REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 44 OF 2017

PETER NGANGA KIMANI.....APPELLANT

VERSUS

FRANCIS NJENGA KAMAU.....1ST RESPONDENT

GITHUNGURI CONSTITUENCY RANCHING CO. LTD...2ND RESPONDENT

(Being an Appeal from the Judgment of Hon. S. N. Mbungi(SPM) delivered on 31st July 2015 in respect of Thika CMC Case No.109 of 2014)

JUDGMENT

The 1st Respondent herein **Peter Ng'ang'a Kimani** filed **ELC No. 10 of 2014** at the Chief Magistrates Court Thika . The claim was against the Appellant herein and he sought for the following orders:-

> ***a) The Land Registrar Thika be and is hereby ordered to remove restriction on the land parcel No. Ruiru/Kiu Block 2(Githunguri) 1210 entered on 3/8/1999 forthwith***
>
> ***b) A permanent injunction be and is hereby issued to restrain the defendants, their agents or employees and or anybody else claims under or through them from trespassing, entering, encroaching, selling encumbering, charging, transferring altering the membership register to the detriment of the Plaintiff and or interfering in whatever manner with the Plaintiffs land parcel No. Ruiru/Kiu Block 2 (Githunguri)1210***
>
> ***c) The costs and interest of the suit***
>
> ***d) Any other and or such further relief as the Court may deem fir and just to grant.***

In his statement of claim the Plaintiff (1st Respondent) averred that he was a member and a shareholder **of Githunguri Constituency Ranching Company Limited** and he was allocated land parcel **No. Ruiru/ Kiu Block 2 (Githunguri) 1229** vide **ballot No. 3418** and share certificate No. **4347**. Further that around the **13th April 1985,** his father transferred the suit property to him and they entered into a sale agreement and he paid the transfer fee to the 2nd Defendant (Respondent) and he was issued with a share certificate **No. 5257** dated **13th July 1993**.However on the ground he was inadvertently allocated land parcel **Ruiru/Kiu Block 2 (Githunguri) 1210,** by the 2nd Respondent and he took possession and commenced development. He contended that around **1996,** the 2nd Respondent realized the mistake and resolved that the Appellant to retain the land parcel **1229** and he would retain land parcel **1210** in view of the fact that he had already developed it.

Further that on the **26th of November 1996,** the 2nd Respondent wrote a letter to the Land Registrar Thika, confirming the errors and the amendments that they had made and on the **28th of March 2006**, the 2nd Respondent wrote another letter to the Land Registrar confirming that 1st Respondent was the rightful owner of the land parcel **1210**. On the **9th of September 2011,** the 2nd Respondent further issued a clearance certificate to him for land parcel **1210** vide ballot **No. 3380** and a share certificate **B-5257**. He further averred that on the **21st of February 2014,** the 2nd Respondent summoned him to appear before the Board of Directors on the **28th of February 2014** and informed him to vacate the land parcel purporting that it belonged to the Appellant.

He averred that the restriction entered against title deed **No. Ruiru/ Kiu Block 2 (Githunguri) 1210** around the **3rd of August 1999** is unlawful and it ought to be lifted to enable him exercise full potential of his land as the issue of duplication was sorted out.

The suit was contested and the Appellant herein filed a Defence and a Counter claim and sought for orders that;

a) Cancellation of the Plaintiff title to land parcel Ruiru/Kiu Block 2(Githunguri) 1210 and the same to revert back to the duly owner the 1st Defendant herein

b) The grant of vacant possession in respect of land parcel Ruiru/ Kiu Block 2(Githunguri) 1210 and removal of all the illegal structures therein within 30 days of this Judgment.

c) Costs and interest of this suit.

He denied all the allegations made in the Plaint and averred that he is equally the bonafide owner of the suit property vide share **certificate 5485** and **ballot no. 3380**. He further averred that the Plaintiff took possession of the suit property by ignorance as his land was 1229.

