



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
CHUKA ELC CIVIL APPEAL CASE NO. 129 OF 2017
FORMERLY MERU ELC. CIVIL APPEAL CASE 60 OF 2016
CHARLES MUKURU NJEU.....APPELLANT

VERSUS

LAWRENCE MIRITI M'RACHI.....1ST RESPONDENT

JULIAS NJERU M'RITHAA.....2ND RESPONDENT

JUDGMENT

(Being an appeal from the judgment and decree of the Honourable B. N Ireri – Ag Principal Magistrate in Chuka PMCC No. 36 of 2012 delivered on 29th May, 2015)

1. The Memorandum of Appeal in this matter has the following grounds:

1. The learned Ag. Principal Magistrate erred in law and fact in holding that the Land Dispute Tribunal in LDT Case NO. 17 of 2009 had no jurisdiction to determine issues of ownership of Land Parcel No.1309, 1219 and 1568 yet in actual fact, the said Land Dispute Tribunal did not determine issues of ownership of the said land parcel but ordered that the District Land Surveyor with the help of the map to fix boundaries according to the measurements of the lands which infact was within the jurisdiction of the said Land Dispute Tribunal.
2. The learned Ag. Principal Magistrate erred in law and fact in holding that the Land Dispute Tribunal had no jurisdiction to determine issues of ownership whereas he had no jurisdiction to make such a finding and/or holding.
3. The learned Ag. Principal Magistrate erred in law and fact in holding that the appellant did not state how much the plaintiff bought the land whereas it was not an issue before the court for determination.
4. The learned Ag. Principal Magistrate erred in law and fact in not making a finding that the appellant had not proved his case on the balance of probability as required by the law whereas there was overwhelming evidence to prove that the appellant had proved his case on balance of probabilities.
5. The learned Ag Principal Magistrate erred in law and fact in allowing the respondents to tender evidence and produce exhibits yet they had not filed any defence and/or any pleadings to deny and/or controvert the appellant's claim.

6. The learned Ag Principal Magistrate erred in law and fact in reducing himself to a level of mere defence witness and went out (sic) his way to address issues which were never raised by the respondents in their cross-examination to the appellant by the respondents and this made him to go out of his way to assist the respondents.

7. The learned Ag Principal Magistrate erred in law and fact in failing to make a finding that indeed the appellant was the registered owner of Land Parcel No. Muthambi/Gatua/1309 having produced the requisite and relevant documents and evidence to prove ownership of the said land.

8. The learned Ag Principal Magistrate erred in law and fact in holding that the appellant did not state how much he bought the land, or produce any sale agreement to support his claim yet the case before him was not a dispute between the appellant and the person who sold land parcel No. Muthambi/Gatua/1309 to the appellant.

9. The learned Ag Principal Magistrate erred in law and fact in holding that he found it difficult to establish how the seller sold the land to the appellant and how the seller acquired the land yet the copy of the register produced by the appellant herein clearly showed that one M'Meru Mbauni who was the appellant's witness in the lower court sold LAND Parcel No. Muthambi/Gatua/1309 to the Appellant and he was the first registered owner of the said land before he sold and had it transferred to the appellant.

10. The learned Ag Principal Magistrate erred in law and fact in holding that it is not clear how the appellant acquired title to Land Parcel No. Muthambi/Gatua/1309 yet the appellant produced a copy of the register for the said land clearly showing that originally, the said land was first registered in the names of M'Meru M'Bauni who transferred the same to the appellant as per the title deed marked as plaintiff's exhibit No. 2 issued to the appellant.

11. The learned Ag. Principal Magistrate erred in law and fact in emphasizing on extraneous matters which made him to arrive at a wrong conclusion in his judgment.

12. The judgment by the Ag. Principal Magistrate is completely biased.

13. The Judgment by the Ag Principal Magistrate is against the law and the weight of evidence tendered by the appellant in court.

2. For the above reasons, the appellant prays for the following:

- a) Appeal herein be allowed with costs to the appellant.
- b) The Ag. Principal Magistrate's Judgment dated 29th May, 2015 be set aside.
- c) The appellant's claim in Chuka PMCC No.36 of 2012 be allowed with costs.

