



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL CASE NO. 26 OF 2018

MARGARET MBULWA NGAU.....APPELLANT

VERSUS

LEONARD KIMAITA.....1ST RESPONDENT

MUKA MUKUU (F.S.C.).....2ND RESPONDENT

(Appeal from the Judgment of M/S Hon. A. M. Maina Senior Principal Magistrate delivered on the 9th Day of October 2018 in Chief Magistrate's Civil Case No. 251 of 2008, Thika)

BETWEEN

LEONARD KIMAITA.....PLAINTIFF

VERSUS

MUKA MUKUU (F.S.C.).....1ST DEFENDANT

MARGARET MBULWA NGAU.....2ND DEFENDANT

JUDGMENT

The Appellant herein **Margaret Mbulwa Ngau**, was the 2nd Defendant in **Thika CMCC No.251 of 2018**. The 1st Respondent **Leonard Kimaita** was the Plaintiff and the 2nd Respondent, **Muka Mukuu (F.S.C)** was the 1st Defendant in the above stated suit. The Plaintiff had via a Plaint dated **22nd March 2008** sought for the following orders against the Defendants;

- a) A Declaration that Plots No. 42 and 43 at the 1st Defendant's farm belong to the Plaintiff.***
- b) The purported transfer to 2nd Defendant be declared null and void.***
- c) Costs of the suit.***
- d) Such other and further relief as the Court shall deem fit and just to grant.***

The Plaintiff (1st Respondent) had averred that in **December 2004**, the 2nd Defendant(Appellant) purchased **Plots No. 2788 and 2789**, from the 1st Defendant(2nd Respondent). That upon payment of the full purchase price on **15th May 2006**, the Plaintiff (1st Respondent) took possession of the plots and started cultivating the same. That in **2007**, the 1st Defendant (2nd Respondent) in total disregard of the Plaintiff's (1st Respondent's) rights as the owner of the plots made illegal demands to the Plaintiff(1st Respondent) to vacate the plots and move to a new site.

That in blatant abuse of the Plaintiff's (1st Respondent's) rights of ownership to the subject plots, the 1st Defendant (2nd Respondent) purported to illegally and fraudulently put the 2nd Defendant(Appellant) into occupation of the plots. He particularized fraud as; putting a third party to wit the 2nd Defendant (Appellant) into the plots without the Plaintiff's (1st Respondent's) knowledge. The Plaintiff (1st Respondent) further averred that the 1st Defendant (2nd Respondent) having sold and allocated the plots to the Plaintiff (1st Respondent), lacked capacity to transfer to the 2nd Defendant(Appellant).

The suit was opposed and the 2nd Defendant (Appellant) filed a Defence dated **28th April 2008**, and denied all the allegations made in the Plaint. It was her contention that she was the legal owner of **Plots No. 31,42 and 43**, having lawfully purchased them from the 1st Defendant (2nd Respondent) and that she had no **nexus** with the Plaintiff's (1st Respondent's) Plots Number **2788 and 2789**. That since there was no demand to sue, the Plaintiff (1st Respondent) was not entitled to costs and the suit was misconceived, bad in law and an abuse of the Court process.

The 1st Defendant (2nd Respondent) also filed a statement of Defence dated **28th April 2008**, and denied all the allegations made in the Plaint and denied ever selling the plot to the Plaintiff (1st Respondent) that no land was earmarked for sale at the said area. And that the Plaintiff (1st Respondent) and the 2nd Defendant (Appellant) are irregularly on the suit property and they do not have the *locus standi*. The 1st Defendant (2nd Respondent) denied any rights to property accruing to the Plaintiff (1st Respondent) and the 2nd Defendant (Appellant) That the 2nd Defendant (Appellant) could not claim to pass any title. The suit is governed by the Cooperative Societies Act and the cause of action was addressed by an Inquiry Order dated **9th April 2008**, and the Jurisdiction of the Court was ousted. That the matter could only be filed at the High Court or the Land Disputes Tribunal.

