taken but as will become clear later in this Judgment, that error was not of any significant consequences.

Grounds No 4, 5, 8 and 9 of the Memorandum of Appeal shall be determined together. They assail the trial Magistrate of being plainly wrong in her analysis of the evidence and thereby arriving at a contradictory Judgment, rushing to the conclusion that the Respondents' evidence was verifiable and truthful and showed that the parties jointly owned the suit plot and ignoring the overwhelming evidence by the Appellant on the history of the suit plot. Put together, I understand the Appellant to be saying that the trial Magistrate erred in law and fact by failing to properly analyse the evidence and thereby made a rush decision that was totally against the weight of the evidence and therefore bad in law.

The issue that the trial Court was called upon to determine was fairly straight forward. It was whether the suit plot belonged to the Respondents' deceased husband or to the Appellant. This being a first appeal, I have, as I am required to do, re – evaluated on the evidence that was adduced before the trial Magistrate to determine whether the Judgment should be interfered with. It is clear from the impugned Judgment that what propelled the trial magistrate to arrive at the decision which she did was a letter dated 13th May 1978 written to the **CHIEF CHEPTAIS LOCATION** by one **TIMOTHY TUNGUTA** the **MARKET OFFICER BUNGOMA COUNTY COUNCIL** with respect to the dispute between the Appellant and **WYCLIFFE BARASA (PW 3)** over the suit plot. This is how the trial Magistrate addressed herself on the significance of that letter at page 123 of the record of appeal.

> ***"On the evidence adduced by and on behalf of the plaintiff, the Court finds a particular bit of evidence as crucial to the just determination of this matter. This is a letter dated 13th May 1978. In the said letter, it is a response to the Chief's letter dated 29th March which was also produced by the plaintiffs. The chief was making an inquiry over the ownership of plot No 92 between the defendant herein PATRICK MULEYI and PW 2 WYCLIFFE BARASA WASILWA. In the response to the said letter, the County Council through it's Survey office states that after carrying out it's investigations, it found that the plot No 92is co – owned by both the defendant herein as well as PW 2 one WYCLIFFE BARASA WASILWA. This evidence has not been challenged by anything and the said WYCLIFFE has also produced some receipts which confirm that at some point, he paid rates for the plot but on selling it to RICHARD NABALOKHA, he stopped paying the rates. The County Government ought therefore to have pursued the said deceased over un – paid rates but from the records, it would seem it is the defendant who has been paying those rates. That alone cannot make him the owner of the plots as the records show that the said deceased was equally entered as an owner of the plot. The evidence given by and on behalf of the plaintiffs is verifiable, truthful and believable."***

I have perused the letter dated 13th May 1978 referred to in the Judgment and because of it's significance, I shall reproduce it in extensor. It reads: -

> ***"13th May 78***
>
> ***CHIEF***
>
> ***CHEPTAIS LOCATION***
>
> ***P O BOX 82***
>
> ***CHEPTAIS***
>
> ***RE: DISPUTE ON PLOT NO 92 – CHEPTAI MARKET***
>
> ***PATRICK MULEYI .V. WYCLIFFE BARASA.***
>
> ***According to the investigation carried out by my office, the plot in question belongs to both MULEYI and BARASA but not MULEYI alone as alleged earlier by the former. The parties concerned agreed to bury their differences and work together.***
>
> ***In the circumstances therefore, PATRICK MULEYI should go ahead and develop his part i.e. 33' by 100' and WYCLIFFE BARASA 17' by 100'.***
>
> ***Thank you***
>
> ***TIMOTHY TUNGUTA***
>
> ***MARKETS OFFICER***
>
> ***BUNGOMA COUNTY COUNCIL"***