3. The respondents are lay people who were not represented by advocates in this suit. I find that the submissions they have filed in opposition of the appeal are rather unorthodox as they are in the form of letters addressed to the Deputy Registrar of this court. In the interest of justice, I deem the two letters to be their submissions. In other words, the two letters are admitted as the respondents' submissions. However, in order for it to be seen that all issues raised in this appeal have been considered by the court, I have decided to reproduce here below in full the appellant's submissions and the respondents' submissions.

4. Appellant's submissions

1. INTRODUCTION

Your Lordship, the appellant herein filed this appeal pursuant to the leave of the court granted on 10th

November, 2016.

In the appeal herein, the appellant is challenging the judgment of the Ag Principal Magistrate in Chuka PMCC No. 36 of 2012 delivered on 29th May, 2015 and raised 13 grounds of appeal.

In our submissions herein below, we intend to submit on grounds Nos. 1 & 2 together, grounds 3, 8, 9 and 10 together, and grounds 4, 5, 6, 7, 11, 12 and 13 separately.

2. GROUNDS OF APPEAL

(a) Grounds 1 & 2

Your Lordship, at page 77 of the record of appeal line 2, the learned Ag Principal Magistrate had this to say “First I take note of the ruling of the land dispute tribunal dated 30.11.2010 which purported to determine the issue of ownership of land parcel No. 1309, 18 and 1219. As it were the Tribunals then had no jurisdiction to determine issues of ownership, the mandate was confined to determining issue of boundaries disputes, and therefore, I do find that the decision is null and void and I proceed to disregard the same.”

Your Lordship, at page 58 of the record of appeal, you will note that the learned Ag Principal Magistrate was referring to the ruling of the land Dispute Tribunal in Tribunal Case No. 17 of 2009 which was between Lawrence Miriti M’Ranchi and James Riungu M’Ranchi on one hand versus M’Bauni M’Meru who was the original owner of land parcel No. Muthambi/Gatua/1309 the subject matter in this appeal – see P Exhibit 3 at page 50 of the record of appeal. The said Tribunal Case No. 17 of 2009 was not a dispute between the appellant and the respondent herein. It was a dispute between the 1st respondent and one James Riungu M’Ranchi versus M’Bauni M’Meru who was PW3 in Chuka PMCC No. 36 of 2012.

Your Lordship, the dispute before the court in Chuka PMCC No. 36 of 2012 was between the appellant and the respondents.

We submit that the Ag Principal Magistrate erred in holding that the Land Dispute Tribunal did not have jurisdiction to hear ownership dispute whereas the said dispute was not between the appellant and the respondents herein.

The appellant was not party to the said land dispute case no. 17 of 1990.

In any event, from the plaintiff’s (applicant’s) exhibit No. 3, which (sic) exhibited at page 50 of the record of appeal, it shows that as at 6.11.1997, the said land parcel No. Muthambi/Gatua/1309 was registered in the names of one M’Bauni M’Meru and he transferred the said land to the appellant herein on 17.10.2011.

In fact M’Bauni M’Meru was the first registered owner of the said land. There was therefore no dispute of ownership between the plaintiff and the said M’Bauni M’Meru and in fact, the land dispute in the Tribunal did not determine the ownership.

It is clear your Lordship, that in their findings of the Tribunal at page 61 of the record of appeal lines 12, 13 and 14 that the tribunal noted that there was a problem of the boundary and in their final order at page 61 from line 23 to 24 they ordered that the District Surveyor with the help of the map implement their decision by fixing boundaries.

Your Lordship, section 8(1) of the Land Dispute Tribunal Act No. 18 of 1990 (now repealed) provides that once the Land Dispute Tribunal made a finding the aggrieved party should appeal at the Provincial Tribunal within 30 days and in section 8(9) of Land Dispute Tribunal Act No. 18 of 1990, a party aggrieved by the judgment of the Provincial Land Dispute Tribunal, should appeal to the High Court on points of law only within 60 days of the Provincial Appeals Committee’s

decision.

We submit that even if the Land Dispute Tribunal did not have jurisdiction to determine ownership in Land Dispute case No. 17 of 2009, the learned Ag Principal Magistrate had no jurisdiction to make a finding that the Tribunal Land Dispute did not have jurisdiction to make a finding that the Land Disputes Tribunal did not have jurisdiction to determine ownership issues.

It is only the High Court which has jurisdiction to determine whether the Land Dispute Tribunal has jurisdiction by aggrieved party either by filing an appeal or by seeking prerogative orders of Judicial Review in the High Court.