In his statement of claim the Appellant (1st Defendant) denied all the allegations in the Plaint and averred that the mistake was intentional with the sole aim of defrauding him and that the restrictions against the suit title deed are lawful and intended to protect his rights over the suit land.

In his Counter claim he averred that the 1st Respondent (Plaintiff) despite being aware and acknowledging that he had developed his parcel of

land offered land parcel **3418** which belonged to a third party and despite request and constant demand not to do so. He further averred that if the 1st Respondent (Plaintiff)cannot allocate a parcel of equal value to the suit land the he should vacate his suit land.

Though the 2nd Defendant filed a Memorandum of Appearance through **Muchoki Kangata & Njenga Advocates** on **9th April 2014**, it did not file its Statement of Defence. However, the 2nd Defendant filed an application dated **30th July 2015,** seeking for review and setting aside of the impugned Judgment and that the annexed defence be deemed as duly filed. However, it is not clear whether the said application was determined or not.

The 1st Respondent who was the Plaintiff before the trial Court adopted his witness statement and gave evidence that he was given the land in **1985** by the 2nd Defendant. It was his testimony that the land mutation belonged to his father and he produced Exhibits **1,2, 3,4,5,6, 7 A and B**. He further testified that he was shown the land and the same did not have beacons and they marked the beacons with the stems. That there was a problem with the location of the parcels of land and each of the allottee was to get 1 ¼ acres. However since he had built on the suit plot, he was to retain the said land and he returned initial ballot **No.3418** and he was given **3380**. That he was given **LR.1210** and he returned ballot **No.1229** and the company processed the titled deed. That the 2nd Defendant gave him documentation evidencing how the dispute was resolved and he was told to continue occupying the land in issue. That the new Directors visited the land and saw that he had built on it and in the year **2011** he was called by the new directors and after hearing his case, they decided that he continues to stay in the land as it belonged to him. He further confirmed that he did not know if the 1st Defendant was given the land by the 2nd defendant.

Further that he had lived on the land since **1985** and buried his kins and no one objected. He further testified that on **21st February 2014**, the Directors called him and told him that the land was not his and he decided to come to Court for protection.

On cross examination he testified that his land was transferred to him by his father when he was still alive. He however testified that the transfer of the share certificate was done after the death of his father but he had been given a letter of transfer before his death. He acknowledged that the register does not show that his father had authorized his wife to ballot on his behalf. It was his testimony that Ballot **No. 3418** gave birth to parcel **No.1229,** in **1985** but he has settled in **1210**. He further acknowledged that the 1st Defendant was the initial owner of land number **1229** and that it was the 1st Defendant who raised issues against him and then he was summoned and the 2nd Defendant gave him the suit land. He testified that he did not know that there was someone who had laid a claim to the other land.

On re-examination he testified that the initial ballot and share certificate was retained by the 2nd Defendant and the 2nd Defendant gave him permission to build on land parcel **1210.**

PW2 Rebecca Wambua Nyaga, the Chair Lady of the 2nd Defendant from **1986-1991** stated that when the initial survey was conducted, some people got bigger parcels of land than others. The Government gave them a surveyor who did the surveying afresh. Then the Company resolved that those who had built houses should not move and each member got an equal share.

On cross examination she testified that when the balloting was done some people had started building. She further testified that the 1st Defendant was given **1210** and the Plaintiff was given **1229, the** 1st Defendant did not complain when she was a chairperson.

PW3 Henry Wanaina Njoroge, a Director of the 2nd Defendant in **1996,** stated that the survey work was wrongly done in **1985** and he had seen company records that indicated that the company resolved to allow the Plaintiff to occupy the land and build. That the 1st Defendant was given plot Number **1229,** which was vacant and the Chairman signed a letter allowing the Plaintiff to re occupy the land. He confirmed that they had similar disputes and they resolved them.

