REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 65 OF 2019

JAMES MUGO MANYARA.....APPELLANT

VERSUS

PHARIS MUNGATHIA.....RESPONDENT

(***Being an appeal from the judgment/decree of Hon. Joan Irura (PM)***

dated and delivered on the 27th day of March 2019

in Nkubu PMCC No. 57 of 2005)

JUDGMENT

1. The appellant herein was the 2nd defendant in the main suit, but a plaintiff in the counterclaim while the respondent was the plaintiff in the main suit but a defendant in the counterclaim.

2. At the heart of the dispute are parcels of land No. Abogeta/Kithangari/1455 and 1456 which 1st defendant (Mary Karai M'Itonga, now deceased) allegedly sold a portion thereof to the respondent on 29.3.2003 but 1st defendant sold the same piece of land thereafter to the appellant on 27.8.2003. The piece of land parcel No.1455 is still registered in the name of 1st defendant 'Mary Karai M'Itonga' who apparently died in year 2013.

3. For ease of reference the appellant will be identified as such or as 2nd defendant while respondent will also be identified as such or as the plaintiff even in respect of the counterclaim.

4. The respondent had sued the 1st defendant (as the only defendant) vide his plaint dated 13.5.2005 praying for judgment against the 1st defendant for the following orders.

> *(i) "Specific performance compelling the defendant to transfer 0.55 acres from land parcel no.Abogeta/U-Kithangari/1455 in the plaintiff's name.*
>
> *(ii) AND OR IN THE ALTERNATIVE, a refund of the consideration paid in full to the defendant plus liquidated damages for breach of contract.*
>
> *(iii) Costs and interests".*

5. The 1st defendant filed a statement of defence on 27.11.2006 generally denying plaintiffs claim. She doesn't appear to have participated in the trial in any manner thereafter.

6. The respondent had then filed an application dated 15.2.2013 seeking orders inter alia to have the "**2nd defendant JAMES MUGO MANYARA enjoined in the suit as a defendant**" of which the prayer for joinder as well as the order for inhibition of parcel no. Abogeta upper Kithangari/1456 were allowed exparte on 19.2.2013 and confirmed on 10.4.2013.

7. The appellant filed a statement of defence and a counterclaim on 4.5.2015 where he denied the claim of the respondent, and he sought for judgment against the respondent in the following terms:

(a) "An order that the defendant in the counterclaim do forthwith vacate land parcel No. Abogeta/U-Kithangari/1456 and in default he be forcefully evicted therefrom with the assistance of the O.C.S Nkubu police station.

(b) An order of permanent injunction restraining the defendant, his agents, servants, assigns or successors in title from entering, occupying, remaining or in any other way interfering with the plaintiff in the counterclaim or the plaintiffs in the counter claim servants, employees, successors in title user, occupation and enjoyment of land parcel no. Abogeta/U-Kithangari/1456 howsoever.

(c) Mesne profits

(d) Costs of the suit

(e) Any further or better relief".

8. The suit before the Nkubu Magistrate's court was allowed in favour of the respondent/plaintiff. The appellant having been aggrieved by the judgment of the trial court lodged this appeal raising 5 grounds in the memorandum of appeal as follows :

(i) That the learned trial magistrate erred in law in making findings against the 1st defendant in the lower court since the suit had abated against her way back on 13th August 2014, the 1st defendant in the lower court had died on 13th August 2013, which was one year after her demise and no legal representative was appointed in her place nor substitution made, a fact very well acknowledged by the respondent vide grounds no's (a) and (c) of the respondents notice of motion dated 3.3.2015 and filed in court on 1.4.2015 and paragraphs 9 and 10 of the supporting affidavit thereof. Hence the decree to transfer land parcel no. Abogeta/U-Kithangari/1455 and 1456 by the alleged administrator or heir, and the executive officer to sign the necessary instruments of transfer, and land control board forms or any other relevant documents should be set aside forth with.

(ii) That the learned trial magistrate erred in law in failing to find that the agreement dated 29.3.2003 was not enforceable for lack of mandatory divisional land control board consent, the suit land being agricultural land, importing issues over constructive trust and proprietary estoppel when none were pleaded or evidence tendered upon, elevating a simple voided agreement for lack of the divisional land control board consent to a constitutional principle of justice.