In Tribunal case no. 17 of 2009, there was no evidence to prove that any party appealed.

We therefore submit that the learned Ag Principal Magistrate erred in law when he made a finding that the Land Dispute Tribunal did not have jurisdiction to determine ownership because:

(a) The parties involved in that dispute except the 1st respondent were not parties in Chuka PMCC No. 36 of 2012.

(b) The issues before the court in Chuka PMCC No. 36 of 2012 were between the (sic) not the appellant herein and the respondents.

(c) The Ag Principal Magistrate did not have jurisdiction to determine whether the Land Dispute Tribunal had jurisdiction or not. It is only the High Court which has such jurisdiction by way of appeal and/or Judicial Review.

(d) The Land Dispute Tribunal had Jurisdiction to order for determination of boundaries which they did in Tribunal case No. 17 of 2009.

(e) There was no evidence tendered in court to prove that any party filed an appeal or Judicial Review disputing the findings of the Land Dispute Tribunal in Tribunal Case No. 17 of 2009.

(f) There was no evidence to prove that the dissatisfied party or parties filed an appeal before the Provincial Land Dispute Tribunal challenging the said Tribunal decision.

(b) Grounds No. 3, 8, 9 and 10

Your Lordship, at page 77 lines 8 to 13 of the record of appeal, the learned Ag Principal Magistrate held that although the plaintiff claims to have bought land parcel NO. Muthambi/Gatua/1309, from M'Bauni M'Meru, he did not state how much he bought the said land and he did not produce any agreement. He further stated that although M'Bauni M'Meru the seller stated that he was paid Kshs.200,000/=, the plaintiff did not know how much he bought the land.

Your Lordship, we submit that it was wrong for the Ag Principal Magistrate to hold that the plaintiff did not state how much he bought the land and/or produce sale agreement. This is because there was no dispute between the plaintiff and the seller one M'Bauni M'Meru on whether he bought the said land or how much he purchased the said land.

The case before the court was between the plaintiff and the respondents herein in which the plaintiff (appellant) was seeking eviction of respondents (defendants) from his land parcel No. Muthambi/Gatua/1309.

We further submit that the Ag Principal Magistrate erred in law and fact in holding that the plaintiff could not remember how much he bought land parcel No. Muthambi/Gatua/1309. We submit that the appellant's failure to remember how much he bought his land was not fatal.

Your Lordship, although it was also not disputed how much the plaintiff bought the said land, the seller M'Bauni M'Meru gave evidence in court and stated that the plaintiff paid him Kshs.200,000/=

In any event, at page 13 of the record of appeal, the said agreement is listed as No. 3 in the plaintiff's list of documents and it is displayed at pages 15 and 16 of the record of appeal. There is also the evidence of PW2 at page 29 and evidence of PW3 M'Bauni M'Meru at pages 30 and 31 of the record of appeal.

Your Lordship, the respondents did not file any defence and/or a counter claim disputing that the appellant did not buy land parcel No. Muthambi/Gatua/1309. The respondents were not also disputing how much the appellant bought the said land.

We submit that following the finding by the learned Ag Principal Magistrate's that the appellant did not state how much he bought land parcel No. Muthambi/Gatua/1309, he proceeded to make a judgment which was erroneous and against the evidence tendered in court by the appellant.

Further your Lordship, the case before the court was not between the appellant and the person who sold land parcel No. Muthambi/Gatua/1309 and as we have already stated herein above there was no dispute on how much money the appellant bought land parcel No. Muthambi/Gatua/1309.

The appellant produced the copies of the original title deed and a copy of the register marked P Exhibit No. 2 and P Exhibit No. 3 respectively which showed that the appellant was the registered owner of land parcel No. Muthambi/Gatua/1309.

There was overwhelming evidence tendered by the appellant and his witnesses to prove that he was the owner of land parcel No. Muthambi/Gatua/1309 and the trial magistrate therefore erred in holding that it was not clear how the appellant acquired the title to land parcel No. Muthambi/Gatua/1309.

The seller of the said land parcel NO. Muthambi/Gatua/1309 gave evidence in court and indeed P. Exhibit No. 3 exhibited at page 50 of the record of appeal shows that one M'Bauni M'Meru was the first registered owner of the said land and he subsequently transferred the same to the appellant.

The said M'Bauni M'Meru was one of the appellant's witnesses.

