



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL NO.110 OF 2011

JAMES NDIRANGU NG'ANG'A.....APPELLANT

VERSUS

KAHUBHA MERUBHA VANGELA.....RESPONDENT

JUDGEMENT

The background

[1] This is an appeal from the decision in Bungoma Chief Magistrate's Court Civil Suit No.602 of 2008. The Plaintiff in that suit (now respondent in this appeal) filed a suit and alleged that the defendant (now appellant in this appeal) had without any lawful permission from the plaintiff erected a fence upon the plaintiff's parcel of land No. Webuye Block 1/793, a commercial leasehold in the then County Council of Bungoma. He demanded that the defendant do remove a fence erected by the defendant and that the defendant also removes construction materials dumped on the site. The plaintiff prayed for a permanent order of injunction against the defendant by himself, his workers, servants and whomsoever restraining them from entering unto and putting any structures thereof in Title Webuye Block 1/793. Costs and interest of the suit.

[2] The defendant filed a statement of defence and counterclaim. He denied the claim of the plaintiff. He stated in his defence that title No. Webuye Block 1/793 does not exist and or the same was fraudulently obtained.

The defendant raised the issue that the trial Court lacked jurisdiction in that the suit was in excess of Kshs.500,000 and that under Section 159 of the Registered Land Act (now repealed) the Court lacked jurisdiction to hear and determine the suit. He therefore argued that the suit was incompetent and an abuse of the process of the Court. He averred, that he had built a commercial building on LR No. Ndivisi/Muchi/6924 and Ndivisi/Muchi/6925 and not in LR No. Webuye/Block 1/793. He averred that his land was valued over Kshs. 1 million.

He counterclaimed that he is the owner of Ndivisi/Muchi/6924 and 6925 where he was building a banking facility for Equity Bank Webuye Branch and had spent in excess of Kshs.3,000,000/- and had building materials on site which were going to waste due to heavy rains and vandalism. He prayed for judgement against the plaintiff for Kshs.3,000,000/-, costs of the suit for counterclaim, interest and costs.

[3] This case was heard in the preliminary stages by Mr. F. Kyambia Resident Magistrate who heard an application for contempt of Court under order XXXIX rule 2A (2) of Civil Procedure rules. Later on 4/12/2008 the case was transferred to the Chief Magistrate R. Nyakundi (as he then was) who on 19/3/2009 heard PW1 Henry Indala, on 8/4/2009 heard PW2 Kiogora Mbugwa, on 22/6/2009 heard the evidence of PW3 John Morungo and on 16/2/2009, heard the evidence of PW4 Hezekieli Ochami

Ngacheyi, DW1 Jennifer Tanimwet and PW5 Ndurumo Wagakoi, then the case came up before M. Onditi PM, J.K. Ng'arng'ar SRM and then to F. Kyambia RM for hearing of an application dated 23/12/2009 for contempt, he heard the application on 21/1/2010, 28/1/2010 and on 11/2/2010 he fined the defendant Kshs.10,000 for contempt of Court in default of payment of the fine to an imprisoned for four months. The file was then transferred to the Chief Magistrate Mr. R. Nyakundi (as he then was) for further orders and hearing after various appearances before J.K. Ng'arng'ar PM and F. Kyambia Resident Magistrate. On 26/7/2010 Mr. Nyakundi the then CM heard the evidence of PW6 Hezekiah Ochomi and on 15/10/2010, heard an objection against Mr. Ocharo advocate appearing for the defendant, and subsequently he sustained that objection and then heard the evidence of the plaintiff and on 15/11/2010 DW1's evidence. The evidence of DW2 was heard on 16/11/2010 and that of DW3. That marked the evidence of the formal witnesses. On 14/12/2010 Mr. R. Nyakundi then CM, disqualified himself and UP Kidula CM then came on the record on 21/12/2010. The CM mentioned the matter once more on 25/1/2011. UP Kidula Chief Magistrate was the one who wrote the judgement now appealed from. She never heard a single witness in the Court room. The only one thing the said Chief Magistrate did was to visit the site with lawyers and a few technical witnesses.