On cross examination he testified that he wrote the letter dated **17th August 2000** and the same indicate that the ballot number **3340** plot number **1210** belonged to the 1st Defendant but they later changed and gave it to the Plaintiff. He denied knowledge of someone who is claiming **1229.**

On the part of the 1st Defendant (Appellant), he reiterated that he is the owner of land parcel Number **1210,** having acquired it from the 2nd

Defendant by virtue of being a member and that he had a green card dated **17th February 1992.** That the Plaintiff stays on the suit land and that he did not know how he occupied it. Further that when he noticed the Plaintiff building on the suit land he reported it to the 2nd Defendant. However, his title deed got lost and he reported it to the police and had an abstract of the same. That he wrote a letter to the Land Registrar to put a restriction on the **LR.No.1210**.

On cross examination he stated that he suffered from lapse of memory and that the he has never been given **1229** and denied refusing to take plot **1229.** He denied giving the Plaintiffs any documents and that he reported the said loss. Further that the Plaintiff gave him ballot number **3418** which he transferred to **Godfrey Maina**. That ballot number **3418** bore land parcel number **1229** and when he was shown a clearance certificate, the same had an error as it indicated **1228,** instead of **1229.** He further testified that **Godfrey Maina** was issued with a lease certificate but they found that the land belonged to another woman.

After the *viva voce* evidence, the parties filed their written submissions and thereafter the trial Court entered Judgment in favour of the Plaintiff (1st Respondent) plus costs of the suit to the 2nd Respondent. The trial Court further dismissed the Counter claim as it was not accompanied by a **Verifying Affidavit** as required by law with no orders as to costs.

The Appellant was aggrieved by the above determination of the trial Court and Decree thereon and he has sought to challenge the said Judgment through the **Memorandum of Appeal** filed on **16th February 2015**, on the following grounds:-

> ***1. That the learned trial Magistrate gravely erred in law and in fact by failing to appreciate that the appellant had acquired land parcel RUIRU/KIU BLOCK 2 (GITHUNGURI) 1210 by first registration thereby arriving at the wrong decision.***
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> ***2. That the trial Magistrate erred in law and in fact by holding that the appellant land RUIRU/KIU BLOCK 2 (GITHUNGURI) 1210 should be 1229 whilst the same did not belong to the 1st Respondent thereby depriving the appellant his rightfully land and hence arriving at a wrong decision.***
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> ***3. That the learned trial magistrate erred in law and in fact by relying more on the 1st Respondent's documents of title than those of the appellant whilst both were genuine title issued by the relevant lands ministry thereby arriving at a wrong decision.***
>
> ***4. That the learned trial Magistrate erred in law and in fact by ordering the cancellation of the Appellant title notwithstanding the fact that there was no evidence of fraud or forgery in acquiring the same and holding that the 1st Respondent title was authentic thereby arriving at a wrong decision.***
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> ***5. That the trial magistrate erred in law and fact by placing undue weight to frivolous and vexatious argument of the Plaintiff thereby arriving at a wrong decision.***

The Appeal was opposed and the 1st Respondent filed a Replying Affidavit and averred that the Law Firm that represents the Appellant also represents the 2nd Respondent in this Appeal and also acts for the 1st and 2nd Defendants in the lower Court. Further that the Appellant's Firm of Advocates is not properly on record as no consent to change the Advocates or Courts leave was obtained prior to filing of the Memorandum of Appeal after entry of Judgment as required by law. . He further averred that the 2nd Respondent filed an Application for Review at the lower Court and its Advocates are the Appellant's Advocates herein and therefore Appellant's Advocates cannot act for the 2nd Respondent in the same appeal. He further alleged that the Record of Appeal was filed without leave of the Court after expiry of 30 days from the date of Judgment of the lower Court and it contains pleadings that are not legible and are duplicated.

It was therefore his contention that no congent ground of appeal has been raised to warrant setting aside of the lower Court's judgment as it is correct legally and sound and proper in view of the evidence tendered and the reasons given by the trial Courts in its Judgment.