(iii) That the learned trial magistrate erred in law in ordering the cancellation of the appellants title and interests on land parcel no. Abogeta/U-Kithangari/1456 and thereby taking away his constitutional right to own the same when there were no pleadings or claim by the respondent over the same.

(iv) That the leaned trial magistrate erred in law in failing to find, order and direct that the respondent be evicted from the appellants land parcel no. Abogeta/U-Kithangari/1456 and permanently injuncted as prayed in the appellant's counterclaim dated and filed on 4.5.2015.

(v) The entire judgment is unlawful and against the weight of evidence on record.

9. This appeal was heard by way of written submissions where by the appellant framed 6 issues for determination as follows:

(a) Whether or not the suit against Mary Karai M'Itonga (deceased) has abated.

(b) Whether or not there was a valid agreement between the respondent and Mary Karai M'Itonga (deceased).

(c) Whether the respondent interfered with the boundaries between the parcel no. Abogeta/U-Kithangari/1455 and 1456.

(d) Whether or not the respondent is entitled to the reliefs sought in the plaint dated 13.5.2005.

(e) Whether or not the appellant's counterclaim dated 4.5.2015 is merited.

(f) Who pays the costs of this appeal?

10. On the issue of abatement of the suit, it was submitted that the 1st defendant (Mary Karai) died on 13.8.2013 and was never substituted. The suit having abated against 1st defendant, it was erroneous for the magistrate to order the transfer of the suit parcel No. Abogeta/U-Kiungone/1455 and 1456 to plaintiff by the legal administrator who does not exist. On this point, the appellant invoked the provisions of order 24 of the civil procedure rules and also cited the case of ***Macfoy vs United Africa C. Ltd (1961) 3 ALL ER 1169.***

11. On whether there was a valid general agreement between respondent and 1st defendant, it was submitted as follows:

"The agreement presented by the respondent in court in this instant suit dated 29.3.2003 described the subject matter as land parcel no. Abogeta/U-Kithangari/1455 which the vendor intended to sell 0.55 acres to be excised from the mainland. That at no point does the agreement mention parcel No. Abogeta/U-Kithangari/1255 which was sub-divided into parcels no. Abogeta/U-Kithangari/1453, 1454, 1455 and 1456. Furthermore the said agreement does not describe the size of the parcel no. Abogeta/U-Kithangari/1455 so that we may know what is to be excised from what. In actual fact, this agreement is quite ambiguous in that regard on the description of the subject matter. We humbly invite this honourable court to peruse the agreement for sale of land dated 29.3.2003".

12. Further it was submitted that the alleged oral agreement was made in year 2000 and was reduced into writing on 29.3.2003 contrary to provisions of section 38 (1) (3) of the land act.

13. It was also submitted by the appellant that the respondent did not produce any consent from the land control board after the making of the agreement on 29.9.2003 hence the contract between respondent and 1st defendant was in violation of the provisions of section 8 (1) of the land control act and hence the agreement between the two became null and void on 29.9.2003.

14. The appellant urged the court to find that the trial magistrate erred in law and fact in failing to find that the absence of the consent from the land control board by the respondent was fatal to the suit and that the magistrate failed to appreciate the provisions of section 6 (1) and 8 (1) of the land control act. On this point the appellant cited the case of **David Sironga Ole Tukai vs Francis Arap Muge & 2 others (2014) eKLR** in which other decisions have been widely quoted.

15. On the question on interference with the boundaries between parcels 1455 and 1456, it was submitted that respondent had extended his claim upon parcel 1455 to include parcel 1456 just to structure his impunity to fit his ill intentions and that he trespassed upon the two parcels after the death of 1st defendant in year 2013. The appellant therefore concluded that the respondents claim must fail for the reasons given herein.

16. On the issue of the counterclaim, it was submitted that appellant had demonstrated that his parcels of land 1455/1456 were being illegally occupied by plaintiff who should be evicted from both parcels. He also avers that he is entitled to mesne profits.