Your Lordship, as the owner of land parcel No. Muthambi/Gatua/1309, all what was required to prove ownership of the said land was production of the title deed and a copy of the register for the said land which the appellant did.

The appellant also produced the Sketch Map as an exhibit to show the location of his land parcel No. Muthambi/Gatua/1309 and land parcel No. Muthambi/Gatua/1568 belonging to the 1st respondent – see P. Exhibit No. 4 at page 17 of the record of appeal.

We therefore submit that the issue of how the appellant bought and how much he bought the said land was not a dispute before the court and the trial magistrate erred when he emphasized on them as a basis of determining the appellant's claim in which he dismissed.

C. Ground 4

Your Lordship, we submit that the learned Ag Principal Magistrate erred in law and fact in not finding and/or making a finding that the appellant had not proved his case on balance of probabilities.

Your Lordship, it is clear from the evidence tendered in court by the appellant and his two witnesses that the appellant had proved his case as required in Civil Cases.

The evidence of the appellant herein is to be found at pages 27 upto page 31 of the record of appeal.

At page 27 of the record of appeal line 10 to 13, the appellant produced a copy of the register to prove that he was registered owner of land parcel No. MUTHAMBI/GATUA/1309 – see the said exhibit at page 50 of the record of appeal.

He also produced the original title deed for the said land showing that he was the registered owner of the land and a sketch map showing the location of land parcel No. Muthambi/Gatua/1309 – see pages 48, 49 and 51 of the record of appeal.

We submit that the said documents which the appellant produced as exhibits in the lower court was a prove that he owns land parcel No. Muthambi/Gatua/1309.

Your Lordship, from the appellant's exhibit No. 3 which was a copy of the register or a green card for land parcel No. Muthambi/Gatua/1309, it is clear that land parcel No. Muthambi/Gatua/1309 was originally registered in the names of one M'Bauni/M'Meru who was the first owner. He then transferred it to the appellant.

The said M'Bauni M'Meru gave evidence as PW3 – see pages 30 and 31 of the record of appeal.

It is clear from the said green card (P. Exhibit No. 3) exhibited at page 50 of the record of appeal that land parcel No. Muthambi/Gatua/1309 had no encumbrances before and/or after it was transferred to the appellant.

We therefore submit that indeed, the learned Ag Principal Magistrate had enough material evidence to enable him come to the conclusion that indeed, the appellant had proved his case on balance of probabilities.

Your Lordship, it is not disputed that the appellant was the registered owner of land parcel No. Muthambi/Gatua/1309. Whereas it is true there was confusion when the plaintiff produced search certificate for land parcel No. Muthambi/Gatua/1568 as exhibit No. 1 which is registered in the name of the 1st respondent, the appellant's exhibits No. 4 which is a sketch map clearly shows that land parcel nos. 1309 and 1568 are two distinct land parcels and are completely separated by a road.

Indeed, even in the plaint, the evidence which the appellant tendered in court and his submissions, he did not make a claim against land parcel No. Muthambi/Gatua/1568 belonging to the 1st respondent.

We therefore submit that even though the appellant produced exhibit No. 1 which he may have believed it was for land parcel no. Muthambi/Gatua/1309, there was enough material evidence tendered by the appellant to prove that his claim for eviction against the respondents was in respect of land parcel No. Muthambi/Gatua/1309 – see appellant's exhibits 2, 3, and 4 at pages 48, 49 and 51 of the record of appeal.

We therefore submit that the learned Ag Principal Magistrate ought to have made a finding that the appellant had proved his case on the balance required in a civil suit and allowed the appellant's claim against the respondents.

(d) Ground 5

Your Lordship, after the respondents were served with the summons to enter appearance and the appellant's pleadings in the lower court, they filed an appearance but they did not file defence – see appearance at page 18 of the record of appeal.

Interlocutory judgment was entered against the defendant on 5.6.2012. They never set aside the said

interlocutory judgment and neither did they file defence.

Your Lordship, when the matter was set down for hearing, the appellant gave evidence and was cross examined by the respondents.

The Ag Principal Magistrate also allowed the respondents to call witnesses. But what is so surprising is that he allowed the respondents to tender evidence in court and produce exhibits as if they had filed defence.

We submit that the learned Ag Principal Magistrate erred in law and fact in allowing the respondents to give evidence and produce exhibits as if they had filed defence because the respondents had only the right to cross-examine the appellant having not filed their defence. The respondents could not give evidence, produce exhibits and call witnesses when they had not filed defence. It was a serious error and by allowing the respondents to give evidence, produce exhibits and call witnesses, the appellant who had no prior knowledge of the respondents defence and/or exhibits was seriously prejudiced.

