



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL CASE NO. 11 OF 2019

ELIJAH NGUGI NJOROGE.....APPELLANT

VERSUS

**IRENE WAMUYU GACHERU(Administrator of the Estate
of Josephat Gacheru Mwangi).....1ST RESPONDENT**

GEOFFREY MUNGAI KARANJA.....2ND RESPONDENT

(Being an Appeal against the whole of the Judgment and order of Hon. M.W Wanjala Senior Resident Magistrate, Thika on 22nd January 2019)

IN

IN THE CHIEF MAGISTRATES COURT AT THIKA

CIVIL SUIT NO. 720 OF 2013

JOSEPHAT GACHERU MWANGI.....1ST PLAINTIFF

GEOFFEREY MUNGAI KARANJA...2ND PLAINTIFF

VERSUS

ELIJAH NGUGI NJOROGE.....1ST DEFENDANT

GITHUNGURI CONSTITUENCY

RANCHING COMPANY LTD.....2ND DEFENDANT

JUDGMENT

The Appellant herein **Elijah Ngugi Njoro**ge was the Defendant in **Thika CMCC No. 720 of 2013**. The Respondents were the Plaintiffs in the above stated suit. The Plaintiffs (Respondents) had via a Further Amended Plaintiff dated **29th October 2018**, sought for the following orders against the Defendants;-

- a. A Declaration that the 1st Plaintiff is the legitimate and the legal owner of land parcel **No. Ruiru/Kiu Block 2/3857**.
- b. An order of rectification / cancellation of abstract of title in respect of land parcel **Ruiru/Kiu Block 2/3857** into the names of the 1st Plaintiff.
- c. A permanent Injunction restraining the Defendants by themselves and/or employees, servants and /or agents from selling, disposing and or in any other manner whatsoever interfering with the Plaintiffs ownership of land parcel number **Ruiru/Kiu Block 2/3857**.

d. Costs and interests of the suit and interest thereon at Court.

e. Any other and/ or further relief as the Honourable Court may deem just and fit to grant.

In their statement of Claim, the Plaintiffs(Respondents) averred that the 1st Defendant(Appellant) is the registered owner of the suit property which registration was done in a secretly, fraudulent and dubious manner. That the 2nd Plaintiff (2ND Respondent) is a member of **Githunguri Constituency Ranching Company Limited** dating **1980**, when he was allocated the suit property by the Company. That he was in possession of the same since the time of allocation, to the time of sale to the 1st Plaintiff (1st Respondent) though the plot was not developed. That on **13th January 2012**, the 1st and 2nd Plaintiffs (Respondents) entered into a sale agreement of the suit property for a consideration of **Kshs. 350,000/=**. That the 1st Plaintiff (1st Respondent) duly paid all the requisite fees to the Company offices and was issued with a clearance certificate from the said offices and a bonafide official signed the transfer form to effect transfer into the names of 1st Plaintiff (1st Respondent) As per the Company offices, the land was not yet registered at the Lands office. Further that upon lodging the duly signed transfer forms, the 1st Plaintiff(1st Respondent) learnt that there was a title deed already issued in the name of the 1st Defendant (Appellant) leading the Plaintiffs(Respondents) to lodge a caution.

It was discovered that the 1st Defendant (Appellant) was never a member of the said Company as per their records and he was not able to explain how the title document came about. It was averred that the Defendants actions were fraudulent for reasons that he purported to be a shareholder of the Company and hence an allottee of the suit land whilst he was not, presenting forged documents to the Thika Lands Registry and acquiring a title in respect of the said land.

The suit was contested and the Defendant (Appellant) filed a statement of Defence and Counter Claim dated **17th October 2013**. In his statement of Defence, the Defendant denied all the allegations made in the Complaint and admitted that he was the registered owner. He contended that the 2nd Plaintiff (2nd Respondent) was not an allottee of the suit land and averred that he did not have to be a member of the Company to be a legal owner of the suit property. That he was a bonafide purchaser for value from **Mary Wanjiku Kiarie**, without notice of any adverse claim on the suit land. That there was no reason for him to hand over vacant possession. He urged the Court to dismiss the Plaintiff's suit.