The appeal

[4] The appellant herein filed grounds of Appeal on 26th October 2011. The appellant's complaint was that the trial Magistrate erred in law in failing to analyze the evidence tendered by various witnesses in this matter and relied on contradictory evidence of the District Surveyor and the site visit disregarding crucial evidence and lack of validity of the plaintiff's title.

The appellant also appeals and maintains that the trial Magistrate failed to consider the proprietary manner in which the respondent acquired the leasehold title which evidence if considered could have rendered his claim untenable. Finally, that the trial Magistrate erred in law in treating the matter before her as a boundary dispute whereas the crux of the suit involved the validity of the leasehold title held by the respondent and finally that she failed to frame the issues for determination and failed to reach a finding on each of the issues.

The appellant filed a supplementary record of Appeal pursuant to leave granted on 31/3/2014. In his submissions the appellant further argued that the learned trial Magistrate erred in not finding that she did not have jurisdiction to hear the matter by virtue of section 159 of Registered Land Act (now repealed). That Chief Magistrate erred in ignoring all evidence in support of the appellant's title, that she ignored the clear evidence against the validity the respondents title Webuye/Block 1/793 in that it had been rejected as a valid document by Webuye Municipal Council and the then County Council of Bungoma and that the size of the plaintiff's title which was 1/4 (or 0.0996 hectares) yet the land on the ground is ½ an acre (or 0.2 hectares) corresponding to plaintiff's titles. Further that the trial Magistrate erred in ignoring all the evidence of PW1, PW2, PW3, PW4 and DW2 the investigating Officer and in not finding that PW5 gave false evidence that contradicted the written record of the Council and hence he was an unreliable witness. He prayed for the appeal to be allowed and an order dismissing the plaintiff's suit in the lower Court with costs and allowing the counterclaim and costs and/or any other Relief the Court deems fit to grant be issued.

[5] The respondent opposed the appeal. He argued that the relief sought in the case appealed from was an injunction. He argued that the appellant was seeking in the Court for loss of Kshs.3 million and he counterclaimed for the said Kshs.3 million. He argued that the issue was, which parcel between parcels Webuye Block 1/793 and Ndivisi/Muchi/6924 and 6925 fell on the area fenced by the defendant. He admitted that the issues were not framed in the judgement of the lower Court but contended that order 21 does not say that they should be framed in a particular way. He argued that during the Court's visit with the Lawyers to the site of the suit plots, there was no dispute as to the identification of the plots. He argued that the appellant disobeyed a Court order restraining him from interfering with the suit premises and that therefore, he deserves no mercy from the Court. That he was fined Kshs.10,000 for the same. He argued that the history of the case showed the plaintiff/respondent obtained the land way before the plaintiff purchased the same and that the appellant never called Surveyors to point out his parcels before the respondent did. The respondent argued that there were no particulars availed to the Court at all. He

stated that the counterclaim was never proved at all. He urged the Court to find that the appeal was not merited at all. That there was no reason for a retrial and the appeal should be dismissed with costs.

[6] In reply, Counsel for appellant took issue with the fact that, the Court that wrote the judgement did not evaluate the evidence. He said that, the Court's statement that, the witnesses contradicted themselves, is not an evaluation of evidence. That framing of issues is mandatory under rule 15 of the Civil Procedure rules. He argued that the issue of fraud and trust raised in the pleadings should have been dealt with by the Court. That it was the duty of the Court to evaluate the evidence adduced. The appellant took issue with the Magistrates reliance on RIM while giving no attention to PID on which plots 6924 and 6925 were recognized as freeholds. It was argued that there was no rationale of preferring the RIM as against PID. That no beacons were identified on the said plots on the site.