The Court directed that the Appeal be canvassed by way of written submissions and the Appellant through the **Law Firm of Kanyi Kiruchi & Co. Advocates,** filed his written submissions on the **15th of April 2019,** and urged the Court to allow the appeal. It was submitted that the trial

Court ought not to have extinguished the Appellant's right as the rightful owner of the suit land without interrogating further to find out from the Land Registrar why there are two titles over the same property. It was further submitted that the trial magistrate failed to appreciate that the purported change of plot was a fabrication hence any further registration due to the same was fraud and hence the trial Court was wrong in finding that there was need to cancel the title. He relied on various provisions of law and decided cases and urged the Court to allow the appeal.

The 1st Respondent through the **Law Firm of Millimo Muthomi & Co. Advocates** filed his submissions **20th February 2019** and submitted that the Record Appeal was filed out of time and that no leave to appeal out of time was sought and therefore the same is incompetent. Further that the Court lacks *locus standi* as all the documents filed by the Appellants are incompetent as the advocates on record did not properly come on record. He relied on various provisions of law and decided cases and urged the Court to dismiss the appeal.

This Court recognizes that it neither saw nor heard the witnesses and must therefore give allowance to that. The Court has also carefully considered the findings of the trial court, the submissions by the Counsels and finds as follows;-

As this is a first appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. See the case of **Selle v Associated Motor Boat Co. [1968] EA 123 where the Court held that;**

"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 as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of **Ocean Freight Shipping Co. Ltd….Vs.. Oakdale Commodities Ltd(1997)eKLR, Civil App.No.198 of 1995,** where the Court held that:-

"….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".

This Court will first determine the issue on whether this appeal is properly before this Court as the 1st Respondent has alleged in the Replying Affidavit and his submissions. It was alleged that the Records of appeal was filed out of time without leave of the court. The Appellant on the other hand has dismissed this allegations and termed them unnecessary as thy have come late in the day as the Appellants ought to have raised the same as a preliminary objection and cannot raised them at this juncture.

The issue on whether or not the Record of Appeal was filed out of time goes to the jurisdiction of this Court. It is trite that an issue of Jurisdiction has to be dealt with at the earliest opportune of time as Jurisdiction is everything and if the Court has no Jurisdiction, it must down its tools and say no more.

The issue of whether or not the Record of Appeal was filed out of time without the Courts leave goes to the Jurisdiction of this Court and the same must first be determined. See the case of ***Patrick Kiruja Kithinji vs. Victor Mugira Marete [2015] eKLR*** as follows:

"In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under Article 159."

This Court notes that the Memorandum of Appeal by the Applicant was filed on the **16th of February 2015**. However the record of appeal was filed on the **16th of August 2017**. **Section 79 G** of the Civil Procedure Act provides that;

"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

It is this Court opinion that the filing of the appeal includes the Memorandum of appeal and the Record of Appeal for it to be complete. The Judgment of the trial Court having been delivered on the **23rd of January 2015**, the Appellant had a period of 30 days within which to file his Appeal and if for any reason this was not possible, the Appellant still had remedies and that would include seeking leave of Court and providing satisfactory reasons as to why the same could not be filed on time. The Judgment having been delivered on the **23rd of January 2015**, the period within which the Appellant had to file the Appeal lapsed on the **16th of February 2015** and though the Memorandum of Appeal was filed within time, there is no explanation as to why the Record of Appeal was not filed on time.

This Court has perused the lower Court file and noticed that the Appellant herein wrote a letter that was filed on the 10th of February 20015 seeking for the Decree and typed proceedings of the Court. However it is not clear on which date the same were provided and the Appellant has not provided any explanations why he did not seek leave of Court to file the same out of time or even the reason why the same was filed two years later. In the absence of any explanation, this Court finds and holds that the Record of Appeal is not properly on record and therefore the same ought to be struck out. See the case of **Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority [2019] eKLR** where the Court held that