17. On costs, appellant avers that he is entitled to the same in the appeal and in the trial court.

18. The respondent on the other hand has framed the following issues for determination:

> *(i) Whether the agreement dated 29.3.2003 was enforceable albeit lack of the land control board consent, whether the doctrine of constructive trust and proprietary estoppel was applicable in the circumstances.*
>
> *(ii) Whether the learned magistrate erred in law in making a finding that the 1st defendants heir/administrator should transfer land parcel Abogeta/U-Kithangari 1455 and 1456 to the respondent.*
>
> *(iii) Whether the order canceling the appellant's title and interests on land parcel no. Abogeta/U-Kithangari 1456 should be upheld.*
>
> *(iv) Whether an order to evict the respondent would suffice as per the appellant's counter claim dated 4.5.2015.*

19. On whether there was a credible agreement between respondent and 1st defendant, it is submitted that there was credible evidence showing there was an agreement for sale of 0.55 acres of land out of parcel 1456 for Shs.150,000 and all that remained was the attendance to the land control board. And when 1st defendant failed to honour her part of the agreement, plaintiff duly registered a caution. It was therefore submitted that the sale agreement having been reduced into writing complied with provision of section 3 (3) of the Law of Contract Act.

20. It was submitted that once the plaintiff/respondent fulfilled his part of the agreement and was let into possession of the portion of land he had purchased from the 1st defendant, the 1st defendant henceforth held the portion of land in trust for the respondent. In the circumstances of the present case, a constructive trust was created in favour of the plaintiff/respondent. The possession by the respondent of the suit land was an overriding interest over the land that required no noting in the land register.

21. On this point, the respondent relied on the case of **Macharia Mwangi Maina and 87 others vs Davidson Mwangi Kagiri (2014) eKLR** and the case of **Willy Kimutai Kitilit vs Michael Kibet (2018)eKLR** to buttress the doctrine of constructive trust. The respondent also relied on the cases of **Kanyi vs Muthiora (1984) KLR 712, Twalib Hatayan and another vs Said Saggar Ahmed Al-heidy & others (2015) eKLR** and **Mwanjera Gichuka vs Alice Mwangi Gicheha Nairobi CA No. 183 of 1987** to state that there existed a trust arising from the arrangement between the plaintiff and 1st defendant.

22. On the issue as to whether the magistrate erred in law in finding that 1st defendants heir/administrator should transfer parcel 1455 and 1456 to the respondent, it was submitted that even though 1st defendant died, the appellant had admitted to having bought the suit parcels 1455 and 1456 thus acquiring an interest over the subject matter. The cause of action hence survived 2nd defendant and therefore the court was right in making the finding that the 1st defendant's administrator should transfer the land parcels as per the agreement of 29.3.2003.

23. On the issue of the cancellation of title (1456), it was submitted that the green cards to parcels 1453 to 1456 showed that appellant acquired these parcels as gifts thus casting doubts on the validity of acquisition of these parcels, hence the magistrate was right in ordering for the cancellation of the appellants title to land 1456.

24. On the issue of eviction, it was submitted that the appellant did not prove his case on a balance of probability, that respondent bought parcel 1455 before the appellant and that it is respondent who resides on parcels 1455 and 1456. The eviction order would therefore not suffice and this court should uphold the findings of the trial magistrate.

Analysis and determination

25. This being the 1st appellate court, it has the duty to reconsider the evidence, evaluate the same and draw its own conclusion though it

should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance. ***See Selle and another Vs Associated Motor Boat Company Ltd & others (1968) EA 123.***

26. The case for the respondent before the trial court was advanced by plaintiff who testified as PW 1 and he also adopted as his evidence his recorded statement of 30.6.2015. PW 1 averred that on 29.3.2003, he entered into an agreement with Mary Karai (1st defendant) where the latter was to sell to him 0.55 acres to be excised from parcel Kithangari/1455 at a consideration of Kshs.150,000. They also agreed that if the land was not enough, 1st defendant would add him some more land.

27. Respondent took possession of the land and started farming crops and he also fenced the land. The two then went to the land control board where the relevant forms were filled. In 2013, pw1 did a search and established that the land he is currently occupying is registered in the name of the appellant. Upon further inquiry, he learnt that 1st defendant had resold her land on 27.8.2003 through one Nyaga M'Itunga to appellant. Respondent had further stated that before the agreement of 27.3.2003, the agreement between him and 1st defendant had been oral.