The learned Ag Principal Magistrate ought to have guided the parties appropriately taking into account that they were not represented. He should not have taken advantage of the appellant who had no benefit of a lawyer by allowing the respondents to give evidence and produce exhibits while they had no defence on record.

We further submit that having not filed a defence, there was no pleading to controvert the appellants claim and it was wrong for the Ag Principal Magistrate to dismiss the appellant's claim.

A party is bound by his/or her pleadings and without a pleading, the learned Ag Principal Magistrate did not have the basis of giving judgment in favour of the respondents.

Your Lordship, at page 74 of the record of appeal line 1 to 3 the trial magistrate acknowledged that the respondents did not file any defence but stated that because the matter had proceeded to full hearing, he found it fair to determine the case on merit and that he would determine the evidence on merit.

The Ag Principal Magistrate did not show which law allowed him to allow the respondents proceed to make judgment on evidence by the respondents who had not filed defence and/or give evidence, produce exhibits and call witnesses and then a counter-claim.

We submit that the trial magistrate ought to have made a finding that because the respondents had not filed defence, he could not proceed to determine the case on merit as that would prejudice the plaintiff. He should have allowed the appellant to proceed with this case as a formal proof but only allowing the respondents to cross-examine the appellant in the lower court.

Your Lordship, Order 7 Rule 1 provide that after the defendant has been served with the summons to enter appearance, he shall, unless some other or further order is made by the court file defence within 14 days.

Your Lordship, even Order 10 Rule 10 of the Civil Procedure Rules 2010 does not state that a defendant who has filed an appearance but has not filed a defence should be taken as if he has filed a defence and be allowed to give evidence and call witnesses.

The trial magistrate treated the failure by the respondents to file defence so casually and erred in law by proceeding to determine the Chuka PMCC No. 36 of 2012 by considering evidence tendered by the respondents and their witnesses and the exhibits they produced in court.

(e) Ground 6

Your Lordship, as we have already submitted in ground No. 5 hereinabove, the learned Ag Principal Magistrate proceeded to allow the respondents to give evidence, call witnesses and give evidence. By doing so, the learned Ag Principal Magistrate then proceeded to address the said evidence tendered by the respondents and their witnesses in making his judgment against the applicant.

We submit that by doing so, the learned Ag Principal Magistrate reduced himself into a mere defence witness because he ought not to have addressed the said evidence and exhibits tendered by the respondents in their defence.

Indeed, in his judgment, the learned Ag Principal Magistrate addressed the issues which were never raised by the respondents and this clearly shows that he was out to assist the respondents. For example, the following did not arise in the cross-examination of the appellant by the respondents but were addressed by the learned Ag Principal Magistrate.

- (a) How much the appellant bought land parcel No. Muthambi/Gatua/1309
- (b) Production of sale agreement in respect of land parcel No. Muthambi/Gatua/1309
- (c) Jurisdiction of the land dispute tribunal in LDT No. 17 of 2009 and its findings.
- (d) How land parcel No. Muthambi/Gatua/1309 was sold by the seller to the applicant.

To verify our above submissions, we refer the court to the evidence of the appellant and his witnesses and the cross-examination by the respondents is at pages 27 to 31 of the record of appeal.

We therefore submit that by going out of his way to address issues which were not part of the evidence and which ought not to have been addressed, the learned Ag Principal Magistrate reduced himself to a mere defence witness with the sole intention of assisting the respondents.

(f). Ground 7

Your Lordship, from the material evidence presented to the court particularly appellant's exhibits Nos. 2, 3 and 4 exhibited at pages 48 to 51 of the record of appeal, we submit that there was enough material evidence for the learned Ag Principal Magistrate to make findings that the appellant was the registered owner of land parcel No. Muthambi/Gatua/1309.

(g). Ground No. 11

Your Lordship, we submit that the learned Ag Principal Magistrate erred in law and fact in emphasizing on extraneous matters which made him arrive at a wrong conclusion in his judgment.