The matter proceeded for hearing as follows:-

PLAINTIFFS CASE

PW 1 Leonard Gitonga Kimaita adopted his witness statement dated **23rd September 2013** and testified that the 1st Defendant was his employer. He produced his list of documents dated **30th September 2013** as Exhibits 1 to 8. Further that he did not authorize anyone to sell Plots **42 and 43** which belonged to him.

He acknowledged that though he was in Court over **Plots 42 and 43**, the plots he mentioned in his witness statement were plots no. **2788 and 2789**. That as per letter dated **20th December 2006**, the 1st Defendant was offering him an alternative plot because they sold him wrong plots. That as per the letter, the 1st Defendant indicated that it sold him a commercial plot instead of a residential plot, yet a commercial plot was going for **Kshs. 30,000/=** and a residential on for **Kshs. 25,000/=**, That the 1st Defendant asked him to top up with **Kshs. 5,000/=** to retain the plot or in the alternative he be given another plot for **Kshs. 5,000/=**.

That he did not pay the **Kshs. 5,000/=** as requested as he had bought a residential plot for **Kshs. 25,000/=**. That the 1st Defendant sold plots to non members as it had a loan and was disposing off its land to pay off the loan. That the 1st Defendant was selling both commercial and residential plots. That the agreement dated **7th December 2014**, is altered in ink and it was one **Kitavi** who cancelled some sections of the documents. However, he did not counter sign against the alterations. That the alterations is for the word residential to commercial and he had been in possession of the documents for many years. That the 1st Defendant offered to refund his money or give him an alternative plot or let him keep the plot so long as he would add **Kshs. 5,000/=**.

Further that the plots were **100 by 100 M** and the sale agreement shows the plots measuring **40 by 100 meters**. That the 2nd Defendant's plot's description and acreage are different from his and he had paid for both plots. That he paid **Kshs.20,982** for **plot No. 2789** and on **7th December 2004** he again paid **Kshs. 4,000/=** but he was not given a beacon certificate. That he did not take possession of the land, and the 1st Defendant never gave him a transfer document. That his plot measures **100 by 100 meters** and the 2nd Defendant's measures **40 by 100 meters**.

That he made payments twice totaling to **Kshs.25,000/=**. That **Plot No. 2789** is indicated as **Plot No. 43**. That all residential Plots measured **100 by 100 metres** and the sale agreement showed that the Society could repossess the plots if they were not fully paid for. That he paid the full amount and repossession did not apply to him. That **Kitavi** wrote letters after he finished paying for the plots.

DEFENCE CASE

DW1 Mwangangi Kitavi adopted his witness statement dated **1st December 2017** and averred that he was an Administrative Manager at **Muka Makuu Ltd**. That in **1991**, the Company took a loan from **Cooperative Bank** in order to raise funds. That in **September 1991**, the Society called a meeting and the Management Committee authorized the Society to sell its commercial plots to members in order to repay the loan. That in addition, each member would contribute **Kshs. 10,000/**. Further that the commercial plots measured **40 by 100 metres**. That the minutes referred to shopping centers which were the commercial plots. That in the year **2004**, the Plaintiff purchased a residential plot, but the area in which the plot was, was for commercial plots. That he bought a plot measuring **100 by 100 metres** which was a residential plot for **Kshs.25,000/=**. That the commercial Plots costed **Kshs.30,000/=**. He denied that the correction on **D Exhibit 1**, were done by him and further that the receipts were for purchase of a commercial plot.

That on **11th October 2007**, the Society held a meeting and reference was made to the sale of the plots. That the sale of the suit property was one of the plots being revoked as per Minute No. 6 of the said meeting. Further that the cancellation of the sale was not in compliance with the Society's regulations. That the Society stated that the residential Plots should not have been sold and an inquiry was done via a meeting was held on **15th August 2008**, the inquiry was adopted.

That the Plaintiff bought his plot at **Kshs.25,000/=** and was allocated a Commercial plot instead of a Residential plot. That he was requested to pay the difference of **Kshs. 5,000/=** and in the alternative, he was offered a Residential plot, but he never took any of the offers. That according to the sale agreement, if the purchaser failed to repay the entire purchase price, the Society would repossess the land.