In his Counter claim the Defendant(Appellant) sought for orders that;

a. A permanent Injunction against the Plaintiff, their agents, servants, employees, relatives, family members and or anybody else claiming through and or with them from destroying beacons, trespassing, charging, disposing off, wasting, alienating and or in any manner interfering with land parcel No. Ruiru/kiu/ Block 2/3857.

b. The land Registrar Thika be and is hereby ordered to remove the caution lodged by the 1st Plaintiff, Josephat Gacheru Mwangi on land parcel No. Ruiru/kiu Block 2/3857 forthwith.

c. Costs and interest of the suit and Counter claim.

d. Any other and or such further relief as the Honourable Court may deem fair and just.

The Defendant (Appellant) reiterated the contents of the Defence and averred that **Mary Wanjiku Kiarie** offered to sell the suit property to him and he was given a copy of the title deed. That he conducted an official search which confirmed that the suit property belonged to the vendor absolutely. That he was shown the suit property and the vendor was in possession. That on **6th January 2009**, the Vendor obtained the consent of the Land Control Board and on **23rd January 2009**, they formalised their transaction. Further that on **24th January 2009**, the vendor executed the transfer forms in favour of the Defendant and on **12th February 2009**, he was issued with a title deed.

That the Defendant (Appellant) subdivided the land into several plots and in early **2013**, when he conducted an official search, he learnt that a caution had be lodged by the 1st Plaintiff (Respondent) claiming beneficial interest .It was contended that the Plaintiffs (Respondents) have no right to lodge a caution against the suit land.

The matter proceeded via viva voce evidence as follows:-

PLAINTIFF'S CASE

PW1 Irene Wamuyu Gacheru testified that she was the widow to the late **Josephat Gacheru Mwangi**, and she had letter of Administration dated **20th April 2018**. She adopted the witness statement of the late **Josephat Gacheru** dated **24th June 2013**, as her evidence. She produced a list of documents as Exhibit 1 to 5. She further produced the list of documents filed on **21st September 2015** as Exhibit 6 and 7 and ballot card as Exhibit 8. It was her evidence that her late husband bought the land from **Geoffrey Munga Karanja**, who was a shareholder at **Githunguri**. That all the necessary transfer processes were done at the **Githunguri Ranching Company** offices. That her husband was not a shareholder at **Githunguri Ranching Company**, but they were given all documents. However, when they visited the Thika Land Registry, they found a title over the same piece of land had already been issued to **Elijah Ngugi Njoroge**.

She further testified that the share certificate she relied on dated **19th October 1972** shows the number of shares as **40** while the capital shares were **1,000,000** divided to into 100 ordinary shares of **Kshs. 10** each. That the title from **Mary Wanjiku Kiarie** shows that **Elijah** bought land from her who already had a title. That **Mary Wanjiku** should have been a shareholder and her name should have been in the file. That though **Mary** was in the register, she had a different plot from the suit property. That **Geoffrey** was a member of **Githunguri**

Ranching Company since **1980**, and the receipts showed he paid for the title on **28th July 1989** though the receipt did not mention the plot number. That the said **Mary** sold land to **Elijah** without proper documents.

It was her further testimony that the share certificate shows the number of shares as 40. That **Githunguri Ranching Company Limited** confirmed that **Mungai** was a shareholder and had cleared all payments and he was the one who sold the suit property to her husband and what remained was the processing of the title deed. That **Githunguri Ranching Company** informed her that they had not sold her land to anyone else.

PW2 John Maina Mburu testified that he is the Chairman of **Githunguri Constituency Ranching Company Limited**. That he became a director on **12th September 2009**. He adopted his witness statement dated **21st November 2018**. It was his testimony that the 2nd Plaintiff had bought land from **Geoffrey Mungai Karanja** and **Josephat** had visited their offices accompanied by **Geoffrey**. That one must have shares in the Company for one to become a shareholder. That registration was by paying requisite fees and a receipt issued. That after payment, one was allocated a plot. That after paying for shares, one was then allowed to ballot.