This is because in ensuring that he made a judgment against the appellant, he emphasized the following none issues:

- (i) The jurisdiction of the Land Dispute Tribunal when such an issue was not a matter within his jurisdiction and when the issue of the Land Dispute Tribunal Case No. 17 of 2009 was not before him for determination. He only addressed the issue of jurisdiction of the Land Dispute Tribunal because he was only out to ensure that the appellant's case in the Lower Court failed.
- (ii) The issues of how much the appellant bought land parcel No. Muthambi/Gatua/1309, and non production of the sale agreement and how much the appellant paid for the sale of the subject parcel of land were all extraneous matters only tailored to give a judgment against the appellant because those were non issues and were not in dispute.
- (iii) That PW3 did not recall from whom he bought the subject parcel of land and how the seller

(PW3) acquired the land were all extraneous matters which clearly shows that the trial magistrate opted to focus his mind on the extraneous issues which were negative in nature.

In fact, from his judgment, although he allowed the respondent to give evidence without having filed a defence, he did not address the allegations made by the respondents in his findings in his judgment.

He only addressed the 1st respondent's allegations that the land in dispute was a family land and he had lived in the said land for thirty (30) years yet he had not filed any pleadings to that effect.

(iv) The trial magistrate completely ignored the evidence of PW2 and instead castigated the evidence of the PW1 (the appellant herein) and that of PW3, a clear evidence that he had a mind set and emphasized on extraneous matters with sole intention of making a finding against the appellant.

(v) At page 40 of the record of appeal line 5, the 1st respondent applied to the court to visit the scene. The court agreed. At pages 40 of the record of appeal, line 18 and pages 41 line 10 and page 42 line 16, the court was supposed to visit the scene. However, there is no reference in the learned Ag Principal Magistrate's judgment that he visited the scene and what were his findings.

As regards the learned Ag. Principal Magistrate's finding that the defendant had lived in the suit land for 30 years, none of the respondents gave evidence to the effect that he had lived in the said suit for 30 years. It is one of the respondents witness to wit DW3 who stated that Lawrence has lived in that land for 30 years. He did not state which land he was referring to – see the evidence of DW3 at page 38 of the record of appeal.

(h). Ground No. 12

Your Lordship, we submit that the judgment of the learned Ag Principal Magistrate is completely biased for the following reasons:

(a) He allowed the respondents to give evidence, produce exhibits and call witnesses and he was aware that they had not filed a defence to controvert the appellant's claim which was against the law.

(b) He had a mind set in his judgment in that he emphasized on the none issues when making his findings against the appellant in his judgment because he was already biased against the appellant.

(c) He failed to visit the scene as prayed by the 1st respondent even after making an order for such a visit without giving reasons because he had already a mindset that he will give judgment against the appellant.

(d) He emphasized on none issues and extraneous matters (which we have already submitted in ground No. 11 herein above) with the sole intention of arriving at a specific judgment against the appellant.

(e) He was biased and had a wrong attitude in analyzing the appellant's evidence in his judgment and thus ended up arriving at a wrong judgment.

(i). Ground No. 13

Your Lordship, we submit that the judgment by the Ag Principal Magistrate is against the law and the weight of the evidence tendered by the appellant in court.

Your Lordship, although the learned Ag Magistrate summarized the evidence tendered in court by the appellants and that of the witness vis a vis that of the respondents and their witnesses, he never addressed the issues for determination.

He went straight to emphasize on what was not relevant so as to arrive at a decision which was against the appellant and this is against the law.

The trial magistrate allowed the respondent to give evidence even though it is a requirement of the law that they should have filed a defence and/or counter claim against the appellant's suit. This was again against the Civil Procedure Rules.

Indeed, even the evidence of ownership of the land parcel No. Muthambi/Gatua/1309 tendered by the appellant, the trial magistrate completely ignored it and went out to address extraneous matters which were never tendered as evidence and/or that which did not arise during the cross examination of the appellant by the respondent.

Even when none of the respondents gave evidence to the effect that he had lived in the suit land for over 30 years, the trial court in its judgment at page 78 of the record of appeal lines 1 and 2 had this to say..... "on the balance of probability, and I find the balance tilting in favour of the defendants, who states that the land in question is ancestral land and he has lived on it for over 30 years".....which clearly shows that the trial court's judgment is not based on the law and evidence adduced in court. There was no pleading by the respondents to that effect.

In *Nairobi Civil Appeal No. 274 of 1997 Kenya Commercial Bank Ltd Versus Mwanzau Mbaruka & Ano* at page 3 of the said judgment, the Court of Appeal held that the trial judge by raising and determining the suit on an issue that was neither pleaded or evidence adduced on thereby introduced a new cause of action against the appellant. The court held that he clearly went astray and his judgment could not be left to stand.