[7] The issues were never framed at all in this suit. What were the issues that could have been framed before the Court? The issues could have flown from the pleadings as follows;

(a) *the existence or not of parcel No. Webuye/Block 1/793*

(b) *if the land existed, was its creation fraudulent?*

(c) *did the Court have jurisdiction in view of section 159 of the Registered Land Act?*

(d) *did Ndivisi/Muchi/6924 and Ndivisi/Muchi/6925 exist? if so, where were they situated?*

(e) *on what piece of land had the defendant constructed his fence and his building? Was its value in excess of Kshs.1,000,000/-?*

(f) *did the defendant / appellant have building materials on site? what was the cost of the same plus the costs and transport? was it Kshs.3,000,000 as alleged in the counterclaim?*

(g) *What was the evidence adduced in Court?*

(h) *who was entitled to costs?*

[8] The judgement of UP Kidula CM was not made out of any issues framed by the parties. There were no issues framed by the Court under rule 15 of the Civil Procedure rules. The judgement does not comply with order 21 rule 4 of the Civil Procedure Rules which states as follows;

4. Judgements in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.

How is the Court as an appellate Court to deal with such a situation?

The principles upon which Courts act on an appeal are well set out in the Court of Appeal case of *Selle V Assoli Motor Boat Co.(1968) E.A. 124*

Which stated;

"... this Court must consider the evidence, evaluate it itself and draw its own conclusions though it must 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 necessarily to follow the trial judge's finding of fact if it appears either that he clearly failed on some point to take account of particular circumstance or probabilities materially to estimate the evidence or if the impression based on deameanour of a witness is inconsistent with the evidence in the case generally"

R. Nyakundi Chief Magistrate (as he then was) the trial Magistrate in this case was not the one who wrote the judgement, UP Kidula, C.M. who wrote the judgement just visited the site where the disputed plots

are situated. The parties to the suit did not frame the issues. U.P. Kidula C.M. never saw or heard most of the witnesses. The Chief Magistrate wrote the judgement and never framed the issues. Order 15 of the Civil procedure rules obliges the Court to frame the issues from allegations in the pleadings. The trial Magistrate's judgement did not comply with order 21 rule 4 of the Civil Procedure Rules which is couched on mandatory terms. Since all the evidence is readily available on record I shall therefore reevaluate the same and arrive at my own conclusions.

Evaluation of evidence before the Lower Court

[9] PW1 Henry Indara a Land administration Officer Bungoma told the Court that he prepared a report on Plot Block 1/793. He said his findings were that he checked the District Land Registry and did not come across the file for Plot No. Block 1 /793 for the plaintiff. That he consulted the Commissioner of lands and came across information that the plot was acquired earlier as Plot 1401 under ownership of Ashon Wanyonyi Shikoli and Luke Makokha. It was later subdivided into plots No.6920 and 6921. That parcel No.6921 was transferred to the defendant who subdivided it into parcels 6924 and 6925 respectively measuring 0.10 hectares and titles issued as leaseholds. The records for Block 1/793 in the Municipal Council of Webuye were missing. They were also missing in Nairobi but in the Bungoma lands Registry the records were there. The witness explained about plot 1401 and said plot No. Block 1/793 was not existing. That it was not known how the plaintiff acquired the lease of Block 1/793. An allotment letter was issued by Commissioner of lands to Wige Investments. He said he went to Bungoma Land Registry and it was not known how the land was transferred as there was no consent to transfer the same from the Commissioner of lands.

[10] PW2 Syrus Kiogora told the Court that he is a Senior Land administration Officer from the Commissioner of Lands and in-charge of Court matters. He was summoned to Court to produce file reference 1806/18 in respect of title Webuye block 1/793 in the name of Wige Investment Ltd. He said the letter of allotment was a photocopy instead of a carbon copy as is used in practice. It was not certified. The plan attached to the photocopy has no reference and was not approved by the Commissioner of Lands. The Part Development Plans (PDP) did not tally with their records. There was no document of transfer. It did not have the Commissioner of Lands consent and it did not meet the seven check list required by the Commissioner for lands namely;

(a) The application for land allocation

(b) The preparation of Part Development Plan (P.D.P)

(c) The details to be approved by department of physical planning

(d) The valuation

(e) The letter of offer preparation

(f) The allotment letter original and carbon copy to be used to prepare the file

(g) The giving of the file number

He said the signature on the file may not be genuine. He said the P.D.P. on the file was not genuine. He said he visited the ground to verify the location. The measurement on the disputed area showed $\frac{1}{2}$ an acre while the size on that title Block 1/793 show $\frac{1}{4}$ of an acre. He said he visited the Land's Office Bungoma. The owners of the land in dispute are Makokha Wanyonyi. He said Block 1/793 touches a portion of 1401.