It was his evidence that **Geoffrey Mungai** was the original owner of the Plaintiff's documents before the same were transferred to **Josephat**, who was then issued with a share Certificate **No. 2617**. That share Certificate **No. 2449** was issued before the land was subdivided and by the time of issuance, he had contributed **40 shares**. He denied that they ever sanctioned transfer of the land to the Defendant. That the Defendant was a shareholder when he was elected into office but he had no documents for the suit property.

He confirmed that he had signed the letter dated **14th September 2015**, and the Clearance Certificate. Further that he made the entries in the clearance certificate and the only entry he made was for **13th January 2012**, being the name **Josephat Mwangi** and the date. That a fully paid up member was supposed to have **100 shares**. Further that **Geoffrey** was issued with another share certificate showing that he was issued with the remaining shares. That **Certificate No. 151** shows that he was issued with a residential Plot. It was his testimony that the Company never issued **Geoffrey Karanja** with a title deed nor a clearance certificate. That one was required to pay survey fees of **Kshs. 600/=** at the **District Commissioner Kiambu**, and **Kshs. 800/=** for shares. That the value of the shares was increased by **kshs. 800** for every one hundred shares to be paid before balloting. That one was required to have a clearance certificate before balloting. That in the year **2003**, the clearance certificates were submitted to the lands office for the Commissioner of Lands to sign the transfer.

It was his testimony that **Mary** has never been their member. That when he took over in **2009**, the previous officials refused to hand over the Register and documents to him and only handed over when he filed a case. That they found all the documents were intact. That he had the proper register which has always been in their office. That residential plots were allocated in **1972 and 1973**. He further testified that it was mandatory for one to have 40 shares in order to get residential plots. That the Plaintiffs are still shareholders and genuine owners of **3857** and the ballot is **2316**.

DEFENCE CASE

DW1 Elijah Ngugi Njoro adopted his witness statement dated **12th March 2014**. He produced his list of documents dated **12th March 2014** as Exhibit 1 to 9. It was his testimony that he bought the land in **2008** from **Mary**. That he conducted a search and confirmed that she owned the land. That the purchase price was **Kshs. 150,000/=** and a title deed was issued in **2003**. He denied that her title was ever cancelled by **Githunguri Ranching**. He further testified that his name could not be on the register because he was not a member. It was his evidence that he got a consent on **6th January 200**, and together with the original title and a transfer form duly executed, the land was transferred to him and he validly got ownership. He testified that he had availed all documents in support of his case. That a caution was placed on the suit property in **2013**, when he wanted to subdivide the land. That he visited the land before he bought it and it was not occupied.

That he knew **Mary** was a shareholder at **Githunguri Ranching Company Limited** at the time of purchase. That every shareholder at Githunguri must have a share certificate as he confirmed from the Company that **Mary** was a member and she was member **No. 3857**. That he found **James Kamau Njoro**, **Francis Kairinja Njoro** and **Francis** was a Director from **2003 to 2009**. That as per the sale agreement, he was buying Land **No. 3857** as per the order under Githunguri Ranching. That **Mary** died in **2013**. That he had been sued together with **Francis Kairinja** in another case for using fraudulent documents to register a title, and that **Francis** was a Company Secretary at Githunguri Ranching Company Limited. That he did not know which plot **Mary** had balloted for and it was not necessary as **Mary** already had a title.

DW2 Francis Kairanja Njoro adopted his witness statement as his evidence. It was his testimony that he was a Director at Githunguri Ranching Company Limited and he was also the Company Secretary. That he gave a certified register of members to **Elijah**. He denied that the original Copy of the register presented by **PW2** was the one they were using as the register got lost. That the writings and entries are different from the one he had given **Elijah** as the one he gave **Elijah** was the authentic one. He further denied that there was any handing over to the new officials when he left in **2009**. Further that **James Maina** who was the then Chairman could not have given the register to the incoming official as he was blind.

That members were required to have **100 shares** and would get 3 portions. That 40 shares were not enough for one to get the 3 portions of land. That he was authorised to sign documents for the Company. Further that though he had been sued in many suits, he has never been convicted of any.

He testified that he was not authorised to make a new register. That the register he gave did not have a date as it normally did not show the date it was made. That the then Chairman was **James Kamau** who was blind and could sign documents but could not write. That he was present when the Chairman signed the documents. That the Company's records were in his custody but he did not know where they were. That he saw **Mary's** Share Certificate but he did not see her clearance certificate as it was given to her before he was a Director.