This is exactly what the trial court did in its judgment in Chuka PMCC No. 36 of 2012.

We therefore urge the honourable court to:

- (a) Allow the appeal herein with costs to the appellant
- (b) The Ag Principal Magistrate's judgment dated 29th May, 2015 be set aside.
- (c) The appellant's claim in Chuka PMCC NO. 36 OF 2012 be allowed with costs.

We so humbly pray.

Dated at Meru this 5th day of June, 2017

Nyamu Nyaga & Co. Advocates

Advocates for the appellant

1ST RESPONDENT'S SUBMISSIONS (In his actual words)

LAWRENCE MIRITI M. RATHI

MINUGU PRIMARY SCHOOL,

P. O. BOX 252-60400,

CHUKA-MERU.

30TH OCTOBER, 2017

THE DEPUTY REGISTRAR,

HIGH COURT OF KENYA AT CHUKA

RE: CHUKA ELC CASE NO. 129 OF 2017

CHARLES MUKURU NJERUPLAINTIFF

VERSUS

LAWRENCE MIRITI.....1ST DEFENDANT

JULIUS NJERU M. RITHAA2ND DEFENDANT

Dear Sir,

Your honour, may I submit my application to your honourable court and as Deputy Registrar.

Your honour, this land belonged to my father **CHARLES M. RACHI M. RINKANYA** under the following facts:

- A. It was rewarded to my father from number 193
- B. My father (sic) number is 219 ranging 2.93
- C. It was subdivided to the following members:
 - 1. Lawrence Miriti M.Rachi 1 acre
 - 2. James Riungu M. Rachi 0.96 points
 - 3. atrick Miriti 0.49 points
 - 4. Gitonga Baini 0.24 points
 - 5. Sabari M. Rikanya 0.24 points

Conclusion:-

- a) Your honour, I don't know Charles Mukuru Njeru
- b) Charles Mukuru Njeru did not buy the land to (sic) me or my father or one of the family
- c) My land is ancestral land from my father.
- d) 60 days objection, where was M'Bauni Meru?
- e) District Registrar refused to attend the court at Chuka
- f) The learned Ag Principal Magistrate erred no.(sic) wre (sic) according to proceedings of case No. 36 of 2012.
- g) Visiting any land with the Principal Magistrate of Chukka Law Court was to confirm to both parties no appeal to found in both filed to anyone (sic).

Confirmation

- a) No one accused my father among these two parties (Charles Mukuru Njeru) neither Bauni Meru.
- b) 60 days objection none of the onhected neither Charles Mukuru nor Bauni Meru.
- c) I have more than 40 years living into this land and developing it including my family.

NB:

- a. Your honour, Bane M. Mere (sic) statement was very true that the land register at mitheru land office he found a balance of one acre only from Daniel Kanake Ngambi (sic).
- b. The land along Karandini on the side of Nithi River were not transferred according to land act committee act at Mitheru Land Office.
- c. For all that matter, please your honour, I am sure this is an office error because who sent claim to the land office and tribunal court is me Lawrence Miriti M.Rachi not M. Bauni Meru (sic).

I remain that you are going to hear my cry.

Yours faithfully,

LAWRENCE MIRITI M. RACHI

2ND RESPONDENT'S SUBMISSIONS (In his actual words)

JULIUS NJERU M.RITHAA,
MIWUGU PRIMARY SCHOOL,
P. O. BOX 252,

CHUKA – MERU

30TH OCTOBER, 2017

THE DEPUTY REGISTRAR,
HIGH COURT OF KENYA AT CHUKA

RE: CHUKKA ELC CASE NO. 129 OF 2017

CHARLES MUKURU NJERU.....PLAINTIFF

VERSUS

JULIUS NJERU M. RITHAA2ND DEFENDANT

Dear Sir,

Your honour, may I submit my application to your honourable court and as a Deputy Registrar.

Your honour, I Julius Njeru M. Rithaa bought 20 points of land from Lawrence Miriti M.Rachi in 1996. I have 21 years living in those 20 points.

Your honour, I have no other land. Lawrence is not my brother.

Your honour for that matter I remain hoping that you are going to hear my cry.

Yours faithfully,

JULIUS NJERU M. RITHAA.