That the Plaintiff's plots were allocated to **Margaret Ngao** after she paid the full purchase price for the Commercial plots as the Plaintiff

failed to comply with the Society's directives. That **Margaret Ngao** paid the full purchase price which was by then **Kshs. 80,000/=**. That there was a sale agreement between the 1st Defendant and **Margaret Ngao** for a plot measuring **40 by 100 meters** which were measurements for a commercial plot.

That as per the report dated **1st October 2008**, against **No. 33**, it read **Leonard Kimaita Ref No 2788 and 2789**, and the resultant plots are **42 and 43** in Sisal factory . That the size of plots allocated to the Plaintiff were **100 by 100 M** for **Kshs. 25,000/=** and they issued a receipt showing that the Plaintiff's balance was nil . He acknowledged that the Plaintiff had fulfilled his part of the Contract. That they sold the plot to the 2nd Defendant on **25th June 2007**, That before a transfer was done, payment was to have been done. That the 2nd Defendant bought the plot on **25th June 2007**, a year after she had been allocated. Further that the letters to the Plaintiff were handwritten and that they did not result from any Society's deliberations, though there was a decision by the Society that the agreement between it and the Plaintiff be revoked as per **minute 68**. That the receipt for the purchase by the 2nd Defendant did not have the 1st Defendant's letter, but were stamped as the letters to the Plaintiff but the sale agreement had the letter head.

That the Surveyor did not put a date on the beacon certificate. That the date should be the one when the 2nd Defendant was shown the plot. That the Certificate was not dated and so it lacked validity. Further that the 2nd Defendant bought plots from the 1st Defendant and she paid the purchase price and was issued with a receipt. It was his further testimony that the Plaintiff never took possession of the plots and that he was shown smaller plots in the wrong area. That they had revoked the initial sale by the time the plots were sold to the 2nd Defendant by an Administrative action. That under **plots 42 and 543** in Sisal Factory, the 2nd Defendant is indicated as the owner and the Ministry of Co-operative Societies recognized the 2nd Defendant as the owner. That according to the document, the Plaintiff and the 2nd Defendant do not own the plots in question. That the 1st Defendant's management committee did not conduct its affairs properly.

That the Plaintiff bought land in **2004**, and the case was filed in **March 2008** and the inquiry is dated **1st October 2008**. That the decision to compile the inquiry report was made in the year **2007**. Further that the plots were sold to members and non-members. That the receipts issued to the Plaintiff were not headed but stamped and that the General Manager also wrote to the Plaintiff.

DW2 Margaret Ngao, the 2nd Defendant adopted her witness statement dated **9th October 2013** as part of her evidence . It was her testimony that she purchased plots from the 1st Defendant vide sale agreement in respect to **Plots No. 42 and 43** and she paid **Kshs. 80,000/=** for each plot. That she was shown the plots and after she finished paying the purchase price in **2007**, the plots were issued to her upon being shown the beacon certificates . That her plots are Commercial plots and after the inquiry was done she was not told to vacate. That she lives on the plots which she has fully developed and if her ownership is nullified, it would be unjust. Further that the beacon certificate has **plot 31, 42 and 43** sisal area , members no and the date of issue was **18th May 2006**. That the Plaintiff found her fencing the plot in **2007**, and informed her that the plot was his. Further that she took possession of the plot in **June 2007**, and the inquiry report indicates that she was among the beneficiaries.

The parties filed written submissions and thereafter the trial Magistrate delivered her determination on **9th October 2018**, and allowed the Plaintiff's (1st Respondent's) claim and entered Judgment for the Plaintiff and held that ;

“In summary, I find the Plaintiff and the 1st defendant entered into a valid land sale agreement, in which he bought plots No. 42 and 43 at Kshs.25,000/= each. I find that as a result of the Contract , the said plots belong to the Plaintiff and the 1st defendant therefore had no capacity to sell the same plots to the 2nd Defendant .”