The parties filed written submissions and thereafter the trial Magistrate delivered his determination on **22nd January 2019** and allowed

the Plaintiffs (Respondents) claim and entered Judgment for the Plaintiffs (Respondents) and held that;

“ Be as it may without any documents indicating that Mary Kiarie was a member at the 2nd Defendant Company. It can only be logically concluded that the title that she acquired over the suit parcel herein was acquire by fraud. The 1st Plaintiff has shown that the 2^d Plaintiff from whom he bought the suit land herein is in possession of all documents that would prove membership to the 2nd Defendant Company. I find the 1st Plaintiff to have proved that he is the rightful owner of the suit land . I consequently allow the suit in terms of prayers No (a) , (b), (c) n d(d) of the further amended Plaintiff filed in Court on 29th October 2018. The Interest on costs shall run from the date of this Judgment. I also dismiss the Counter Claim of the 1st Defendant with costs.

The Appellant was aggrieved by the decision and by a Memorandum of Appeal dated **30th January 2019** he sought for orders that;

a. That the Appeal be allowed.

b. That Judgment and Consequential orders made by Hon.M.W Wanjala Resident Magistrate Thika, dated 2nd January, 2019 be set aside.

c. That the costs of this Appeal be borne by the Respondents.

The Appeal is based on the grounds that;

- 1. That the Learned Magistrate misdirected himself in law and in fact in allowing Irene Wamuyu Gacheru to testify on allegation that the 1st plaintiff in Civil Suit No. 720 of 2013 Thika had passed on and without the Plaintiff ever having been amended nor proper substitution having been done.**
- 2. That the learned Magistrate misdirected himself in Law and in fact in allowing Irene Wamuyu Gacheru to present the written statement of the alleged deceased, the 1st Plaintiff in Civil Suit No. 720 of 2013 without the said Irene wamuyu ever recording her own statement and serving the same on the Appellant, nor the statement of the deceased Josephat Gacheru Mwangi being changed.**
- 3. That the Learned Magistrate misdirected himself in law and in fact in allowing the statement of the 2nd Plaintiff in Suit No. 720 of 2013 in the absence of the 2nd Plaintiff hence denying the Appellant a chance to cross examine the said witness PW2.**
- 4. the Learned Magistrate erred in law and in fact in failing to take into account the documents submitted by the Appellant in this matter.**
- 5. The Learned Magistrate erred in fact and in law in allowing documents filed by the Respondents who were said to be deceased or absent in Court at the time of hearing hence denying the Appellant a chance to cross examine and probe the documents for the Respondents.**
- 6. That the learned Magistrate erred in law and in fact in completely disregarding the evidence tendered by the Appellant and all witnesses and more so failed to consider the Appellant had purchased the suit property when the same was titled from Mary Kiarie a former shareholder of Githunguri Constituency Ranching Company Limited.**
- 7. That the learned Magistrate erred in law and in fact in holding that the sale agreement presented by the Appellant was not signed, that his filed documents contained inconsistencies and that the transfer documents giving title to the Appellant were not lodged at the Lands Registry amongst others.**
- 8. That the Learned Magistrate erred in law and in fact in holding that property number Ruiru/Kiu Block 2/3857 belongs to the 1st Plaintiff , the said deceased.**
- 9. That the Learned Magistrate erred law and in fact in dismissing the Counter Claim filed by the Appellant in its totality.**
- 10. That the Learned Magistrate erred in law and in fact in refusing to accept the witness statement and testimony of the Appellant which were crucial for the determination of this case.**
- 11. That the Learned Magistrate erred in law and in fact in conducting suit No. 720 of 2013 Thika past the official hours as the Court set up to 9.30 p.m**

The Appeal was canvassed by way of written submissions and the Appellant through the **Law Firm of Njonjo Okello & Associates Advocates** filed his written submissions dated **9th June 2020**, and submitted that this Court being the first Appeal Court is required to re-asses the entire evidence tendered at the trial Court and make its own independent findings. It was submitted that **Irene Wamuyu Gacheru** was allowed to testify without formally presenting her own statement and fully relying on the statement of the deceased person. That there was no way she could have been cross examined on a statement that was filed by a different person and the same led to an injustice. Further that the 2nd Respondent's statement was admitted in his absences and the Appellant never got a chance to cross examine

him on the veracity of his statement. Further had the 2nd Respondent attended Court for cross examination, a different conclusion would have been arrived at.