PW3 John Mosungu said he was a clerk to Municipal Council Webuye he said his duties includes administration of Local authority Assets land and human resources Management and he also keeps records of the Authority. He produced the valuation role of the Municipality of Webuye which was prepared by professional valuers from Nairobi and which was gazetted. He said the name of the plaintiff

has been entered by pencil. The rest are typed. The register was produced as DMFI 3. He said the plot is not rateable under the valuation role from 1992 to-date.

[11] PW4 Hexekieli Ochami Ngacheyi gave evidence as the District Surveyor Bungoma District. He prepared the beacon certificate on 12/7/2006 for LR Webuye Municipality Block 1/793 registered in the name of the **Kanubha Vhegela** the plaintiff. He said he visited the land before issuing the certificate. He said no survey fees was paid in his office and he had no survey report when he came to Court. He said there was a permanent house in a state of disrepair inside the parcel owned by Bungoma County Council. He said that the lessor would be Bungoma County Council. On cross examination, he said that if there is no survey fees the certificate of beacons would not be valid. He said he was instructed by the plaintiff. He said the map he used was identified to him by Mr. Umwoyo and that the same was forwarded to Nairobi for authentication. That he consulted Webuye County Council about the lease. That the town clerk of the Municipality confirmed that the area was for survey. He said he was not aware of an existing Freehold on the same parcel of land.

[12] DW1 Jennifer Tanimwet said that she is a Senior Cartographer with the Department of Survey. That she deals with maps. She said she had a map of Ndivisi/Muchi Webuye Town. She produced DM FI 5 on perusal of the map she said Ndivisi/Muchi/6924 and 6925 exist on the map. She said that they are freehold. She said she was the custodian of all Survey maps in Western Kenya. She said the map she had showed Government land and freehold land.

[13] PW5 Ndurumo Wagakoi said he was a Clerk to the County Council of Bungoma. He produced a letter dated 22/9/2008. The letter was regarding ownership of Ndivisi/Muchi/1401 and 1399. It was about a consent to transfer the said lands from the County Council of Bungoma to Ashon Wanyonyi and Luka Wanyonyi. The letter was about Ndivisi/Muchi/401. The land Ndivisi/Muchi/401 was under the name of maize and produce Board. This was a consent as result of Civil Case No.452/2006 Mula Makokha Wanyonyi and Ashon Wanyonyi Vs. Bungoma County Council. He said he was not aware that the consent has ever been set aside.

[14] PW6 Hezekiah Ochomi gave evidence that he is a district Surveyor of the Greater Bungoma District. He said he was directed to visit the land in dispute reference No Ndivisi/Muchi 6924 and 6925 and Webuye Municipality Block 1/793. He said he was to visit with a private surveyor appointed by the second defendant. He said he carried the exercise on 10/11/2009. He said he filed a report that there is no overlap on Webuye Municipality Block 1/793 and Ndivisi/Muchi 6924 and 1625 which are freeholds. He said that Webuye Municipality 793 lies to the Northern East end of Webuye Railway Station. He said that they are not in the same place. He annexed a sketch plan. He said plots No.6924 and 6925 are fenced with iron sheets and that there is a wall fencing the entire portion and it has been secured. He produced his report as exhibit 15(a)(b).