"In this case, the Notice of Appeal was 'filed' on 14th February, 2017, thus if the period of 60 days within which to appeal are factored, the deadline for the filing of the record of appeal fell on 25th April, 2017. Instead, the record herein was filed 20th June, 2017; 48 days out of time. The appellant has blamed the High court registry for the delay in lodging the record of appeal. However, this argument that the registry was to blame cannot hold because, under the proviso to Rule 82 (1) aforesaid, an appellant is afforded some reprieve in so far as computation of time is concerned, if there was delay in preparation of the proceedings upon making a written request for the proceedings. In other words, the computation of the 60 day window within which he should lodge the record of appeal is suspended during the typing of proceedings provided the appellant serves the letter bespeaking proceedings upon the court and the respondent. A certificate of delay is usually issued in such cases, specifying the time taken for the proceedings to be typed, for purposes of exclusion of the same during computation. It is common ground that

the letter bespeaking proceedings was never served upon the respondent in this case. The appellant therefore was obliged to file the record of appeal strictly within sixty uninterrupted days of filing the Notice of appeal, this period lapsed on 25th April, 2017. Having failed to pursue a certificate of delay, it is too late for the respondent to visit blame on the registry for his own misapprehension of the Rules. The record of appeal was thus inexcusably filed out of time, without leave of Court and premised on a defective Notice of Appeal.

Further in the case of **Munir Abubakar Masoud (As member of Tawheed Muslim Association) v Ali Abdalla Salim & another [2018] eKLR the** Court held that;

"As a result, the undeniable fate of the Record which was filed out of time without leave of the Court is to be struck out. However, in the interest of justice we hereby suspend the order of striking out the Record and by extension the appeal herein for a period of two months from the date hereof to enable the appellant to file the requisite application for extension of time under Rule 4 of the Rules. In the event that the appellant succeeds in obtaining extension of time within the next two months, his appeal will be deemed to have been filed within time. If he does not succeed the appeal herein will stand struck out with costs. The costs of this application are awarded to the respondents."

The Upshot of the above therefore is that the Record of Appeal is not properly before Court and in the absence of proper Record of Appeal, it would mean that there is no Appeal and the same is therefore struck out.

The 1st Respondent had also alleged that the Advocates on record are not properly on record as they did not seek leave of Court before they could come on record. This Court however finds that this is an issue of mere procedural technicality that would cause no injustice to the 1st Respondent as the reason as to why Order 9 Rule 9 came into place was to safe guard the interest of an Advocate who may have been short changed by the parties. This is so as the Order further relates to outgoing Advocates and incoming Advocates and not the opposing counsel. It is this Courts finding that the same would not occasion any injustice to the 1st respondent and therefore lacks merit. See the case of **Ngitimbe Hudson Nyanumba v Thomas Ongondo [2018] eKLR**

"The idea/objective behind amending the Civil Procedure Rules to provide that where judgment had been entered any change of advocate was to be with the leave of the court was essentially for the protection of the advocates to safeguard their fees from their clients. The amendment was aimed at preventing mischief whereafter an advocate worked tirelessly for a client upto obtaining a judgment, the advocate is not debriefed by merely another advocate filing a notice of change or the client filing a notice to act in person so that execution of the decree is by another advocate who did not participate in the trial and/or by the client directly with the object of denying the advocate his fees or costs.

The appellant suffered no prejudice at all by reason of such change of advocate. The appellant participated and/or was not prevented from participating in the proceedings and there was no miscarriage of justice. The court is enjoined under Sections 1A and 1B of the Civil Procedure Act, Sections 3(1) and 19(1) of the Environment and Land Court Act and Article 159 2(d) to administer justice expeditiously and justly and without undue regard to technicalities of procedure and it is my view that this is such a case where the court would have been entitled to disregard the strict rules of procedure in order to **do substantive justice.** "

With the above mind, the Court finds that the Appeal before this Court is not properly before it and though it will overlook the procedural technicalities with regards to Counsel on record, it is the Court's finding that the filing of the Record of Appeal is not curable as the Appellant has not attempted to give an explanation for the same. Accordingly the same is struck out as this Court has no Jurisdiction to determine it.