The Appellant was aggrieved by the decision and by a **Memorandum of Appeal** dated **26th October 2018**, he filed the instant Appeal and sought for orders that;

- 1) The Appeal be allowed.**
- 2) The Judgment delivered on the 9th Day of October 2018 be set aside and the suit be ordered for retrial.**
- 3) The Costs of and occasioned by the Appeal be provided for.**
- 4) Such further orders as the Honourable Court may deem fit to grant .**

The Appeal is based on the grounds that;

- 1) The Learned Magistrate erred and misdirected herself in Law and fact by ignoring the 2nd Defendant 's evidence totally on the issue of the size of the plots claimed and the plots purchased by the 2nd Defendant.**
- 2) The Learned Magistrate erred and misdirected herself in Law and fact by failing to appreciate that the 2nd Defendant has a valid claim over the subject property.**
- 3) The Learned Magistrate erred and misdirected herself in Law and fact by awarding the Plaintiff commercial plots which measure 40 by 100 ft when he had indeed purchased plots of 100 by 100 ft from the 1st Defendant.**
- 4) The Learned Magistrate erred and misdirected herself in Law and fact by failing to appreciate that the Appellant's plots measure 49 by 100 ft whereas the Respondent's plots measured 100 by 100 ft and therefore different.**

5) *The Learned Magistrate erred and misdirected herself in law and in fact by declaring the plots sold by the 1st Defendant to the 2nd Defendant as being null and void.*

6) *The Learned Magistrate erred and misdirected herself in law and in fact by awarding the Plaintiff with the Appellant's plots which measure 40 by 100 ft and not 100 by 100ft .*

The Appeal was canvassed by way of written submissions. The Appellant through the **Law Firm of S.K Muendo & Company Advocates** filed her written submissions dated **13th August 2020**, and submitted that the 1st Respondent did not tender any document to show the connection between **Plots No. 2788 and 2789** with **Plot No. 42 and 43**, respectively as the 1st Respondent pleaded that he had purchased Plot No. **2788 and 2789** in **2004** and sought for a declaration that **Plots No. 42 and 43** at the 2nd Respondent's farm belonged to him. Further that the trial Court ignored the Appellant's evidence that she was the legal owner of the suit properties. Further that the Court admitted altered documents and failed to appreciate Appellant's evidence.

That the trial Court erred in awarding the 1st Respondent **2 plots**, which did not support his claim and neither did they support his description. That there was no doubt that the plots **No. 2788 and 2789** were different plots from **Plots 42 and 43** and hence the trial's Court decision was misguided. To buttress her argument, the Appellant relied on the case of **Independent Electoral and Boundaries Commission & Another ...Vs... Stephen Mutinda Mule & 3 others (2014) eKLR**, where the Court of Appeal Considered with approval two foreign cases on the issue of parties being bound by their pleadings.

The 1st Respondent in opposing the Appeal filed his written submissions through the **Law Firm of Waithira Mwangi & Co Advocates** dated **8th September 2020**, and submitted that from the Contract document dated **7th December 2004** and the Sale repayment forms, it was clear on what was bought, what was the size, what was the purchase price and the link between **Plots No. 48 and 49** and Numbers **2788 and 2789**. That the correspondence from the 2nd Respondent confirmed that plots numbers **2788 and 2789** refer to **plots No. 42 and 43**. Further that the Appellant in her own submissions in the lower Court admitted that the plots were first sold to the 1st Respondent.

Further that the 2nd Respondent had no authority to re allocate the suit properties to the Appellant and without his consent. That the act of renaming the plots as commercial plots as opposed to residential plots could not invalidate the first sale nor defeat his claim over the plots. The 1st Respondent relied on the case of **National Bank of Kenya ...Vs... Pipelastik Samkolit (K) Ltd & Another (2001)** where the Court held that a Court of Law cannot purport to rewrite a Contract between the parties. That the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded.

Further that no variation agreement was ever signed by both the 1st and 2nd Respondent to include an additional further **Kshs. 5,000/=** for each plot. That both parties were bound to honour the sale agreement that was entered into on **7th December 2004**. Further that no minutes were produced to show that there was a resolution to charge an additional expense.