The letter was copied to both the Appellant and **WYCLIFFE BARASA** who testified as the Respondents' witness No 3 (not PW 2 as indicated in the Judgment). He is a brother in law to the Respondents and had also done business with the Appellant. In his testimony, he

told the trial Court that he and the Appellant had jointly purchased the suit plot measuring 50 feet by 100 feet from one **HENRY NAMASAKE**. However, following a dispute between them and which was referred to the then **BUNGOMA COUNTY COUNCIL**, the suit plot was divided into two portions. **WYCLIFFE BARASA** retained the portion measuring 17 feet by 100 feet while the Appellant kept the other portion measuring 33 feet by 100 feet. He later sold his portion to the deceased on 20th October 1978 who took possession thereof. In support of that testimony, **WYCLIFFE BARASA WASILWA** produced a sale agreement between himself and the deceased dated 20th October 1978 (plaintiffs Exhibit 2) describing the plot being sold as No 92 A. The reference to **No 92 A** can only mean that the said **WYCLIFFE BARASA WASILWA** indeed sold his portion to the deceased while the Appellant retained the other portion of the suit plot. During the plenary hearing, the Appellant insisted that the suit plot belonged to him and denied that his deceased brother had any interest therein. He added that he had an allotment. Letter issued to him in 1984 but had nothing to show for it. He did not suggest that **WYCLIFFE BARASA WASILWA (PW 3)** and who was his former business partner had any reason to give false testimony with regard to the suit plot. The 2nd Respondent **ROSEMARY NABANGALA NABALOKHA (PW 1)** told the trial Court that after the deceased purchased his portion of the suit plot from **WYCLIFFE BARASA WASILWA** in 1978, he constructed a shop thereon which they have been using even after the deceased the passed away in 2000 and it was not until 2018 that the Appellant tried to take over their portion culminating in this suit. When she was re – examined by her Counsel **MR WERE**, she confirmed that the suit plot was jointly owned by their deceased husband and the Appellant. This is what she said: -

> ***"The letters from the County Government shows the plot is my husband's (refer to list of documents dated 13. .78)***
>
> ***The letter shows the plot is owned by Z. MULEYI and WYCLIFFE. We bought if from WYCLIFFE who also owned it. The plot is owned by Z. RICHARD has his part, PATRICK has his part. PATRICK has part of the plot where he has constructed and my husband has his own. Refer to receipt on plaintiff's list of documents. The receipt shows 2 names WYCLIFFE and PATRICK."***

The Appellant on the other hand hinged his claim to the suit plot on a sale agreement which did not indicate the plot number and also on a letter of allotment which he did not avail. He also premised his claim on the fact that he was the one paying the rates.

Having heard and observed the witnesses, the trial Magistrate was entitled, as she did, to believe the Respondents' version as being ***"verifiable, truthful and believable."*** She was also entitled to find, as she did, that the mere fact of paying the rates did not mean that the whole suit plot belonged to the Appellant. Indeed, following the 2nd Respondent's own oral testimony, the trial Magistrate was entitled to make the finding, which she did, that the suit plot was co – owned between the Appellant and the deceased. In the circumstances, the Respondents as the widows and personal representatives of the deceased were entitled to occupy and utilize his portion of the suit plot as they have always done during his life – time. It is instructive to note that whereas the Appellant was paying the rates for the suit plot, the **COUNTY COUNCIL OF MOUNT ELGON** recognized the deceased as the owner thereof. In a letter dated 21st November 2012 and addressed to the Appellant, the said **COUNTY COUNCIL** advised him as follows: -

> ***"RE: PLOT NO 92***
>
> ***CHEPTAI MARKET***
>
> ***Records held in this office reveal that the above plot (No 92 CHEPTAIS MARKET) is registered in the name of RICHARD MULEI who is deceased.***
>
> ***Reports reaching this office says that you have taken over the said plot without the consent of the deceased wives i.e. ROSEMARY NABANGALA and SELINE NAMBUYE.***
>
> ***This therefore to ask you to stop interfering with the said plot.***
>
> ***By copy of this letter, the District Officer Cheptais Division is requested to assist the wives of the deceased access the said.***
>
> ***In case you have any document concerning claiming ownership, don't hesitate to come forward.***
>
> ***Yours faithfully***
>
> ***LUKE L. MUKOYA***
>
> ***FOR COUNTY CLERK"***

There is no evidence to show that the Appellant replied to the said letter in rebuttal of the contents thereof or even approached the writer with any evidence to prove ownership yet he had been invited to do so. Surely if he had the allotment letter issued to him in 1984 but which got lost as he alleged in his oral testimony before the trial Magistrate, that was the right time to bring up that issue with the writer of the said letter. He did not.