If the court had jurisdiction, what would be the merit of the Appeal? The Appellant has raised various grounds of appeal and amongst them was that the trial Court erred in finding that the his land should have been swapped with that of the 1st Respondent. It is not in doubt that the Appellant was the registered owner of the property **L.R 1210** having obtained the same from the 2nd Defendant and further that he had acquired the same before the 1st Respondent acquired his. **Section 24 of the Land Registration Act provides that:-**

"(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease"

From the foregoing it is clear that the circumstances upon which registration of a person can be cancelled is if the said registration was acquired through fraud or misrepresentation. In the trial Court the 1st Respondent did not plead this nor did he produce evidence to prove the same, on the contrary the Respondents acknowledged that the Appellant had acquired the suit property legally having been a member of the 2nd Respondent.

Further this Court notes that there are two titles to the suit property. In such a case where there are two titles, if the same were issued procedurally, then the first in time will always take precedence and even in so doing the party must explain the root of the title. Further a party must satisfactorily explain how he got his **title.** See the case of **Hubert L. Martin & 2 Others …Vs… Margaret J. Kamar & 5 Others[2016] eKLR,** where the Court held that;

'A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered

which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.''

The Appellant in the instant case has shown through evidence the ballot and share certificate that through which he got the title of the suit land. Furthermore, his title has not been challenged by the Respondents for being unlawful and the Respondents had acknowledged that the same was competent and first in time. This Court therefore finds and holds that the Appellant had a valid title to the suit land and has satisfactorily explained how he obtained the same.

On the other hand the 1st Respondent also has a title to the suit land being **L.R 1210.** However the title held by the 1st Respondent was obtained after the Appellant had obtained his title. Further since the Appellant had held the title to the land, what ought to have reflected in the green card was the transfer of the property from the Appellant to the 1st Respondent. However this is not the case.

Further the learned Magistrate in his Judgment held that there was change that took place and the parties exchanged their parcels of land. It is not in doubt that there was consultations between the parties and that the 2nd Respondent had resolved that the two parties should swap their lands an d the 1st Respondent was to remain with the **L.R 1210** in exchange of granting the Appellant **L.R 1229.** It is clear that the swap was conditional. However the Appellant has faulted the 1st Respondent for failing to deliver his part of the bargain. The Appellant and the 2nd Respondent have clearly stated that the reason the swap did not take place was because the 1st Respondent was to deliver L.R 1229 but failed to do so. This Court finds that the 1st Respondent had an obligation to produce proper documentation to the appellant to enable him transfer the suit land to himself and in the absence of the same it cannot be said that there was a swap.

The Appellant has alleged that he was given a ballot for **L.R 1229** but a share certificate of **L.R 1228** as properly demonstrated in court and therefore he could not take possession of the said land as the same did not belong to the Appellant. It is therefore this Courts opinion that the duty to deliver proper documentation was upon the 1st Respondent and failure to do so could therefore not result in the swap.

Consequently, the Court finds that there was no swap and the Appellant having been duly registered as the owner of the suit property was entitled to the same.

Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the Memorandum of Appeal together with the written submissions, the Court finds that the trial Magistrate arrived at improper determination and this Court finds that had the Appeal been properly on record, it would have allowed it. However this Court already found and held that the Record of Appeal was filed out of time without leave of Court and therefore was not properly before Court.

The upshot of the foregoing is that the Appellant's Appeal is not merited as this Court lacks jurisdiction and consequently the said Appeal is struck out. Judgment and Decree of the trial court is upheld with no order as to costs.

It is so ordered

Dated, Signed **and** ***Delivered*** **at** ***Thika*** **this** ***25th day of October, 2019*****.**

L. GACHERU

JUDGE

25/10/2019

In the presence of

M/S Cheserek holding brief for Mr. Kanyi for Appellant

Mr. Kamau holding brief for Mr. Muthomi for the 1st Respondent

No appearance for 2nd Respondent

Lucy - Court Assistant

Court – Judgment read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

25/10/2019