Further that the Contract of sale between the Appellant and the 2nd Respondent was **null ab initio** as by the time the Appellant claims to have bought the suit properties on **25th June 2007**, they already belonged to him. He relied on the case of **Mount Kenya Investment Limited...Vs... Allan Ngethe & 2 others (2009)eklr** where the Court relied on **M'Mukanya ...Vs... M'Mbijwe(1984) KLR 761** where the Court held that;

'...once a person has been allocated a plot, and pays the rent due and is given the plot number the plot becomes his and does not have to be in physical possession.'

The Court was urged to dismiss the Appeal.

The above analysis summarizes the pleadings and evidence before the trial court. Further it captures the Grounds of Appeal and submissions by the parties herein. The court is called upon to make a determination of this Appeal filed by the Appellant as provided by **Section 78 of the Civil Procedure Act**; This court is called upon to analyze the whole evidence, evaluate, assess, weigh, investigate and scrutinize the said evidence and give its own independent conclusion.

However, the court will be alive to the fact that it neither saw nor heard the witnesses and the findings of the trial court must be given due deference unless it falls foul of proper evaluation of the evidence on record or 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 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. 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 there was a Nexus between Plots 42 and 43 and Numbers 2788 & 2789.*
- 2) *Whether there was a Binding Contract between 1st and 2nd Respondents over the suit properties.*
- 3) *Who is the Legal Owner of the Suit properties.*
- 4) *Whether the Appeal is merited.*
- 5) *Who should bear the cost of the Appeal.*

1. Whether there was a Nexus between Plots 42 and 43 and Numbers 2788 & 2789.

The Appeal is mainly predicated on the issue that the trial Court misdirected itself in finding that the **Plots No. 42 and 43** as claimed by the 1st Respondent were the same as the **Plots No. 2788 and 2789** as pleaded being the ones he had bought from the 2nd Respondent.

It is not in doubt that the 1st Respondent bought plots **No. 2788 and 2789** from the 2nd Respondent. It is the 1st Respondent's contention that though the sale agreement refers to plots numbers **2788 and 2789**, what was marked on the ground were plots **No. 42 and 43**. The Court has seen the letter dated 5th July 2007 referenced "**Commercial Plots NO. 42 and 43 Sale Agreement No. 2788 and 2789 Sisal Factory**" the said letter was from **Mr. Kitavi** and the same bore the stamp of the 2nd Respondent. The Court has also seen subsequent letters dated **12th July 2007, 20th July 2007 and 30th July 2007** indicating that plots **No. 42 and 43** are the same as **No. 2788 and 2789**. More compelling is the fact that **DW1** who was a representative of the 2nd Respondent confirmed that the Appellant had been allocated land that had initially been allocated to the 1st Respondent. The Appellants' beacon certificate produced in evidence shows that she had been allocated three portions amongst them **Plots No. 42 and 43**.

Therefore, there is no doubt in the Court's mind that there is a **Nexus** between **Plots No. 42 and 43** and **Numbers 2788 and 2789** and the same refers to the same plots respectively.

2. Whether there was a Binding Contract between 1st and 2nd Respondent over the suit properties

Vide a sale agreements dated 7th December 2004, the 1st and 2nd Respondents entered into two separate sale agreements over the suit properties. The Court has seen the sale agreements. The said agreements are in writing and are signed by the parties. It thus met the requirements of **Section 3(3)** of Law of Contract Act which states as follows:-

3 (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of **Nelson Kivuvani... Vs...Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, where the Court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

All the above ingredients are met in the instant sale agreements entered between the 1st and 2nd Respondents and therefore the sale agreements between the two are valid. Having found that the two had valid sale agreements, it follows that the parties are bound by the terms of their Contract. See the case of **National Bank of Kenya Ltd ...Vs...Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503**, where the Court held that:-

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.

It is not in doubt that the 2nd Respondent was bound by the terms of the Contracts that **Plots No. 2788 and 2789**, which the Court has already held are the same as **Plots No 42 and 43** were to be sold to the 1st Respondent for **Kshs. 25,000/=**. Further it could only repossess the suit property if there was failure by the 1st Respondent to pay total payment within the period given.