28. During cross examination the respondent had stated that 1st defendant died in year 2013. He also said that the agreement had not mentioned parcel 1456 and that what was mentioned was 0.55 acres out of parcel 1455 but the parcels were to be excised from parcel 1255. He did not know about the issuance of title 1456 in the year 2011 and he had not conducted a search as she had trusted the vendor.

29. In re-examination, the respondent averred that he was buying 0.55 acres to be excised from parcel 1255. In support of his case, the respondent had produced the documents in the list dated 30.6.2015 and the one dated 14.10.2015 as plaintiff exhibits 1-6.

30. The case for appellant was equally advanced by himself who testified as DW 1. He adopted his statement dated 9.12.2015 as his evidence. It was his testimony that on 27.8.2003, he entered into a land sale agreement with 1st defendant where the latter was to sell to him 4 parcels namely Abogeta/U-Kithangari/1453, 1454, 1455 and 1456 at a consideration price of Kshs.210,000. All the parcels were dully transferred to him except parcel 1455 because respondent had registered a caution thereon while appellant was working far away. That is when the respondent also invaded his two parcels namely 1455 and 1456.

31. Appellant further stated that they were waiting for the case at Nkubu to be concluded so that 1st defendant could transfer parcel 1455 to him but unfortunately the 1st defendant passed on.

32. It was the case for the appellant in support of his counterclaim that respondent had damaged his boundaries which were between parcels 1455 and 1456 and the trees had also been damaged. That is why he sought orders of eviction and mesne profits.

33. In cross examination, the appellant admitted that he doesn't live on the suit parcels but the respondent started occupying the land in year 2013. The appellant further stated that all the 4 parcels make one acre.

34. In support of his claim, the appellant had produced the documents in his list dated 9.12.2015.

35. I have carefully considered the entire record as well as the submissions of the parties. I will proceed to determine the issues raised by the parties as per the grounds of appeal.

Ground 1: Abatement of the suit.

36. It is not disputed that 1st defendant died sometime in 2013 and she was not substituted. The legal platform on abatement of a suit is to be found in **order 24 of the Civil Procedure Rules,** where it is provided that:

> ***"(1) The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues…….***
>
> ***(4) 1, Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party (****emphasize added****), and shall proceed with the suit.***
>
> ***(4)3, where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant".***

37. The 1st defendant died on 13.8.2013 (see respondents application dated 3.3.2015). No application was made in terms of order 24 rule 4 (3) of the Civil Procedure Rules. As such, the suit against the 1st defendant abated on 13.9.2014.

38. In the case of **Mboya Nzulwa vs Kenya Power & Lighting Co. Ltd (2018) eKLR,** PJ Otieno J. held that:

> ***"An abated suit is non-existent prior to it being revived. For a suit to be revived, an appropriate application must be presented to court and the court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement".***

39. The respondent in his submissions has advanced a claim that vide a notice of motion dated 3.3.2015, he sought orders that since 1st

defendant had died, the cause of action still survived the appellant herein as the latter had acquired interests in the suit parcels. I have had to look for this application of 3.3.2015 in the original file to grasp this argument. The verbatim prayers in that application of 3.3.2015 which was allowed as per the proceedings of 6.5.2015 are as follows:

> **(a) "That this honourable court be pleased to certify that this application be certified urgent and that the same be heard expeditiously!**
>
> **(b) That this honourable court be pleased to grant leave to the applicant to proceed the case against one James Mugo Manyara who was joined to this suit on 10.3.2005 as the plaintiff's case against the defendant has abated by virtue of operation of law.**
>
> **(c) That the parties herein be granted liberal leave to file and or amend pleadings accordingly.**
>
> **(d) The costs be in the cause".**

40. In that application of 3.3.2015, the respondent herein was clearly stating that ***"plaintiff's suit against the said defendant (Mary) had abated by operation of the law".*** What the respondent wanted was to be allowed to proceed with the prosecution of the suit as against the appellant only despite the abatement of the suit as against Mary.

41. The issue of abatement was raised by the appellant in his submissions before the trial court (see page 55 of the record of appeal). When it came to the judgment, the trial magistrate did take note that indeed the vendor of the land died in 2013. However, when it came to the analysis of the issues for determination (see page 90 of the record of appeal) the trial court was mute on this issue.