That all the documents produced were produced unprocedurally and the Appellant did not have a chance to cross examine on them and had he been allowed to cross examine on these documents if they had been produced properly, the Court would not have reached the conclusion it reached and the Appeal ought to be allowed. He relied on the case of **Patrick Sosiso Lekakenya ...Vs...Tomito Alex and 3 others High Court Civil Appeal No. 1 of 2008.**

The Respondents filed their written submissions through the **Law Firm of Kanyi Kiruchi & Co Advocates** dated **8th June 2020** and submitted that the Appellant has premised his Appeal on mere technicalities and not substance of the Judgment. It was submitted that the 1st Respondent was properly appointed as the legal representative of the Estate of **Josephat Gacheru Mwangi** and had the necessary *locus standi* to be legally substituted in the suit. Further that the Plaintiff was amended as evidenced by the Plaintiff filed on **29th October 2018**. It was further submitted that the Appellant did not raise any objection to the adoption of the statement of the 2nd Respondent without calling the maker and had consented to the same through his Advocate on record and therefore waived his rights to have the 2nd Respondent cross examined.

That the Appellant had an opportunity to cross examine the legal representative of **Josephat Gacheru** and he failed to establish the origin of his documents. That the Court rightly noted that the Title Deed issued to **Mary Kiarie** was tainted with fraud.

It was the Respondents submission that the 1st Respondent was at liberty to testify on behalf of the Estate of her deceased husband. That it is an abuse of the Court process for the Appellant having not objected to the 1st Respondent adopting the **late Josephat** statement to turn around and allege that the trial Court misdirected itself.

That the issue of the 2nd Respondent's adoption of his statement without him being called to Court was consented to by the Appellant. That the Respondents Advocate made an Application before Court under **section 35 of the Evidence Act** and the Appellant's Advocate did not object to it. That if the Appellant was dissatisfied with the Court's Ruling on the issue, he would have appealed. It was further submitted that the Appellant will not suffer any prejudice for not cross examining the 2nd Respondent.

Further that the Appellant was mistaken in submitting that the Court failed to take into account its documents and the evidence as the Magistrate in his judgment indicated that he had taken them into account and it was only after all the considerations that the trial Court arrived at a well-reasoned Judgment. That while investigating the root of the Appellant's title, there were glaring questions that remained unanswered as there are no records showing that the alleged **Mary Kiarie** was ever a shareholder at **Githunguri Constituency Ranching Company**, the sale document was never signed, the transfer documents alleging transfer were never lodged at the Lands' Register and the photograph on the transfer are charred. That on the other hand, the Respondent's acquisition of the land remain unbroken as produced documentations to prove the same. That the matter was heard during service week at the Thika Law Courts in a bid to see that suits were timely handled, Judicial Officers had to put in long hours that saw a number of cases adjudicated on past Court hours.

Having summarised the pleadings and evidence before the trial court, having captured the grounds of Appeal and submissions by the parties herein the Court finds that as a first Appeal, Court it is called to make a determination herein by analysing the whole evidence, evaluating, assessing, weighing, investigating and scrutinizing it and give it its own independent conclusion.

The Court acknowledges that it neither saw nor heard the witnesses and it give allowance for that. The Court will also give due deference to the trial Court's findings unless it falls foul of proper evaluation of the evidence on record and that the trial Magistrate acted on a wrong principle in arriving at the findings. See the case of **Selle ...Vs... Associated Mobi Boat Co (1968) EA 123:-**

An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan**(1955), 22 E. A. C. A. 270).**

Further the court will only interfere with the decision of the trial court only where it is shown that the trial court misapprehended the applicable law and failed to take into account the relevant facts or took into account an irrelevant fact or that on the facts and law as are known, the decision is plainly wrong. See case of **Ocean Freight Shipping Company Ltd –vs- Oakdale Commodities Ltd, Civil Appeal No. 198 of 1995):-**where the Court held that;

“.....and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong.”