[15] PW4 Kanuba Merubha Vaghela the plaintiff gave evidence and said that he is the sole owner of leasehold No. Block 1/1793. He said that he purchased it from Wige investments. He said the plot was next to a railway line. He said that he confirmed the ownership with Wige Investments Ltd through a letter of allotment. He said that the survey was confirmed by the Bungoma survey Office. He said he had a beacon certificate. He said the land was transferred to him legally. He denied occasioning any loss to the defendant. He admitted on cross examination that he had no consent from the Commissioner of Lands office. He said the consent he produced is from the District Officer's office. He said the owners of the plot Wige Investment Ltd had no lease. They only had a letter of allotment and receipts from the land office. He admitted that he had not constructed on the alleged plot. He said that the owners of Plot No.6921 are the ones who stopped him from fencing his plots. He admitted that there was a complaint in the Bungoma District Criminal Office of his interference with Plot No. Ndivisi/Muchi 6921 DMFI 2. He also admitted that the title was in the name Luke Wanyonyi and Hashon Wanyonyi Shikolia. That its measurement was 0.20 hectares. That the green card (DMF 6) for parcel Webuye/Municipality/1/793 was 0.966 hectares. He said the parcel No.1401 was in the name of Bungoma County Council as at 2nd October 1970. On 29/11/2006, the title was closed on subdivision and it gave effect to title 6920 and 6921. The witness said the Green card does not show the origin of Webuye Block 1/793.

[16] DW1 James Ndirangu Nganga (the appellant) gave evidence and told the Court that he lives in Busia and wanted to relocate to Webuye. He needed land to build a business premises. He was introduced to Wanyonyi Sikolia and Luka Wanyonyi and was shown land parcel Ndivisi/Muchi/1401. He said he checked the green card, an agreement was made and he purchased the same for KShs.1.5 million which he paid in full. The land had to be subdivided to give him his portion. It was therefore subdivided into Ndivisi/Muchi 6921 0.2 hectares and Ndivisi/Muchi 6920 of 2.37 hectares. He became owner of Ndivisi/Muchi/6921 of 0.2 hectares. He later subdivided the said 6921 into two parcels into Ndivisi/Muchi 6924 and 1625 produced green cards exhibit D12. He said he fenced it off with iron sheets and started bringing building materials cement, ballast, wire mesh and steel bars. He started construction until he was served with an injunction. He said the clerk of Bungoma County Council had written a letter to say that there were no records of parcel Webuye Block 1/793. He said he was not occupying the plaintiff's land. He asked for the plaintiff suit to be dismissed with costs to him.

DW2 C.I.P. Julius Mbathi who investigated the titles in dispute gave evidence of how he investigated the suit lands and how he summoned and recorded statement from all involved. He also said that he investigated the directors of Wige Investments. He found out that it was Wilfred Ndogo and wife Rebecca. He said Mr. Wilfred Ndogo was a District Commissioner of Lands Activation Committee. He dispatched an Officer to Nairobi to get the particulars of directors. The directors were not traced. He said that he formed the opinion that the lease title was not properly acquired. That the allocation of land to Wige Investments was on private land.

[17] DW3 George Opondo Oguto was the Land Registrar in Bungoma. He was summoned to produce documents for Ndivisi/Muchi/1401, 6920, 6921, 6924 and 6925 and the green card for Webuye /Municipality Block 1/793 which he said was belonging to the Government. He explained that Ndivisi/Muchi/1401 the initial owner was Bungoma County Council since 1970. It was reserved for use for maize and produce board (Bronderic Falls) as a Public utility. It was also under Bungoma County Council as a trustee.

The title was subject to a civil suit No.425/2006 before the Senior Principal Magistrate Bungoma. The Court nullified the County Council's ownership and Trusteeship and gave it to the original owners Luka Shikolia Wanyonyi and Ashon Sikoli Wanyonyi. Court directed the Land Registrar to make changes in the register. The land was remitted back on 29/11/2006. The land was then sub-divided into 6920 and 6921. Parcel No.6921 was registered in the name of the defendant James Ndirangu. The Land Registrar said he was supplied with the transfer, consent form and mutations for the transfers and statutory payments.

He said the two titles 6924 and 6925 are clean titles and the land certificate is also clean for any transactions.

Analysis

[18] Did Plot No. Block 1/793 exist? Was its creation fraudulent as alleged? The plaintiff stated in his pleadings that he bought the said plot from Wige Investments Ltd. That Wige Investments Ltd had only a letter of allotment. He made an agreement for sale through Ocharo Kibera advocate and the land was transferred to him through Bungoma Land Office. He confirmed that he had no consent to transfer from the Commissioner of lands. A beacon certificate was issued to him by a surveyor from the District office Bungoma.