In the light of all that evidence, the trial Magistrate was justified in arriving at the finding, and which this Court up – holds, that the suit plot was owned jointly by the Appellant and the deceased with the former's portion measuring 33 feet by 100 feet and the latter's portion being 17 feet by 100 feet. I see no reason to disturb that finding which was the only conclusion that any Court could have arrived at on the basis of the evidence on record.

Having said so however, at the end of her Judgment, the trial Magistrate made the following final orders: -

"In view of the totality of the evidence adduced and evaluated above the Court enters Judgment in favour of the plaintiffs as above in terms of prayers a, b partially and c.

The defendant to pay the plaintiff half the costs of this suit."

The above orders have caused me some concern particularly in the use of the term ***"partially."*** The Respondents had in their plaint sought specific prayers being: -

(a) A declaration that the deceased was the rightful owner of the plot No 92 CHEPTAIS MARKET.

(b) A permanent injunction to restrain the Appellant acting either by himself and/or through his servants, agents and/or family members from entering, taking possession of, developing and/or in any other manner whatsoever dealing with the piece of land known as plot No 92 CHEPTAIS MARKET.

(c) Costs of the suit.

(d) Interest on (c) at Court rates.

(e) Any other or further relief.

The Judgment of a Court must be clear, un – ambiguous and leave no room for conjecture with regard to the decision of the Court on the issues which the parties have brought forward for determination. In my view, where a party has sought orders such as were prayed for in this case, it is not enough for the Court to say that the orders sought have been ***"partially"*** granted. That would leave room for doubt in the parties' mind as to what has been partially allowed and what has been partially disallowed by the Court. The work partially is defined in the **OXFORD DICTIONARY** to mean: -

"only in part; to a limited extent."

That would leave the parties wondering as to which part of the declaratory and permanent injunction were granted and which one was not. There ought to have been more clarity in the final orders granted by the trial Court. However, the Court made awards in that regard because the final decree that was drawn on 3rd February 2020 reads as follows: -

"IT IS HEREBY DECREED ORDERED THAT

1. A declaration that both the defendant and the deceased jointly owned plot No 92 CHEPTAI MARKET and the defendant had no colour of right to evict the deceased widows from the said parcel of land or their premises.

2. Both parties are to occupy their specific portion of land and a permanent injunction cannot issue therefore.

3. The plaintifs will get half their costs."

Therefore, since the final orders of the Court were clarified in the subsequent decree, I do not find it necessary to interfere with the Judgment except to only emphasize on the need for the Judgment to be clear and un – ambiguous with regard to the orders granted.

On the issue of costs, the trial Magistrate correctly stated that they follow the event. She then ordered the Appellant to pay the Respondents half the costs of the suit. Whereas it is clear from **Section 27 (1)** of the **Civil Procedure Act** that ***"costs shall follow the event"*** and are ***"in the discretion of the Court,"*** there is also a provision that the Court may ***"for good reason order otherwise."*** In the circumstance of this case, there is need to interfere with the trial Magistrate's order for costs. This is because of the following reasons. Firstly, it is not disputed that although the suit plot is co – owned, it is the Appellant who has been paying the rates. It is unfair to further penalize him with an order to pay half the costs. Secondly, and more importantly in my view, the parties are family. In order not to further alienate them against each other and bearing in mind that they are neighbours in the suit plot, the order that commends itself to me is that each party shall meet their own costs here and in the Court below.

The up – shot of the above is that this appeal is dismissed. Each party to meet their own costs both here and in the Court below.

BOAZ N. OLAO.

J U D G E

28TH SEPTEMBER 2021.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF

SEPTEMBER 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

RIGHT OF APPEAL EXPLAINED.

BOAZ N. OLAO.

J U D G E

28TH SEPTEMBER 2021.