The Court finds the issues for determination are:-

- 1. Whether the Appellant is Justified in Objecting to issues he did not object to in the Lower Court.**
- 2. Whether the Appeal is merited.**

3. Who should bear the costs of the suit.

1. Whether the Appellant is Justified in Objecting to issues he did not object to in the Lower Court

Having carefully gone through the Memorandum of Appeal and the Appellant's written submissions, the Court notes that the Appellant has raised various issues including the fact that the said **Irene Wamuyu** was allowed to testify without the Plaintiff not having been properly amended. Further that the trial court misdirected itself in allowing the said Irene to present the written statement of the alleged deceased. Further the trial Court allowed the 2nd Respondent's statement to be adopted in his absence.

First of all the Court has seen the Further Amended Plaintiff dated **29th October 2018** in which the deceased was substituted with his legal Representative. If the Appellant was not satisfied with the manner in which the substitution was done, he ought to have raised the issue with the trial Court so that the same could be adjudicated upon. Further the Court having gone through the lower Court's proceedings notes that on **16th March 2018**, when the matter came up for hearing, the Respondents Advocate indicated that the 1st Plaintiff was deceased and he was seeking substitution. That on **2nd October 2018**, the said Application for substitution was unopposed and it was allowed. The Appellant's Advocate was present.

Further on **22nd November 2018**, when the matter came up for hearing, the Respondents' Advocate sought to have the 2nd Respondent's statement admitted and once again **Mr. Muthomi** Advocate for the Appellant had no objection. The Court then allowed the admission of the statement. Therefore, the Court finds and holds that the Appellant is estopped from raising issues he did not object to in the trial Court. See the case of **Mourine Mukonyo ...Vs... Embu Water and Sanitation Company [2020] eKLR** where the Court held that;

"It is on record that the parties herein consented to proceed by way of pleadings and statements filed by them in support of their cases.

13. The appellant further raised the issue that the trial magistrate erred in law and fact and gravely misdirected himself by ordering that the suit be disposed of by way of written submissions. However, the records are clear to the effect that the parties' advocates recorded a very clear consent on 13th March, 2018 that the matter be disposed in that manner. I am of the opinion that the appellant is legally bound by all the actions of her advocates on the mode of hearing before the trial court so long as the advocates were on record as acting for her at that material time.. The record is clear that one Mr. Njage was on record for the appellant on 13/08/2017 when a consent on directions was recorded while Ms. Muriuki was for the respondent. The consent was dictated upon the court and confirmed by both counsels. Both parties to the consent are therefore bound by the said consent.

14. It is trite law that he who alleges must prove. Section 107 of the Evidence Act provides that: -

"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."

15. It is thus trite that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue. Section 109 and 112 of the Evidence Act provides for the evidential burden of proof. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that: -**

"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

16. It follows that the initial burden of proof lies on the plaintiff, now the respondent in this appeal to prove his case on the balance of probabilities.

17. In the instant case, the respondent, in support of its case, filed a list of documents and witness statement by Catherine Mukami and David Kaburi. Amongst the list of documents were photographs taken on the site when the illegal connection was detected, minutes of the technical meeting held on 12/02/2016 and wherein she admitted to the liability and offered to pay the assessed damages. The appellant did not object to the production of the said documents and witness' statements during the trial. The appellant must be estopped to bring the issue on appeal. The trial court relying on the said documents found that the respondent proved its case that the appellant had made an illegal water connection.

Consequently, the Court finds and holds that the Appellant is not justified in Objecting to issues he did not object to in the Lower Court. Further that such actions are an abuse of the Court process.

2. Whether the Appeal is merited

The Appellant has also raised other issues to justify his Appeal. It was his contention that the learned Magistrate erred in failing to take into account the documents he submitted and disregarding the evidence he tendered.. Further that the Magistrate erred in finding that the suit property belonged to the 1st Respondent.

The Court has carefully perused the Judgment delivered by **Hon. M.W Wanjala**, dated **22nd January 2019**. The Court finds that the trial Court noted that;

“In order to arrive at a decision as to who owns the suit land herein. I have to carefully scrutinize the documents produced by both parties in this case.

