REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC APPEAL NO 15 OF 2020

ALEX KYALO MUTUA.....APPELLANT

VERSUS

KING'OO NGULASA.....RESPONDENT

(Being an Appeal against the Judgment of the Honourable Mr. A. G Kibiru

(Chief Magistrate) delivered on the 13th of May 2020 in the Chief Magistrates Court

at Machakos Environment and Land Case No 31 of 2019)

JUDGMENT

Background

1. Vide a Plaint filed on 9th October 2017 in Machakos ELC Case No 29 of 2019, the Plaintiff (Appellant herein) sought for the following orders:

> **i. A declaration that the Plaintiff is the rightful owner of Machakos Town Block 3/695.**
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> **ii. Permanent injunction restraining the Defendant, his servants, agents and/or family members and/or in any manner howsoever from farming on, grazing on, building on, advertising, entering, trespassing, leasing, charging, selling, dealing with, conveying, subdividing, encroaching on and/or remaining on the Plaintiff's land Title No Machakos Town Block 3/695 ("the Land") and/or interfering with the Plaintiff's registered, legal, contractual, equitable interests and/or rights of quiet ownership, possession, occupation and enjoyment thereof.**
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> **iii. An order for eviction and demolition of the structures in the said land at the Defendant's expense with the supervision of the OCS Machakos.**
>
> **iv. Costs of and incidental to the suit and interest at court rates.**

2. The Plaintiff opined that he was the rightful owner of Machakos Town Block 3/696 having purchased the same from Katelembo Athiani Muputi Farming & Ranching Co-operative Society (herein after the society) sometime in 1998; that the title to the property was issued to him on 14th January 2016; that he had yet to take possession of the suit property and finally that the Defendant trespassed on the suit land and erected illegal structures thereon.

3. The Defendant's case was that he had been on the suit land since birth and had settled thereon; that the suit land was his ancestral land; that the Plaintiff's Title Deed was suspect and that the Plaintiff had not availed sufficient evidence proving his purchase of the suit property. The Defendant informed the trial court that him, together with others, filed Petition No.76 of 2017 seeking to have the court declare that the property they reside on was their ancestral property.

4. Vide a Judgment delivered on 13th May, 2020, the Chief Magistrate's Court determined that the Plaintiff had not proved his case as required by law and subsequently dismissed the suit. The Plaintiff/Appellant dissatisfied with the trial court's Judgment, filed this appeal vide the Memorandum of Appeal dated 8th June, 2020. The appeal has 16 grounds which have been enumerated as follows;

> i. The learned Magistrate erred in law and in fact by making findings in the Judgement which are not supported by the tendered

evidence and adduced testimony.

ii. The learned Magistrate erred in law and in fact by making findings in the Judgement which were not issues for trial in the filed pleadings.

iii. The learned Magistrate erred in law and in fact by disregarding and failing to refer to, analyse, apply and/or distinguish the submitted authorities and mandatory legal provisions.

iv. The learned Magistrate erred in law and in fact by failing to find that the Plaintiff's entitlement and basis for claim to the land and issuance to title was through purchase of land from Katelembo Society and not by balloting.

v. The learned Magistrate erred in law and in fact by failing to find that the land has always had registered owner and registered title and had never been owned by the Defendant.

vi. The learned Magistrate erred in law and in fact by failing to find that the Defendant had not pleaded or claimed any superior claim to the land or any overriding interest to impeach the Plaintiff's title to the Land.

vii. The learned Magistrate erred in law and in fact by finding that the Plaintiff's land was subject to task force and cases pending in ELC Court despite the fact that the Plaintiff's title deed has never been impeached by any task force nor are there any orders obtained by the Defendant as against the Plaintiff or as regards the Land in any court.

viii. The learned Magistrate erred in law and in fact by finding that the Defendant had occupied the Plaintiff's land prior to the Plaintiff purchasing and becoming the registered owner thereof despite there being no proof of any such occupation.

ix. The learned Magistrate erred in law and in fact by finding that the society needed to provide minutes of Authority to sell the land which was not a matter in issue before the Court nor in the pleadings not in the tendered evidence.

x. The learned Magistrate erred in law and in fact by finding that Land Control Board Consent had to be given prior to transfer to the Plaintiff of the land contrary to the evidence tendered that the conveyance and transfer of the land was done by the Ministry of Co-operative being the legally authorized government body on behalf of the society by virtue of the land being a Land buying society and required no consent of the Land Control Board.