42. Had the magistrate made an analysis on the issue of abatement, certainly she would not have made a conclusion that the heirs of 1st defendant were to transfer 0.55 acres of land from parcel 1455 and 1456. For there was no claim against such heirs of the estate of 1st defendant.

43. All in all I find that it was an error of law and fact for the magistrate to have failed to make a finding that the case of the respondent against the 1st defendant had abated. On the same breadth, the magistrate erred in law and fact in ordering the heirs of 1st defendant to transfer the suit parcels to the respondent.

Ground 2.

44. There are two issues to be considered in ground no. 2: Whether the agreement between the respondent and 1st defendant was enforceable and whether the trial magistrate erred in invoking the doctrine of constructive trust.

The Agreement of 29.3.2003

45. On the issue of the enforcement of the agreement between respondent and 1st defendant, the court makes reference to the pleadings of the respondent. His claim was against 1st defendant. The court has already pronounced itself on this issue to the effect that the suit against 1st defendant doesn't exist. Thus the issue of enforcing the agreement of 29.3.2003 does not arise.

46. I however find it necessary to consider the ramification of the agreement had the plaintiff sought for the revival of the suit against 1st defendant.

47. I have not managed to see the agreement of 29.3.2003 between respondent and 1st defendant. However, I have no reason to doubt the existence of the same since respondent was even cross examined on the same at length. Throughout his pleading and in his evidence in chief, the respondent claimed that he was buying 0.55 acres which was to be excised from parcel 1455.

48. The land parcel no. 1455 measures 0.107 ha. Which is equivalent to 0.264 acres (0.107 x 2.471). How can it be that the respondent was buying 0.55 acres to be curved out of 0.264 acres! The respondent attempted to cover this anomaly during re-examination when he said that the land he was buying was to be excised from parcel 1255. This argument has also been advanced in respondent's submissions in this appeal. If indeed respondent was buying the land from parcel 1255, why then were the pleadings not amended, yet the matter was in court for many years.

49. Another notable issue is that the title to parcel no. 1455 was obtained on 11.4.2001 just like the other titles to parcels nos. 1453, 1454 and 1456, all in the name of MARY KARAI M'ITONGA. The question which begs for an answer is, "*why did the respondent and 1st defendant refer to excision of the land from parcel 1455 when they were making the agreement of 29.3.2003, yet subdivision of the main title (parcel 1255) had occurred two years earlier in year 2001?* The logical conclusion to make is that the agreement between the respondent and 1st defendant itself was not enforceable for want of proper particulars. There is also no evidence to show that respondent was shown the extent of the portion of land he was buying.

50. Further, it appears that the respondent did not avail evidence of consent of the land control board and hence the agreement was void as per section 6 of the land control act. On this point, I conclude that the agreement between the respondent and 1st defendant was vague and was also frustrated by the failure to obtain the requisite consent of land control board.

Constructive trust.

51. The respondent contends that since he was given possession of the suit land, a constructive trust was created in his favour as against the appellant. I am in agreement with the legal proposition expounded in the case law of **Mwangi Macharia Maina (supra) and Willy Kimutut** (supra) cited by the respondent that ***"Whether the court will apply the doctrine of constructive trust and proprietary estoppel to a contract rendered void by lack of the consent of land control board will largely depend on the circumstances of each particular case".***

52. The doctrine of constructive trust and proprietary estoppel has to be looked at within the well-known legal parameters as appertaining to the burden of proof and pleadings. In this case, the respondent never amended his pleadings after agitating to have the appellant on board. Indeed in the application of 3.3.2015 which respondent considers to be the gateway for the cause of action against 1st defendant to transmit to the appellant, he had sought for leave to amend the pleadings accordingly. However, this was not done. The respondent's pleadings still remains his plaint dated 13.5.2005 and the reply to defence and defence to the counter claim dated 8.6.2015. The claim of the respondent in the plaint is directed against the 1st defendant, while his defence is but a general denial against appellants counter claim.