[19] PW1 Mr. Henry Indara an administrative Officer at Bungoma testified that he did not come across the file for plot No. Block 1/793. On cross examination he confirmed that the same could not be traced at the Webuye Municipal Council.

PW2 Cyrus Kiogora land Administrative Officer from the office of the Commissioner of lands on behalf of the commissioner testified that, parcel No. Block 1/793 was in the name of Wige Investments Ltd. Not the respondents. He did not have a certified copy of the letter of allotment to Wige Investments Ltd in his file as was the practice. That the plan attached to the photocopy has no reference number. He explained

the procedure for obtaining a letter of allotment. He said the signature on the document may not be genuine. He said that the Part Development Plan (PDP) in the file is not genuine. That he counter checked with the Department of Physical Planning and could not trace it.

[20] PW3 John Musingo Clerk to the then Municipal Council of Webuye said that he had checked the archives and the archives did not indicate the allocation of Block 1/793. He further said that in Allocation of plots, there must be a Council resolution supported by a minute. That the documents were missing for Plot No. Block 1/793. The witness explained the procedure in preparing a valuation role for plots. He said that after gazettelement no alteration can be done. He noted that the plaintiff's name had been entered by pencil whilst the others were typed.

[21] C.I.P. Julius Mbathi DW2 who did the investigations of the subject matter said the Directors of Wige Investments Ltd, the original allottee of Block 1/793 could not be traced. He said that after investigation that Plot No. Block 1/793 was not properly acquired.

The District Surveyor Bungoma confirmed that whilst on site the beacons for Plot No. Block 1/793 could not be identified. The documents produced for plot No. Block 1/793 showed the size of the plot to be $\frac{1}{4}$ of an acre.

All the above evidence was not at all considered by the Chief Magistrate who wrote the judgement. The evidence clearly points to the fact that Miss Wige Investments did not follow the proper procedure to acquire Plot Block 1/793. The same was clearly shown to be illegally obtained by them. If the plot was illegally obtained what proprietary interests could the said Wige Investments Ltd pass on to the plaintiffs? They could not pass better interests than they themselves had.

[22] Did Ndivisi/Muchi 6924 and Ndivisi/Muchi/6925 exist? If so, where were they situated?

DW1 Jenifer Tanimwet a Senior cartographer with the Department of Survey testified and relying on map DMF5 said Ndivisi/Muchi 6924 and 6925 exists. She said that she is the custodian of all survey maps in Western Kenya. She referred to PMFI 4 relied on by the plaintiff/appellant and noted that there was no rubber stamp or mark of authentication. She clarified that D. Exhibit 4 was released on 3/11/08 before parcels 6924 and 6925 had been entered on the map. She clarified that P.D.P. are for freeholds but leases like Block 1/397, the cadastral maps are in blocks and are to be found in Nairobi.

[23] PW6 Hezekiah Ochomi, the District Surveyor of the Greater Bungoma testified that parcel 6924 and 6925 belong to the defendant/appellant. He confirmed that the said plots are clean.

Documentary evidence in Exhibit 15(a) the District Surveyors report clearly indicate that there is no overlap and plot Nos. 6924 and 6925 exists on the ground.

D. Exhibit 8 the District Land Registrar's report gives the full history of LR No.6924 and 6925 (on pages 238B and 238C of the record of appeal). D. Exhibit 2 the green card for parcel No.6921 which gave rise to 6924 and 6925 clearly shows the size of the land to be 0.20 hectares while D. Exhibit 8 shows the green card for the original parcel No.1401 from which parcel 6921 and subsequent parcels 6924 and 6925 came from. Page 13 of the Supplementary Record D. Exhibit 9 is a Court order that caused the original parcel No.1401 to be transferred to Ashon Wanyonyi Sikolia and Luka Makokha Wanyonyi the plaintiffs in Bungoma Senior Principal Magistrate's Court Civil Suit No.425 of 2006.

The said persons sold a subdivision parcel 1401 to the defendant/appellant herein. The sale agreement of purchase of the said subdivision was produced as D. Exhibit 10 and the mutation form for 1401 were produced as D. Exhibit 11.