xi. The learned Magistrate erred in law and in fact and misdirected himself by stating that the Plaintiff participated in balloting as a member contrary to the tendered evidence and filed pleadings that he bought land as a purchaser and his witnesses testified that the land was vacant at the time of purchase.

xii. The learned Magistrate erred in law and in fact by failing to find that the title of the Plaintiff was not impeached nor challenged by the Defendant as there was no counterclaim or adverse possession suit.

xiii. The learned Magistrate erred in law and in fact by finding that the Plaintiff's witnesses had established that the land had always had a title deed prior to independence and after independence and thus there was no way the Defendant could claim ancestral rights without impeaching the original title deed.

xiv. The learned Magistrate erred in law and in fact by finding that the Plaintiff had not provided consent to sell, minutes to sell, authority to sell and letter introducing the Plaintiff as a purchaser yet the Defendant is not claiming competing rights as a purchaser to the land nor had those issues been raised in the pleadings or testimony.

xv. The learned Magistrate erred in law and in fact by finding and misdirecting himself in finding that the Appellant was not in occupation of the land thereby giving title to the Respondent.

xvi. The learned Magistrate erred in law and in fact by failing to apply the relevant legal principles for suits of title deed holder's vis a vis trespassers and squatters who lack superior or legal basis to challenge the title.

5. The Appellant has sought for the following prayers:

a) The Appeal is allowed with costs;

b) The Judgement by Honourable Mr A.G Kibiru (Chief Magistrate) delivered on the 13th of May 2020 be set aside and the Court do make orders as per the Plaint.

c) Costs of this Appeal be awarded to the Appellant.

Submissions

6. The Appellant, through his counsel filed detailed submissions and authorities on the 25th of May 2021. Counsel submitted that the Magistrate considered extraneous issues not raised by the parties in their pleadings or through their evidence; that there was no question as to the validity of the sale of the suit property to the Appellant by the Society and that no party submitted on the fact that a person could not

ballot on the property when he was not a member of the Society.

7. The Appellant's Counsel submitted that none of the parties pleaded on the issue of consent to transfer the suit property or that a consent to transfer ought to have been obtained from the Land Control Board. Counsel relied on the Court of Appeal case of ***Dakianga Distributors (K) Ltd vs Kenya Seed Company Limited (2015) eKLR*** which cited the Article "***The present importance of pleadings***" published in 1960 where Sir Jacob stated;

> ***The Court is bound by the pleadings of the parties. It is not part of the duty of court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised.***

8. Counsel further relied on the case of ***Hellen Wangari Wangechi vs Carumera Muthoni Gathua [2015]eKLR*** where the court held:

> ***"It is trite law that parties are bound by their pleadings. This position was correctly captured by the Malawi Supreme Court in the case of Malawi Railways Ltd vs Nyasulu[11] where the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" which was published in {1960} Current Legal Problems at Page 174 where the author stated:-***
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> ***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice……In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "any other business" in the sense that points other than those specific may be raised without notice."***
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> ***Also relevant is the Ugandan case of Libyan Arab Uganda Bank for Foreign Trade and Development & Another vs Adam Vassiliads where the Court of Appeal of Uganda cited with approval the dictum of Lord Denning in Jones vs National Coal Board that:-***
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> ***'In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries"***
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> ***The Supreme Court of Nigeria put it more authoritatively in the case of Adetoun Olade (NIG) Ltd vs Nigerian Breweries PLC[14] where Judge Pius Aderremi expressed himself as follows:-***
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> ***"….it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of pleadings goes to no issue and must be disregarded."***
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> ***In the said case, Judge Christopher Mitchel J.S.C rendered himself as follows: -***
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> ***"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."***

9. Counsel submitted that the Respondent having not pleaded or claimed any superior claim or overriding interest to the land could not impeach the Appellant's title to the land as protected by **Section 25 & 26** of the **Land Registration Act** and that dismissing the Appellant's suit and failing to issue eviction orders against the Defendant was tantamount to deprivation of the Plaintiff's property contrary to Article 40 of the Constitution.