That he had earlier in his Judgment stated that;

“I have perused through the entire testimonies of the witnesses, their recorded statements and documents that were produced as Exhibits.

The Court finds and holds that there is no justification upon which the Appellant has based his allegations.

On whether the learned Magistrate erred in finding that the suit property belonged to the 1st Respondent., it is not in doubt that both the 1st Respondent and the Appellant were laying a claim to the suit property. Further it is not in doubt that the appellant is the registered owner of the said suit property. The Respondents having challenged his proprietorship, it was then upon the Appellant to show the root of his title. See the case of **Munyu Maina..Vs..Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, 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.”

This Court will therefore determine who between the Appellant and the Respondent showed their root of title to be able to determine whether the Appellant is merited.

It is the Appellant' case that he bought the suit property from one **Mary Kiarie**. It was his evidence that the said **Mary Kiarie** was a member of **Githunguri Ranching Company Limited**. That he bought the suit property from her after she had obtained a title deed and therefore did not need to be a member of the Company. It is not in doubt that **Githunguri Constituency Ranching Company** was the initial allottee of the suit property. PW2 and DW2 testified that for one to be a member, one needed to be a shareholder and therefore all members had clearance certificates. Further that the person needed to have balloted for the land and required to have a ballot card. To give evidence that the person was a member the person needed to have his/her name in the register of members.

From the documents produced in the trial Court, the appellant did not produce any evidence that the said **Mary Kiarie** was a member of **Githunguri Constituency Ranching Company**. It is evident that for a party to be issued with a title deed, then the party must present before the Lands Registry clearance from the Company and transfer forms. If indeed these documents existed, it is the Court' considered view that the Appellant had the onus of providing the same by procuring them from the Lands Registry, to show the root of his title. This was never done.

Therefore, the Court finds and holds that having been unable to show the root of his title, then it follows that the title that the Appellants holds can be impeached. See the case of **Daudi Kiptugen ...Vs... Commissioner of Lands & 4 Others [2015] eKLR** where the Court held that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

On the other hand, the 1st Respondent laid a claim to the suit property. It was her contention that her late husband bought the suit property from the 2nd Respondent, a sale which was acknowledged by the 2nd Respondent. PW2 who is the Chairman of the **Githunguri Constituency Ranching Company** produced as exhibit and evidence a Register that shows that the 2nd Respondent was a member of the **Githunguri Ranching Company**. Further the Respondents produced in evidence a share certificate with the name of the 1st Respondent indicating that **Josphat** was issued with a share Certificate for the suit property. They further produced a clearance certificate showing that the said **Josphat** was the registered owner of the suit property .A share certificate was also produced evidencing that the 2nd Respondent had a share certificate over the suit property and that he had paid for the same.

The Court has also seen the sale agreement in which the 2nd Respondent sold the suit property to the 1st Respondent. This Court finds and holds that the 1st Respondent was able to show the root of his title.

Having held and found that the Appellant failed to show the root of his and title and the 1st Respondent was able to properly show the root of his title, the Court finds and holds that the learned trial Magistrate was correct in his findings that the 1st Respondent was the legal owner of the suit property and consequently allowing the Plaintiff's claim as contained in the Complaint and dismissing the Counter claim.

Therefore, this Court finds and holds that the instant Appeal is **not** merited.

3. Who should bear the costs of the suit

Section 27 of the Civil Procedure Act gives the Court discretion to grant costs. It is trite that Costs ordinarily follow the events. The Respondents herein are the successful parties and they are therefore entitled to the Costs of the Appeal .

Having now carefully considered the available evidence, as tendered at the lower Court, having evaluated the same and coming to its own independent conclusion, this Court finds and holds that the trial Magistrate did **not err** nor misapprehended the facts, Law and evidence on record.

Consequently, the court finds that the instant Appeal is **not** merited and the same is dismissed entirely with costs to the Respondents. Judgement accordingly.

Dated, signed and Delivered at Thika this 17th day of December 2020

L. GACHERU

JUDGE

17/12/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They 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.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Appellant – Date taken in the presence of Appellant

Advocate

No appearance for the 1st Respondent

No appearance for 2nd Respondent

L. GACHERU

JUDGE

17/12/2020