The 2nd Respondent in its letters sought to change the terms of the Contracts by requiring the 1st Respondent to add more money or be given an alternative plot. By writing the said letters, the 2nd Respondent forgot that it was bound by the sale agreement that it had voluntarily entered into and it had a duty to fulfil the conditions thereon. The 2nd Respondent could not unilaterally cancel the transaction or invoke new terms in the contract such as payment of **Kshs.10,000**. See the case of **Kenya Breweries Ltd...Vs...Natex Distributors Ltd, Nairobi HCCC No.704 of 2000**, where the Court held that:-

“Parties to a written contract are bound by its terms and the invocation of nonexistent clause to terminate a contract is not legitimate even though there is a termination clause. However much a party resents the behavior of another party to the contract, it cannot terminate it without following the laid down procedure”.

Further in the case **Mjomba Agencies Limited..Vs...Mvule Investment Company Ltd (2017) eKLR** the Court held that;

“..a party who wishes to vary or modify a contract does not do so by preparing another contract, he does so by doing a variation agreement which must state whether or not the new agreement replaces or supersedes the earlier agreements..... My considered view is that if parties intended to incorporate the earlier agreement in the alter one they would have done so by way of an addendum or by referring to it which has not done been done in this case.”

It is clear, that there was no modification from the agreement initially made by the 1st and 2nd Respondents and thus the parties were bound by the terms of their agreement. The 2nd Respondent could not change the said agreement without the consent of the 1st Respondent.

3. Who is the Legal Owner of the Suit properties

It is the Appellant's contention that the suit properties belonged to her having entered into an agreement of sale with the 2nd Respondent and having paid the full purchase price. While it is not in doubt that the Appellant and the 2nd Respondent entered into a sale agreement over the suit properties, it is clear that the 1st Respondent had already been allocated the suit property. Therefore, the said properties were not subject to allocation by any other person. See the case of **M'Ikiara M'Mukanya & another vs Gilbert Kabere M'Mbijiwe [1983] eKLR;-**

“The plot they were granted was not available for allocation since 1967 when it was granted to the respondent. The council had no plot No 58 at Nkubu Market to allocate and it could not allocate what it did not have. This may explain the fact that although the appellants exhibited the letter of indication requesting them to report at the Council's office and be shown the plot allocated to them, they neither spoke of nor exhibited in their evidence any Letter of Allocation granting to them the plot, which the respondent exhibited. The alleged allocation to the appellants is of no effect in law. On the other hand the respondent's interest whether as a licensee, which he is not, or a lessee, which I say he is, was never determined by the Council, and he remains the legal owner of plot No 58, Nkubu Market.”

This Court finds and holds that the suit properties had already been allocated to the 1st Respondent and could not be allocated to the Appellant. Consequently the Court finds that the 1st Respondent is the legal owner of the suit properties.

4. Whether the Appeal is merited

In her Appeal the Appellant had sought for various orders including that the Judgment delivered on **9th October 2018** be set aside and the suit be ordered for retrial. The Appellant has not demonstrated to this Court why the suit should go for retrial and therefore the Court finds that the said prayer is not merited.

In its Judgment the trial Court allowed the 1st Respondent's claim as prayer in the Plaint dated **22nd March 2008**. In essence the Court found that the 1st Respondent was the owner of the suit properties. As per the analysis of the evidence by this Court, it has come to the same conclusion as the trial Court. Consequently, the Court finds and holds that the Appeal herein is not merited.

5. Who should bear the cost of the Appeal

As provided in **Section 27 of the Civil Procedure Act** the Court has discretion to grant costs. Costs usually follow the event unless there are special circumstances, that would warrant the deviation of the same. The Court finds that the 1st Respondent is the successful party and he is therefore entitled to the costs of the Appeal.

Having now carefully considered the available evidence 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** or misapprehend the facts and evidence on record. Consequently, this Court finds that the Appeal is **not** merited and the same is dismissed entirely with costs to the 1st Respondent.

It is so ordered.

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

M/s Muendo for the Appellant

No appearance for the 1st Respondent

No appearance 2nd Respondent

L. GACHERU

JUDGE

17/12/2020