10. It was submitted that there was no evidence to support the contention that the subject matter of the appeal was the same as the subject matters in the pending ELC Petition No 76 of 2017; that the Appellant herein was not a party to the aforesaid Petition; that the Respondent did not prove the issue of *sub-judice* as required by **Section 6** of the **Civil Procedure Act**; that the parties and reliefs sought in the two suits were not similar and further that there was no evidence to show that the subject matter was the same. Counsel relied on the case of ***Kibwari PLC vs Principal Land Registration Officer Ministry of Lands & Physical Planning & 6 others [2021] eKLR*** where the court stated;

> ***"In the case of Nairobi Judicial Review Division (HCJR/EO45/2020 Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya, Justice Mativo had the following to say on sub-judice…***
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> ***"In order to check this very problem, there exists the concept of sub judice which in Latin means "under Judgement." It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In***

such a situation, an order ought to be passed by the subsequent court to stay the proceeding and such order can be made at any stage…"

…In the context of Section 6 of the Civil Procedure Act[9] which encapsulates the principles that underpin the rule, it simply means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed…The Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) had occasion to pronounce itself on the subject of sub judice. It aptly stated: -

"The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives. The sub judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying objective of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings."

11. It was submitted by counsel that by virtue of **Section 24(a)** of the **Land Registration Act, 2012**, the Appellant was the absolute owner of the suit property; that the Magistrate exceeded his jurisdiction by attempting to indirectly nullify the title deed and that the Respondent, despite alleging fraud in the registration of the Appellant's parcels, did not give particulars thereof contrary to **section 107** of the **Evidence Act** which lay the burden of proving the fraud on the Respondent.

12. Counsel cited the case of ***William Kiilu Mbuvi & 3 others vs Peter Nzyoka Mbuvi(2017)eKLR*** where this court quoted the case of ***Peter Kamau Njau vs Emmanuel Charo Tinga(2016) eKLR*** where the Court of Appeal stated as follows:

"It was, with respect, a grave misdirection on the part of the learned judge to burden the Appellant to prove that the Ngaruiya's title to the original property was regularly obtained. Fraud must be pleaded with a great degree of particularity and to be proved by evidence on a standard heavier than on a balance of probabilities generally applied in civil matters... The learned judge was clearly misled by the statement of this court sitting at Nyeri in Munyu Maina (supra) in the passage reproduced earlier, which, in effect erroneously suggests that a document of title is worthless without further supporting evidence... In absence of evidence in rebuttal, it was in grave error for the learned Judge to impeach the Appellant's title in the manner he did..."

13. With regards to the aspect of fraud and the burden of proof thereof, counsel further cited the cases of ***Cyril J Haron and Andrew vs Uchumi services limited & 3 others (2014) eKLR***, ***Central Kenya Ltd vs Trust Bank Ltd & 4 others (1996) eKLR*** and ***Nyagate Guso alias Watson Mogere Mogoka vs Maxwell Okemwa Mogere & Another (2015) eKLR*** and ***Nairobi permanent Market society & others Vs Salima Enterprises & Others(1993-1998)1EA 232*.**

14. Counsel submitted that the only way the Respondent could have acquired proprietary rights over the suit property without having any title was through a claim of adverse possession, which was not pleaded, and that in any event, such a claim could only succeed if Katelembo Society was a party to the suit. Counsel cited the case of ***Mwinyi Hamisi Ali vs the Attorney General and Philemon Mwaisaka Wawaka, Civil Appeal No 123 of 1997;***

"In order that Mr. Hamisi Ali could claim, successfully, title by adverse possession, he had to show that the title of the said four persons stood extinguished. That can only be done if the title holders were parties to the suit."

15. Counsel reiterated that the burden of proof lay on the Respondent. Counsel cited the Court of Appeal case in ***Hellen Wangari Wangechi*** **(supra)** where the court stated;

"The standard of proof in civil and criminal cases is the legal standard to which a party is required to prove his/her case. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of Miller vs Minister of Pensions, [19] Lord Denning said the following about the standard of proof in civil cases:-

'The … (standard of proof)…is well settled. It must carry a reasonable degree of probability. If the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'

In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

16. With regard to the aspect of the requirement of the Land Control Board consent, counsel submitted that the court erred in determining that the same was a requirement; that government land does not require the consent of the board for it to be transferred and that the suit properties were transferred from the government of Kenya to the Appellant who is the first registered owner. Counsel cited the case of ***Theresa Constabir vs Jeremiah M. Maroro & 3 others [2013] eKLR*** where this court succinctly stated:

> *"The procedural law governing the suit properties is the Registration of Titles Act while the substantive law is the Government Land Act because the lessor is the Government. The Government is therefore the ultimate owner of the suit property while the "registered proprietors" are lessees…The Land Control Act was enacted in 1967. It owes its origin to the Land Control Ordinance of 1944. The land tenure committee appointed in 1944 had recommended that any system of land tenure would be unsatisfactory if it permitted unrestricted transfer and unrestricted use and misuse of land…The history that I have enumerated above clearly shows that the land control boards were only required to police agricultural lands that were freehold and not Government Land. I say so because the Government, through the special conditions in all its leases and the implied conditions enumerated in the Government Land Act regulates the use and assignment of its land, whether town plots or agricultural land. In the event that the lessee does not comply with the said conditions, the Government Land Act provides that the government could repossess the said land and allocate it to somebody else…The Land Control Act, which incorporated the provisions of the 1944 and 1959 Ordinances, in my view, does not apply to agricultural land which is Government Land. The only consent that is required, which consent can be denied if the special conditions in the Grant and the implied covenants in the Act have not been complied with by the lessee, is that of the Commissioner of Lands. A lease of whatever period by the Government does not relinquish the rights of the government over the said land…It is therefore right to argue that the Government, being the lessor, will always be a party to transactions contemplated under section 6 of the Land Control Act. When the Government is a party to such transactions, section 6 (3) provides that the consent of the Board is not required. Consequently, the transfers in respect to the suit properties did not require the consent of the Land Control Board in view of the fact that the land in issue is "Government Land". Having said that, and considering that the main Grant with the special conditions was not produced in court to show the use of the land, I will not address the issue as to whether the suit properties were actually agricultural lands or not. Even if the properties were to be used for agricultural purposes, the consent of the Board was not required."*

17. The Appellant's advocate submitted that the trial court erred in determining that the Respondent had ancestral ties to the suit properties; that the same was not proven by the Respondent; that the Appellant proved that the land had always had a title deed even prior to independence and that the Respondent did not follow the laid down process of determining historical land injustices. Counsel cited the case of ***Henry Wambega & 733 Others vs Attorney General & 9 Others [2020] eKLR*** where the Court succinctly set out the relevant laws and procedure for investigation and adjudication of claims arising out of historical injustices.

18. Counsel submitted that the Magistrate erred in determining that the Plaintiff had not provided consent to sell, minutes to sell, authority to sell and letter introducing the Appellant as the purchaser as the same were not in issue at the hearing; that the Magistrate erred in failing to apply the relevant legal principles for suits of title deed holders *vis a vis* trespassers and squatters who lack superior or legal basis to challenge the title and that the Magistrate erred in failing to rely on **Section 26(1)** of the **Land Registration Act**.

19. It was submitted that the Respondent did not prove any fraud to warrant impeaching the Appellant's title. In support Counsel cited the case of ***Sangale Ole Langas Vs Stephen Mishish & Anor [2018] eKLR*** where court held;

> ***"The Plaintiff tendered evidence in court that he is the registered proprietor of the suit land and produced a title deed to that effect. The Defendants did not controvert this piece of evidence. I note in the current scenario the Defendants did not challenge the Plaintiff's Certificate of Title nor indicate it was issued through fraud, misrepresentation or through a corrupt scheme and it is trite law that a valid Certificate of title held by a party is prima facie evidence that the person registered thereon is the absolute proprietor of the suit land.***

20. Further, counsel cited the case of ***David Kipkirui Mutai Vs Joseph Rugut [2018] eKLR*** in which the court re-affirmed the indefeasibility of title subject to **section 25(1)** of the **Land Registration Act.** In conclusion, counsel urged the Court to overturn the decision of the Magistrates court and allow the Appeal with costs.

21. The Respondent's counsel filed submissions in opposition to the Appeal on 12th July 2021. Counsel submitted that the Magistrate properly analysed the parties' testimonies & evidence in arriving at his decision; that the Plaintiff having admitted to not being a member of Katelembo Society, from which he bought the suit property, it was necessary for him to prove that the officials from whom he purchased the property had the necessary authority to sell and that as the dispute involves ownership of the suit property, it was proper for the Magistrate to decide on the issue of whether the Plaintiff was the legal owner of the suit property.

22. Counsel submitted that it was incumbent upon the Appellant to show how he acquired the property. Counsel cited **Section 26** of the **Land Registration Act 2012** which provides;

> ***"(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***
>
> ***(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.***

23. Counsel equally cited **Section 107** the **Evidence Act:**

"(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.

(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."

24. Counsel relied on the case of ***Koinange & 13 Others vs Koinange [1986] eKLR*** where court restated the cardinal precept of law of evidence that he who alleges must prove it. Counsel also relied on the Ruling of this court in this matter. While determining an interlocutory application stated, in which the court stated as follows;

"It is true that a Title Deed is an end product of the process. The process of acquiring a Title include entering in to an agreement with the Transferor and signing the Transfer form. The burden of proving that one obtained a title Deed lawfully lies with the Plaintiff."

25. It was submitted that the Respondent through his defence indicated that he had together with his family been in open continuous and un-interrupted possession of the suit property with his parents since birth; that they have filed Petition no 76 of 2017 to assert their rights and that the Magistrate was correct in holding that customary trusts are part of overriding interests pursuant to **Section 28** of the **Registration of Land Act.**

26. It was submitted that the Magistrate was correct in holding that the Petition before the ELC Court preceded the suit at the Magistrates Court and will determine the issue of ownership of the suit property and subsequently affect the rights of the members of the Society and the purchasers; that the Court in Petition 76 of 2017 granted temporary stay orders barring the Land Registrar or any other officials from interfering with the Respondent's occupation of the property and that by virtue of the fact that there are court orders in favour of the Respondent, this matter is *sub judice* and offends **Section 6** of the **Civil Procedure Rules.**

27. It was submitted by counsel for the Respondent that although the Appellant is not a party to ELC Petition No 76 of 2017, the subject matter is the suit property; that the Appellant's title emanates from the Katelembo Society which is a party to the Petition and that the Magistrates Court was correct in its finding that a Land Control Board Consent was required as the land was not transferred by the society but by purported members of the society.

28. Counsel submitted that the Magistrates court was correct in finding for the Respondent that the suit property was ancestral property and that the court clearly impeached the titles produced by the Appellant. Counsel urged the court to dismiss the Appeal with costs.

Analysis & Determination

29. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. In ***China Zhingxing Construction Company Ltd vs Ann Akuru Sophia [2020] eKLR*** stated as follows:

"The appropriate standard of review established in these cases can be stated in three complementary principles:

(a) First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

(b) In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

(c) It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time."

30. The High Court in the ***China Zhongxing Construction Company Ltd*** case (*supra*) cited the Court of Appeal for East Africa in ***Peters vs Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:

"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. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs-Thomas (1), [1947] A.C. 484."

31. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.

32. The Appellant's case before the trial court was that he purchased the suit property from the Society and that upon being issued with the title, became entitled to the rights appurtenant thereto. On the contrary, the Respondent's case was that the suit property was ancestral land and that he had moved the Environment and Land Court through Petition No 76 of 2017 to assert his ancestral rights.

33. Section 26 of the Land Registration Act provides as follows:

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

34. How therefore was the Appellant required to have shown that he is entitled to the presumption under **section 26 of the LRA** and the rights of a registered proprietor relating thereto?

35. The Court of Appeal of Uganda in ***Katende vs Haridar & Company Limited [2008] 2 E.A.173*** held that:

"For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, … (he) must prove that:

(a) he holds a certificate of title;

(b) he purchased the property in good faith;

(c) he had no knowledge of the fraud;

(d) he purchased for valuable consideration;

(e) the vendors had apparent valid title;

(f) he purchased without notice of any fraud;

(g) he was not party to any fraud."

36. Whereas the Appellant argues that the Respondent did not plead or claim any superior claim to the land or any overriding interest to impeach his title to the land, the Respondent in his Defence challenged and sought to impeach the Appellant's title to the suit property on the ground that he was born on the suit property and that the Appellant obtained the title to the suit property in a dubious, suspect and untenable manner.

37. Considering that the Appellant's title to the suit property was under challenge, it behoved the Appellant to prove how he became the registered proprietor of the suit property. This is in line with the decision in ***Munyu Maina vs Hiram Gathiha Maina [2013] eKLR*** where the Court of Appeal held that:

"We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

38. This is the same position that was taken by the Court of Appeal in ***Kenya National Highway Authority vs Shalien Masood Mughal & 5 others [2017] eKLR*** cited with approval the Court of Appeal case of ***Chemei Investments Limited vs The Attorney General & Others Nairobi Petition No. 94 of 2005*****(unreported)** where it was held:

"The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be sidestepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the Court in the case of Milan Kumar Shah & 2 Others – vs – City Council of Nairobi & Another (supra) where the Court stated as follows, " we hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principal has not himself or itself been part of a cartel which schemed to disregard the applicable law ..."

39. Considering that the Appellant's title was under challenge on account of the Respondent's assertion that the suit property was ancestral property and that the Appellant's title was dubious, suspect and untenable, the Appellant had the burden of proving that he was an innocent purchaser for value of the suit property and that there was a clear chain of the root of his title.

40. The evidence that was adduced before the trial court shows that Katelembo Athiani Muputi Farming and Ranching Cooperative Society Limited (the society) acquired land known as LR No. 10253 measuring 1, 146 acres from Charlotte Maud on 9th February, 1972. The said

land was registered in favour of Charlotte on 17th October, 1962. For purposes of issuing titles to its members, the land was sub-divided and surrendered to the government by the society. However, the suit property continued been owned by the society, save for the portions of land that were allocated to the members, or sold by the society.

41. The Appellant's case is that he bought the suit property from the society, and was subsequently issued with a title deed. The Appellant produced in evidence a letter dated 22nd September, 1998 authored by the Society and signed by the officials of the society and the Appellant. In the said letter, which signed by both parties, the parties confirmed that the Management Committee had sold to the Appellant plot number 2405 measuring 2.05 acres for Kshs. 150,000.

42. In the same letter, the parties agreed that the Appellant was to pay the survey fees; that the title deed will be issued in the name of the Appellant and that indeed the said plot belongs to the Appellant. Considering that the said letter was signed by the three officials of the society and the Appellant, and the same having been witnessed by two witnesses, the said document meets the mandatory provisions of **section 3 (3**) of the **Law of Contract Act**.

43. Indeed, the issue of the society having sold the suit property to the Appellant was confirmed by the society through its letter of 7th October, 2015, in which the society informed the County Land Registrar that the society has no objection to the issuance of a title deed to the Appellant. The said letter was duly signed by the three officials of the society.

44. The Appellant produced in evidence the Transfer document dated 28th September, 2016 signed by himself and the society's officials. The said document shows the society surrendered the suit property to the government for the purpose of having a title deed issued in favour of the Appellant. It is on the basis of the agreement of 22nd September, 1998, the letter dated 7th October, 2015 and the duly signed transfer that the Registrar of Lands issued to the Appellant the title deed.

45. The Respondent has argued that the suit property is agricultural land and falls under the purview of the Land Control Board requiring the Board's consent before transfer. **Section 6 (3)** of the **Land Control Act** provides that the requirement for the consent of the Land Control Board is not required in respect to a transaction to which the Government or the Settlement Fund Trustees or a county council is a party.

46. This court echoed the above position of the law in the case of ***Theresa Constabir vs Jeremiah M. Maroro & 3 others [2013] eKLR*** where it started as follows:

> ***"The procedural law governing the suit properties is the Registration of Titles Act while the substantive law is the Government Land Act because the lessor is the Government. The Government is therefore the ultimate owner of the suit property while the "registered proprietors" are lessees…The Land Control Act was enacted in 1967. It owes its origin to the Land Control Ordinance of 1944. The land tenure committee appointed in 1944 had recommended that any system of land tenure would be unsatisfactory if it permitted unrestricted transfer and unrestricted use and misuse of land…The history that I have enumerated above clearly shows that the land control boards were only required to police agricultural lands that were freehold and not Government Land. I say so because the Government, through the special conditions in all its leases and the implied conditions enumerated in the Government Land Act regulates the use and assignment of its land, whether town plots or agricultural land. In the event that the lessee does not comply with the said conditions, the Government Land Act provides that the government could repossess the said land and allocate it to somebody else…The Land Control Act, which incorporated the provisions of the 1944 and 1959 Ordinances, in my view, does not apply to agricultural land which is Government Land. The only consent that is required, which consent can be denied if the special conditions in the Grant and the implied covenants in the Act have not been complied with by the lessee, is that of the Commissioner of Lands. A lease of whatever period by the Government does not relinquish the rights of the government over the said land…It is therefore right to argue that the Government, being the lessor, will always be a party to transactions contemplated under section 6 of the Land Control Act. When the Government is a party to such transactions, section 6 (3) provides that the consent of the Board is not required. Consequently, the transfers in respect to the suit properties did not require the consent of the Land Control Board in view of the fact that the land in issue is "Government Land". Having said that, and considering that the main Grant with the special conditions was not produced in court to show the use of the land, I will not address the issue as to whether the suit properties were actually agricultural lands or not. Even if the properties were to be used for agricultural purposes, the consent of the Board was not required."***

47. Considering that the suit property was surrendered to the government by the society, before the same was transferred by the government directly to the Appellant, the consent of the Land Control Board was not required.

48. The Respondent submitted that him, together with his family, have been in open, continuous and un-interrupted possession of the suit property with his parents since birth; that they have filed Petition number 76 of 2017 to assert their rights and that the Magistrate was correct in holding that customary trusts are part of overriding interests pursuant to **Section 28** of the **Registration of Land Act**.

49. If the Respondent's defence was that he is entitled to the suit property because he has been in continuous and un-interrupted possession of the suit property, then he should have sued the society. I say so because the limitation period of 12 years for a registered proprietor of land of land to recover land could only have run as against the society which was registered as the owner of the land in 1972, and not the Appellant whose registration as the proprietor of the land was in the year 2015.

50. Having not sued the society for an order of adverse possession, and the society having surrendered the suit property to the government in the year 2015, the Respondent's claim of the suit property cannot be based on the fact that he has been on the land continuously and un interrupted.

51. Although it is true that customary trusts are part of overriding interests, the Respondent did not adduce evidence to show how the concept of customary trust is applicable to the suit property, the same having been allocated and registered in favour of Mr. Charlotte on 17th October, 1962, then transferred to the society in 1972. The parameters for the application of customary trust were set out by the Supreme

Court in the case of ***Isack M'inanga Kiebia vs Isaaya Theuri M'lintari & another [2018] eKLR*** as follows:

> ***"Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.***
>
> ***Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:***
>
> ***1. The land in question was before registration, family, clan or group land;***
>
> ***2. The claimant belongs to such family, clan, or group;***
>
> ***3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous;***
>
> ***4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances;***
>
> ***5. The claim is directed against the registered proprietor who is a member of the family, clan or group.***

52. Indeed, the Respondent did not adduce any evidence in court to show that: the land in question was before registration in 1962 family, clan or group land; the Appellant or the society belongs to such family, clan, or group; the Respondent could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances and that the Respondent's claim is directed against the registered proprietor who is a member of the family, clan or group.

53. The Respondent did not adduce evidence in the lower court to show that the suit land, which was surveyed and registered in the name of Mr. Charlotte in 1962 was land belonging to his clan or family for the Appellant's title to be defeated under the concept of customary trust.

54. Considering that the Appellant herein is not a party to Machakos ELC Petition No 76 of 2017, it was erroneous for the learned magistrate to hold that the Appellant herein should not lay any claim to the suit property until the Petition that the Respondent has filed in this court against the society, *vis a vis* his claim that the suit property belongs to his clan, is heard and determined. It was upon the Respondent to prove that he is entitled to the suit property under the concept of customary trust, which he failed to do.

55. In conclusion, it is the finding of this court that the Appellant proved to the required standards that he acquired the suit property from the society lawfully. On the other hand, the Respondent did not prove that the suit property was acquired by the Appellant fraudulently or by misrepresentation or through a corrupt scheme. The Respondent did not also prove that he is entitled to the suit property under the customary trust doctrine. That being the case, the Appellant's right to property as stipulated under **Article 40** of the Constitution should be protected by this court.

56. For those reasons, the Judgement of the lower court in Machakos Chief Magistrates Land Case number 31 of 2019 is hereby set aside and substituted as follows:

a) A declaration be and is hereby issued that the Appellant (Plaintiff) is the rightful owner of Machakos Town Block 3/695.

b) A Permanent injunction be and is hereby issued restraining the Respondent (Defendant), his servants, agents and/or family members and/or in any manner howsoever from farming on, grazing on, building on, advertising, entering, trespassing, leasing, charging, selling, dealing with, conveying, subdividing, encroaching on and/or remaining on the Appellant's (Plaintiff's) land Title No Machakos Town Block 3/695 and/or interfering with the Appellant's (Plaintiff's) registered, legal, contractual, equitable interests and/or rights of quiet ownership, possession, occupation and enjoyment thereof.

c) An order for eviction and demolition of the structures on the said land be and is hereby issued at the Respondent's (Defendant's) expense with the supervision of the OCS Machakos.

d) Costs of this Appeal and the suit in the lower court to be paid by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 29TH DAY OF OCTOBER, 2021.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Musyoka for the Appellant

Mr. Langalanga for the Respondent

Court Assistant – John Okumu