5. As the first appellate court, I am entitled to look afresh at the evidence tendered in the lower court and arrive at my decision. I have looked at all the evidence proffered in the lower court and do make the following findings:

a) On grounds 1 and 2, I agree with the appellant that Land Dispute Tribunal Case No. 17 of 2009 was not a dispute between the appellant and the respondents in this matter. The Learned Ag Principal Magistrate should not have used it to decide against the appellant. I also agree that the learned Ag Principal Magistrate went overboard by finding that the Land Dispute Tribunal had no jurisdiction, a function that devolved to the High Court, and now this court, upon an appeal from the decision of the Provincial Appeals Committee.

I find that the respondents have not controverted these 2 grounds.

b) On grounds 3, 8, 9 and 10, I agree that the learned magistrate delved into extraneous matters and before arriving at his decision never took into account the totality of the evidence proffered by the parties including the fact that the respondents had not filed any defence or counter claim. I accept the appellant's submissions in toto.

The respondents have failed to controvert these grounds.

c) On ground 4, upon careful consideration of the proceedings in the lower court, I find that the learned Ag Principal Magistrate erred in law and fact by not finding that the appellant had proved his case on a balance of probabilities.

The respondents have not controverted the submissions made in support of this ground.

d) Regarding ground number 5, after examining the evidence proffered in the lower court, I agree that since the respondents had filed no defence, they should not have been allowed to give evidence, produced exhibits and to call witnesses.

I uphold ground number 5 in the appeal and find that it has not been controverted by the respondents.

e) Concerning ground number 6, upon perusal of the proceedings conducted in the lower court, I agree that the learned Ag Principal Magistrate went overboard and exceeded his proper duties, indeed as claimed by the appellant's advocate, seeming to behave as if he was a witness for the respondents. I do find that in his judgment the learned Ag Principal Magistrate addressed issues not raised by the respondents.

I uphold this ground and find that the submissions proffered by the appellant in its support have not been controverted by the respondents.

f) Concerning ground No. 7, upon careful consideration and analysis of the evidence proffered by the parties in the lower court, I agree with the appellant that there was enough material evidence for the learned Ag Principal Magistrate to make a finding that the appellant was the registered owner of land parcel No. Muthambi/Gatua/1309.

This ground is upheld. I find that it has not been controverted by the respondents.

g) On ground No. 11, I have already said that the learned Ag Principal Magistrate had, in arriving at his decision, considered extraneous matters. I uphold this ground and find that it has not been controverted by the respondents.

h) On ground No. 12, as I have already stated, the learned Ag Principal Magistrate had considered extraneous matters. I do not want to conclusively find that he was biased. However, the Ag Principal Magistrate considered extraneous matters, I find that this ground is meritorious. I uphold it and find that it has not been controverted by the respondents.

i) On ground Number 13, having perused the proceedings in the lower court, I am in agreement with the appellant that the learned Ag Principal Magistrate, in arriving at his decision, went against the weight of the available evidence and the law.

This ground is upheld. I find that it is not controverted by the respondents.

I am also in agreement with the authority proffered by the appellant, to wit, Nairobi Civil Appeal No. 274 of 1997, Kenya Commercial Bank Ltd versus Mwanzia Mbaruka and Another, [eKLR] where the Court of Appeal held that the trial Judge, by raising and determining the suit on an issue that was neither pleaded or upon which evidence had been adduced, had introduced a new cause of action against the appellant, and therefore had clearly gone astray thereby rendering the Court of Appeal to find his judgment untenable.

I agree that the Ag. Principal Magistrate in Chuka PMCC No. 36 of 2012 had introduced unpleaded and uncanvassed issues in his judgment.

6. In the circumstances, I uphold this appeal. Judgment is entered in favour of the appellant in the following terms:

(1) This appeal is allowed and costs are awarded to the Appellant.

(2) The judgment of the Ag Principal Magistrate dated 29th May, 2015 is hereby set aside.

(3) The appellant's claim in CHUKA PMCC No. 36 of 2012 is hereby allowed with costs.

Delivered in open court at Chuka this **30th day of January, 2018** in the presence of:

CA: Ndegwa

Nyamu Nyaga Present for the Appellant

Lawrence Miriti – 1st Respondent – absent

Julius Njeru M'Rithaa – 2nd Respondent - absent

P. M. NJOROGE,

JUDGE