From the records produced in the trial Court D. Exhibit 6 the white card for Block 1/793 shows that the parcel is 0.0996 acres which is approximately $\frac{1}{4}$ of an acre. The disputed plot is 0.2 hectares which is $\frac{1}{2}$ an acre. The disputed plot therefore cannot be the plot the plaintiff/respondent bought.

It is therefore clear that when the respondent put a fence on the plots 6924 and 6925 and put building materials, he was doing so on his own plots.

[24] Was the Court obliged to make a finding on whether it had jurisdiction?

This issue was raised from the inception of the Defence. In paragraph 4 and 5 of the statement of defence the defendant stated:

4. *The defendant avers that the value of this suit is in excess of Kshs.500,000/- and in view of the provisions of section 159 of the Registered Land Act this honourable Court is not seized of the Requisite jurisdiction to determine this suit.*

5. *That this suit is incompetent and an abuse of the Court process of this honourable Court and in view of paragraph 4 above the defendant shall raise a preliminary objection to this suit at appropriate time to have the same struck out.*

While it is conceded by the appellant that the Chief Magistrate who wrote the judgement was not the trial Magistrate and therefore could not deal with the issue during the hearing, she should have framed the issues from the pleadings and in doing so, she would have noticed that jurisdiction was an issue therein. She would have therefore, been obliged to make a finding on jurisdiction of the Court. Writing a judgement without addressing that issue made her to fall into error. The jurisdiction in question was purely a monetary jurisdiction. Section 159 of the RLA (now repealed) provides as follows;

“Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate’s Court, or, where the disputes comes within the provision of section 3(1) of the Land Disputes Tribunal Act in accordance with that Act”.

The chief Magistrate should in my view, have asked the parties to supply to her with the valuation(s) of the disputed plots. She would therefore have come to a finding as to whether or not she had jurisdiction in the matter depending on the value(s) presented to her. It is at the point she went to the scene and saw, the size of the plots, the building erected therein, that she would have downed her tools to await the valuation of the subject matters of the suit. In the case *MV Lillian S[1989]KLR2* the Court held that, a question of jurisdiction raised by a party or the Court on its own motion must be decided forthwith on an evidence before the Court. She erred in not making any finding on jurisdiction. The Chief Magistrate who wrote this judgement also erred in not framing the issues. In the case of *Galaxy Paints Co. Ltd V Faloon Guards Ltd (2000) & EA 385*, the Court of appeal held that the issues for determination in a suit generally flowed from the pleadings and the trial Court can only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for Court’s determination.

[25] There is no doubt in my mind that the Magistrate who wrote this judgement did not at all consider the ample evidence on record. She should have done so, particularly when she did not hear most of the witnesses who gave evidence before the trial Magistrates who heard the case before her. She fell into error when she also never considered the issue of jurisdiction which was raised in the pleadings. The evidence clearly shows the matter may have exceeded her jurisdiction. She failed to frame the issues as she was obliged to do under order 15 of the Civil Procedure Rules.

The learned Magistrate reliance **only** on the site visit made her fall in error in not considering the validity of the titles for which she had gone to visit on the ground. Her findings and accepting one side’s version against the other were not at all supported by the ample evidence on record.

The appellant claim that the Magistrate who wrote the judgement treated the issues at hand as a boundary dispute have good foundation. The learned Magistrate’s judgement did not comply with the mandatory

provisions of order 21 rule 4 of the Civil Procedure Rules on how judgements should be written. The failure to do so was a miscarriage of justice. Had she done so, she would most certainly have come to a different conclusion and dismiss the suit in view of the ample evidence on record mitigating against the plaintiff/respondent's claim in his suit.

The Orders

1. This appeal is allowed to the extent that the respondent's suit in the lower Court is dismissed and the appellants counterclaim is allowed in terms of prayers (1).
2. There was no proof of the Kshs.3,000,000 cost of materials and transport as prayed in prayer 2 of the counterclaim and the same are not granted.
3. The appellant shall have the costs of the case in the Lower Court and costs of this appeal with interests from filing of the suit.

It is so ordered.

DATED at BUNGOMA this 2nd day of December, 2015

S.N. MUKUNYA

JUDGE