53. In the case of **Caltex oil (Kenya) Limited vs Rana Limited (2016) eKLR**, the court of appeal had this to say about pleadings:

> ***"They have the potential of informing each party what they expect in the trial before the court. If a party wishes the court to determine or grant a prayer, it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders".***

54. In this case, the respondent simply made an application to enjoin the appellant which prayer was allowed on 19.2.2013. Then the respondent made another application to proceed with the case as against the appellant which prayer was allowed by consent. It was still incumbent upon the respondent to frame his case as against the appellant to enable the latter to respond or rebut the issues accordingly. It was therefore erroneous for the trial magistrate to invoke the doctrine of constructive trust when the respondent's claim against the appellant was not anchored in the pleadings.

Ground 3: Cancellation of title.

55. The trial magistrate had ordered that title of parcel 1456 be cancelled to facilitate the excision of the 0.55 acres. As already indicated herein, no claim was made against the appellant in the pleadings to warrant the issuance of such an order. Further, the pleadings of the respondent did not make reference to parcel 1456.

56. The trial magistrate had on page 95 of the record of appeal (the judgment) questioned the manner in which the appellant had obtained the titles to the suit parcels 1453 – 1456 averring that:

> ***"It is interesting for the green cards he produces in court as exhibits clearly show that they were gifts other than parcel no. 1455. It therefore raises doubts as to how he got the parcels of land registered in his own names conveniently in the year 2010…."***

57. Perhaps the trial magistrate took cue from the submissions of the respondent before the lower court where it was contended that appellant was not a bonafide purchaser. For the issue of validity of the titles of appellant to be raised during the submissions and judgment, the said issues must have come up in the pleadings and during the trial.

58. **Section 107 of the Evidence Act** provides that:

> ***"(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".***

While section 108 thereof provides that:

> ***"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 provides that:

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

59. The trial magistrate was shifting the burden of proof upon the appellant when she purported to challenge the manner in which the appellant acquired his titles. See case of ***Jeniffer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR, BWK vs E & another (2017) eKLR.***

60. In the case of **Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Muke and 3 others (2014) eKLR**, the court cited the **Nigeria Supreme Court case of Adetoun Oladeji (NIG) LTD vs Nigeria Breweries PLC S.C 91/2002** where it was stated that:

> ***"It is now a very trite principle of law that parties are bound by their pleadings and that 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 the pleadings goes to issue and must be disregarded".*** The Kenyan court went on to state that: ***"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".***

61. How was the appellant to deal with the situation that his title to parcel 1456 was up for cancellation when the pleadings and evidence did not support a move to have such a cancellation? My conclusion on this ground of appeal is that the trial magistrate erred in arriving at this conclusion to have the title of parcel 1456 canceled.

Ground 4: Eviction

62. The appellant had in his counterclaim given an account of how he bought all the four parcels of land 1453 – 1456 from 1st defendant but the title to 1455 was not transferred to him because the respondent had lodged a caution on this land. It also emerged that the respondent had not only occupied parcel 1455 but even 1456 and that is why the appellant had sought for eviction orders and mesne profits. The legal position is that the land parcel no. 1456 belongs to the appellant and his title has not been challenged in accordance with the law. In the circumstances, he is entitled to the orders of eviction.

63. However, I desist from awarding any mesne profits in view of the fact that it is not clear as to when respondent went to that land, and that the appellant doesn't appear to have told the respondent to leave the land.

Ground 5

64. Is the judgment of the trial magistrate unlawful and against the weight of the evidence? Certainly! This is because the trial magistrate failed to consider that the pleadings of the respondent were never amended so as to state the claim against the 2nd defendant/appellant.

Final orders:

65. In the final analysis, I do find that this appeal is merited. The same is allowed whereby the judgment of the trial magistrate in Nkubu PMCC No. 57/2005 is hereby set aside and substituted with the following orders:

> **1) The respondent's/plaintiff's case before the Nkubu court PMCC 57/2005 is hereby dismissed.**
>
> **2) The appellant's counter claim is partially allowed where prayer (a) and (b) on eviction and permanent injunction are allowed as against the respondent.**
>
> **3) The court grants the respondent a period of 60 days to vacate the suit premises.**
>
> **4) The respondent is to bear the costs of this appeal and costs in Nkubu PMCC No. 57 of 2005.**

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE