Masango v Njiru (Sued as the personal representative of Florence John (Deceased) (Environment and Land Appeal E010 of 2023) [2024] KEELC 1545 (KLR) (13 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1545 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E010 OF 2023

A NYUKURI, J

MARCH 13, 2024

BETWEEN

JEREMIAH MUTIE MASANGO ..... APPELLANT

AND

BERNET MUTHOMI NJIRU (SUED AS THE PERSONAL REPRESENTATIVE OF FLORENCE JOHN (DECEASED) ..... RESPONDENT

(Being an Appeal from the Judgment of Honourable C.N. Ondieki, Principal Magistrate, delivered on 15th March 2023 in the Chief Magistrate's Court at Machakos Environment and Land Case No. E063 of 2021)

JUDGMENT

Introduction

1. Jeremiah Mutie Musango, the appellant herein, filed this appeal against the judgment of Honourable C. N. Ondieki, Principal Magistrate, delivered on 15th March 2023, in Machakos Chief Magistrates Court ELC Case No E063 of 2021. In the impugned judgment, the trial court found that Plot No 1021 Muputi Farming and Ranching Co-operative Society Limited, (suit property) belonged to the appellant, but applied the maxim aequitas est quasi aequalitus, (meaning where two people have an equal right in one property, the property will be divided equally and or equity is equality and equality is equity) and ordered that plot Number 1021 and plot No 1437 be divided equally between the appellant and the respondent with appropriate facilitation of the society. The trial court also declared that the appellant is the *bona fide* owner of a half of plot No 1021; that upon subdivision, the defendant becomes a trespasser on one half of plot No 1021, and ought to vacate or be evicted; and a permanent injunction against the respondent in respect of the one half of plot No 1021. Each party was ordered to bear its own costs.

Background

2. On 14th June 2021, the appellant herein who was the plaintiff in the lower court, filed a plaint against the respondent, seeking the following orders;

    a. A declaration that the Plaintiff is the rightful owner of plot No 1021 measuring ½ Acres within Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited.

    b. An order of injunction to restrain the Defendant, his servants and/or agents from entering and/or committing acts of waste in plot No 1021 Muputi Farming and Ranching Co-operative Society Limited.

    c. An order for the Defendant to demolish and/or remove all the illegal structures in plot No 1021 Muputi Farming and Ranching Co-operative Society Limited and in default the plaintiff be at liberty to remove them at the defendant's expense with the supervision of the OCS Machakos.

    d. Costs of the suit and interest.

    e. Any other relief the court may deem fit and just.

3. The Plaintiff averred that on 15th May 2013, he purchased the suit property from one Francisco Musyoka Muasya. That the latter had purchased the same from one Julius Pius Katoni who had been allocated the said property by virtue of his membership of Muputi Farming and Ranching Co-operative Society Limited (the Society). That Mr. Katoni was member No 1891. He also averred that when he bought the suit property in 2013, it was vacant until the year 2019 when the defendant entered thereon and erected illegal structures. He stated that in 2021, the society send a surveyor to the suit property who prepared a report.

4. The suit was opposed. On 14th July 2021, the defendant entered appearance and subsequently filed defence on 23rd July 2021, which was amended on 15th February 2022. The defendant denied the plaintiff's claim and stated that the society is the one that is responsible for showing, allocating and reorganizing the plots and numbers on the ground anytime before the plot is developed. She stated that in the year 2019, the society rearranged the position of plot Nos 1021 and 1437 which plots had not been developed. Further that the society moved the defendant to plot No 1021 whereof she immediately undertook development and that the society ruled that since the defendant had developed the suit property, it allocated the plaintiff plot No 1437. That according to the society's bylaws no member is allowed to evict another member. She stated that plot No 1437 is within the same geographical and topological area with the suit property and that the two properties are not far from each other. She also averred that her sister's son had been buried on the suit property and that she would suffer psychologically if the deceased's grave was abandoned on the suit property.

5. In the course of time, Florence John the original defendant died and was substituted with Bernet Muthomi Njeru, the respondent herein, who was her brother.

6. Subsequent to close of pleadings, the matter proceeded for a full hearing by way of viva voce evidence.

Plaintiff's evidence

7. PW1 was Julius Pius Katoni who testified that he had been member No 1891 of the Society and that by virtue of his membership, he was allocated plot No 1021 measuring a half an acre. He informed court that he sold and transferred the suit property to his son in law one Francisco Musyoka Muasya. He stated that he had never had a dispute over the suit property. He produced membership card; a

slip; transfer form and receipt of Kshs 3,000/=. In cross examination, he stated that the society had not issued title deeds to its 100,000 members and that some members had obtained titles while others had not because of corruption.

8. PW2 was Jeremiah Mutiso Musango, the plaintiff in the lower court. He rehashed what he had stated in the plaint and testified that he bought the suit property from Francisco Musyoka Muasya. Further that he appeared before the society for the transfer of the suit property to him. He stated that when he bought the suit property it was vacant and that the society showed him the beacons. He stated that he was aware of the process of swapping plots but that he was not involved in his plot being given to the defendant. He produced the sale agreement; transfer and receipt; letters dated 25th February 2021 and 21st March 2021 by the surveyor; and a demand letter. On cross examination, he stated that he was not a member of the society. He also maintained that he realized the defendant had built on the suit property and that he was not aware that the defendant buried her son thereon. That he did not have a title deed. He stated that he has never been informed that he had been allocated plot No 1437. He stated that he was never called to attend the committee of the society sitting in regard of the suit property. He also said that he did not know where plot No 1437 is, its value or whether it has a dispute.

9. PW3 was Francisco Musyoka Muasya. He stated that he sold the suit property to the plaintiff and that he executed the transfer to him before the society's committee, whereof he paid Kshs 6,000/=. He further stated that he had bought the suit property from PW1 who transferred the same to the him when they both appeared before the society's committee. On cross examination, he stated that the society effected the transfer from him to the plaintiff as demonstrated in the transfer form, which exercise was done at the society's office in the presence of the parties. That marked the close of the plaintiff's case.

Defendant's evidence

10. DW1 was Bernet Muthomi Njiru, who testified that he was a brother to the late to Florence John, the original defendant, now deceased. Further that he only learnt of the suit before the trial court when the deceased died and the plaintiff stopped burial of her body in the suit property. He stated that the society gave him the letter dated 21st November 2021 to show the property belongs to the original defendant. According to him, the deceased entered the suit property in 2004 and that she put up a permanent house. That her son died on 27th December 2022 and was buried on the suit property. On cross examination, he stated that he only knew of parcel No 1437 and was not aware of plot 1021. He stated that he knew that acquisition from the society was by allotment or purchase or inheritance. He further stated that his sister was not a member of the society. That she acquired plot No 1437 by purchase, from one Wilson Muema Masila, the Society's Chairman. He stated that he had not produced in evidence the land sale agreement although he had it. He stated that the letter dated 23rd November 2021 stating that the suit property belonged to the defendant, was written by the said Wilson Muema Masila who sold plot No 1437 to the defendant. He stated that it is on 23rd November 2021 that the management of the society deliberated over the matter herein but that he was not summoned to attend that meeting. He stated that he did not know where plot No 1437 was. He stated that he had no burial permit or death certificate for the alleged deceased son of the late Florence John. He stated that one Morris Mulei had started purchasing the suit property and had not finished paying for the plot, but that the trees on the plot belong to the said Mulei. That marked the close of the defence case.

11. Upon considering the pleadings, evidence and submissions, the trial court rendered its determination on 15th March 2023, applying the maxim of aequitas est quasi aequalitus, and apportioning each of the parties one half of the disputed property and plot No 1437.

12. Aggrieved with the above outcome, the appellant sought to set aside the lower court judgment by filing the Memorandum of Appeal dated 17th March 2023, citing the following grounds;

    1. That the Learned Magistrate erred in law and in fact in finding that the plaintiff succeeded to exhibit an unbroken chain of documents which depicts and is capable of yielding a conclusion that the plaintiff is the bonafide owner of the suit property Plot No 1021 situated in Katelembo Athiani Muputi Farming and Ranching Society Limited and contrary to this ordered the land to be subdivided equally between the plaintiff and the estate of Florence Kaari John thereby giving a way the plaintiff's land despite being the owner.

    2. The Learned Magistrate erred in law and in fact in finding that the plaintiff proved a preponderance of probabilities that the deceased has trespassed in the suit property and failed to order eviction from the said land which is prejudicial to the plaintiff.

    3. The Learned Magistrate erred in law and in fact in finding that in applying the maxim aequitas est quasi aequalitas that is equity is equality and equality is equity and ordered the plaintiff property to be subdivided equally of Plot No 1021 between the plaintiff and the defendant despite that then the said maxim was not raised by any party either in pleadings or submissions or in evidence and despite that the same is not applicable to the suit.

    4. The Learned Magistrate erred in law and in fact in ordering that Plot Nos. 1021 and 1437 be subdivided equally between the plaintiff and the defendant despite there being no evidence presented before the court that Plot No 1437 belongs to the defendant.

    5. The Learned Magistrate erred in law and in fact in departing from the general preposition of the law that cost follow event and denied the plaintiff cost of the suit despite proving his case on balance of probabilities.

    6. The Learned Magistrate erred in law and in fact in finding that the plaintiff is not entitled to the prayers he sought in the plaint of declaration, injunction and for an order for the defendant to demolish and/or remove all illegal structures in Plot No 1021 despite proving his case on a balance of probabilities and proceeded to give other reliefs not prayed for in the plaint.

    7. The Learned Magistrate erred in law and fact in finding that Plot No 1021 and 1437 be subdivided equally between the plaintiff and the estate of Florence Kaari John despite that there was no counterclaim by the defendant requesting for said prayer.

    8. The Learned Magistrate erred in law and in fact in finding that in subdividing the parcel of land known as Plot No 1021 into two halves care should be taken to respect the deceased residential permanent house standing thereon and other permanent structure and the burial site of the deceased son despite that the same relief has not been sought for by a way of counterclaim by the defendant.

    9. The Learned Magistrate erred in law and in fact in finding that the plaintiff is the bonafide beneficial owner of one of the two halves at said parcel Plot No 1021 despite proofing that he was the owner of the whole land and thereby gave a way the plaintiff land to the defendant.

    10. The Learned Magistrate erred in law and in fact in giving reliefs that was not sought by the defendant and the plaintiff to suit the interest of the defendant to the detriment of the plaintiff.

    11. The Learned Magistrate erred in law and in fact in finding that the deceased acquired half an acre as Plot No 1437 and when she requested the society to identify it an agent of the society

pinpointed Plot No 1021 when there was no evidence from the society or the defendant to proof the said finding.

12. The Learned Magistrate erred in law and in fact in finding that the plaintiff being beneficial owner cannot benefit from the principal of indefeasibility of title and that court cannot permit the course of the conventional remedies namely vacation from the whole suit property, a permanent injunction of the whole suit property, general damages and/or manse profits and thereby denied the plaintiff the reliefs sought in his case.

13. The Learned Magistrate erred in law and in fact in failing to address himself and appreciate the fact that parties are bound by pleadings and although the defendant had filed defendant statement of defence but failed to raise the issues determined by the court and the reliefs issued by the court and failed to award the plaintiff his reliefs which were sought and proved in the plaint.

14. The Learned Magistrate erred in law and in fact in disregarding the fact that the only pleading by the defendant on record was his defence which never raised any counterclaim praying for reliefs awarded to the defendant and failed to find that the defendant is bound by that pleading.

15. The Learned Magistrate erred in law and in fact in failing to address himself to the fact that since there was no counterclaim the defendant was entitled to the prayers granted by the court.

16. The Learned Magistrate erred in law and in fact in failing to assess the overwhelming evidence, submissions and pleadings presented by and for the appellant.

17. The Learned Magistrate erred in law and in fact in finding in favour of the defendant and awarded half of the plaintiff land Plot No 1021 to the defendant without satisfying himself that the defendant had discharged evidentiary burden to the required standard.

18. The Learned Magistrate erred in law and in fact in finding that the plaintiff having not secured a title and thus a beneficial owner. Although a beneficial owner has the benefit of protection of law, the principle of indefeasibility of title which vouches for sanctity of title based on the Torrens system which in turn stands on three intrepid pillars woven around the curtain, mirror and insurance principles, now housed in Article 40 of the *Constitution* read with Sections 24, 25 and 26 of the *Land Registration Act*, does not apply to him and gave away the plaintiff land to the defendant.

19. The learned Magistrate erred in law and in fact in failing to grant temporary stay of execution of his judgment order pending the appeal in disregard of the grave consequences it presented against the appellant.

20. That the decision of the said Magistrate was against the weight of the evidence adduced.

21. The Learned Magistrate erred in law and in fact in finding that the defendant had land Plot No 1437 where there was no evidence to proof the same.

22. The Learned Magistrate erred in law and in fact in finding that there was need for an injunction against burial of the defendant Florence John pending the hearing and determination of the main suit and failed to address the issue of the burial in the judgment thereby exposing the plaintiff property to waste.

13. Subsequently, the appellant sought the following orders;

    a. The appeal be allowed.

b. The judgment and orders of the subordinate court be reversed and the appellant suit before the subordinate court be allowed as prayed and reliefs awarded to the defendant be vacated.

c. The costs of this appeal be awarded to the appellant.

d. Any further or other relief as justice of the case may require to be granted in the circumstances. prayed in the plaint and;

14. The appeal was disposed by way of written submissions and on record are submissions filed by the appellant on 13th June 2023 and the respondent's submissions filed on 10th August 2023.

Submissions by the appellant

15. Counsel for the appellant submitted that there was no reason why the trial court did not allow prayer No (a) of the plaint despite finding that the appellant had succeeded to exhibit an unbroken chain of documents which depicts and is capable of yielding a conclusion that it is more probable than not that the plaintiff is the *bona fide* owner of the suit property. Counsel argued that contrary to this finding, the trial court proceeded to order that the suit property be shared equally between the appellant and the respondent. It was also submitted that there was no counterclaim filed by the respondent hence there was no challenge on the ownership of the suit property. Placing reliance on section 26 of the *Land Registration Act* and the case of *Samuel Odhiambo Oludho & 2 others v Jubilee Jumbo Hardware* [2018] eKLR counsel submitted that where the claim of ownership of land is not contested, the owner deserves legal protection. Counsel argued that sections 107, 108 and 109 of the *Evidence Act* placed the burden of proof on the plaintiff. Counsel cited the case of *Danson Kimani Gacina & another v Embakasi Ranching Co. Ltd* (2014) eKLR and submitted that as the suit property is not registered, proof of ownership of such land is found in documentary evidence leading to the root of the title. Counsel argued that documents like membership cards, allotment letters, sale agreements, payment receipts and transfer forms, demonstrate the root of ownership of unregistered land.

16. It was further contended for the appellant that the appellant had proved his case to the required standards, since he produced membership card; letter of allotment; transfer documents from the allottee to the first purchaser and then to the appellant; receipts for transfer; sale agreement; confirmation letter from the society showing that the appellant was the owner of the suit property and beaconing letter and report showing existence of plot No 1021 on the map. Counsel submitted that no document was provided by the defendant to show she owned the suit property, or plot No 1437. Counsel argued that the appellant's averments were not denied by the respondent and that the respondent had corroborated the appellant's assertion that the deceased had erected a permanent house on the suit property. Counsel submitted that there was no reason why the court did not order eviction as requested by the appellant as no evidence was presented by the respondent to show their ownership of plot No 1437.

17. It was also the appellant's submissions that he was entitled to the prayers sought in the plaint and that it was wrong to issue orders of equity which had not been prayed for. As for who should have borne the costs of the suit, the appellant argued that the trial court deviated from the general preposition of the law that costs shall follow the event and denied the appellant costs of the suit. Counsel cited the case of *Gathenge Ngumi v Eric Kotut & 4 others* [2023] eKLR to buttress the above position.

Submissions by the Respondent

18. Counsel for the respondent submitted that the appellant, not being a registered owner of the suit property, had no proprietary interest therein which was indefeasible and from which capacity to take an

action of law would thrive. It was argued for the respondent that only the officials of the society could have originated a cause of action against one Florence Kaari John, or in the alternative, the appellant would have sued them to enforce his rights over the suit property. To buttress this position, reliance was placed in the case of *Mohammed Shehazan Butt v Kenya Revenue Authority* Civil Application No E145 of 2023.

19. Counsel also contended that it is the society that had indefeasible ownership of the suit property and that a member could not evict another member. Counsel submitted that the appellant had not developed the suit property and therefore it was right for the respondent to develop it.

20. It was further submitted that the expression 'any other order that the court may deem fit' is self-explanatory and enjoins the court to consider any other appropriate measure in the nature of an order that may salvage the dire situation before the court, citing provisions of Article 159 of the *Constitution* and section 3A of the *Civil Procedure Act*. To support their argument, they relied on *Odd Jobs v Mubia* [1970] E.A 476 for the proposition that a court may base its decision on unpleaded issues if it appears that the issue has been left t0 the court to decide. Counsel held the position that the trial court was right to apply the maxim of equity is equality and equality is equity".

Analysis and Determination

21. The court has carefully considered the appeal, the entire record and the submissions filed herein. Although the appeal raised 22 grounds, my view is that only 4 issues arise for determination, namely;

    a. Whether by proving ownership of the suit property, the appellant was entitled to have the entire suit property and not half of it.

    b. Whether the trial court was wrong to grant half of the suit property to the respondent when she had no counterclaim.

    c. Whether the maxim of aequitas est quasi aequalitus was applicable in the circumstances of this case.

    d. Whether the trial court properly exercised its discretion in ordering that each party bears its own costs.

22. The mandate of this court sitting as a first appellate court is to reanalyse, re-evaluate and reconsider the evidence afresh and make its own independent conclusions and findings, but bearing in mind that it had no opportunity to see or hear witnesses and give due allowance for that.

23. In the case of *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated with regard to the duty of the first appellate court as follows;

> This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way...

24. It is not in dispute that the suit property herein is not registered. In addition, the appellant's evidence that he purchased the same from Francisca Musyoki Muasya who had purchased it from the original member of the society Mr. Julius Katoni, was credible and not shaken even on cross examination as rightly acknowledged by the trial court. The trial court found that the appellant had proved that he is the *bona fide* owner of the suit property. Looking at the evidence given by the appellants witnesses and documents produced by the appellant, namely, the sale agreement; letter of allotment; membership

card; transfer forms for the two different transfers; letter from the society; transfer receipts and report showing beacons of the suit property, it is clear that indeed the appellant gave the chronological sequence of how he lawfully acquired the suit property. Therefore, the trial court rightly found that the appellant was the *bona fide* legal owner of the suit property.

25. What then would a *bona fide* owner of any property be entitled to? Does want of registration, like in this case, limit or lessen legal protection that should be accorded lawfully acquired and owned property? I do not think so. Article 40 (1) and (6) of the *Constitution* of Kenya protects property that is lawfully acquired and is categorical that there can be no legal protection for registered property whose acquisition is not shown to be lawful. While section 26 of the *Land Registration Act* provides that registration or certificate of title shall be held as conclusive evidence of proprietorship, it does not mean that registration is the only evidence of ownership of property. Even unregistered property can be lawfully owned awaiting registration. In this case, there is no contest or dispute from anyone including the society, over the fact that the suit property was purchased by and belong to the appellant. That has been the position since 2006 when the appellant purchased the suit property. Therefore, registration which is being awaited, will only endorse the reality- that the appellant is the owner of the suit property and nothing more. In the circumstances I respectfully disagree with the trial court on its finding that for lack of registration, there was no indefeasibility.

26. The respondent argued that since the suit property was not registered, the appellant had no indefeasible ownership but such ownership was with the society. In my view, this position is faulty because if the threshold for indefeasibility was proof of registration, then it can not be said that it is the society that has indefeasible ownership, since no evidence or title document was presented to show that the suit property was registered in the name of the society.

27. In addition, a society acquires land and once the same is lawfully allocated to a member, the same ceases to be the property of the society, and even if the society were to still hold title thereto, then it will only be holding it in trust for the member who has been allocated the land. In this case, the suit property ceased to be the property of the society once the same was allocated to Julius Katoni. It is therefore not correct to allege that the society had power to reallocate and give other persons other than those allocated or their privies or purchasers land as long as the same was not developed. That would negate and make void the essence of allocation.

28. Although the respondent mentioned plot No 1437 in his pleadings and testimony, he stated in cross examination that he does not know where that plot is, neither was he involved in the society's sitting which granted the respondent the suit property and allegedly reallocated plot No 1437 to the appellant. I have with a fine toothcomb gone through the respondent's pleadings and witness statement and I have not found any allegation or averment that plot No 1437 belonged to the late Florence John or that at any point in time, she acquired it, either by allotment, purchase or by any other means. Besides, I have considered the respondent's evidence and I note that the respondent produced four documents, namely, death certificate for the late Florence John; letter from the society dated 29th March 2021 confirming that plot 1021 was surveyed and beaconed but is occupied by the defendant; and the burial permit in respect of the late Florence John. There is no letter of allotment, or sale agreement or any other document to suggest acquisition by the late Florence John of plot No 1437. If the deceased respondent owned plot No 1437, she could have said so but she did not. Besides there is no evidence of the existence of the said plot either from the respondent or the society. That being the position, there was no legal or equitable basis or justification for the trial court to grant the respondent half of the suit property because neither is there an iota of evidence to suggest that the late Florence John had any right or interest in the suit property to warrant granting her estate half of it nor that she had acquired or owned plot No 1437.

29. It is trite that parties are bound by their pleadings. Even in the cited case of *Odd Jobs v Mubia* (*supra*) it was held that the court can only deal with issues arising before it. Where a defendant has neither filed a counterclaim, nor presented evidence demonstrating any interest in the suit property, then granting them a fraction of another's property would be baseless in law. In my view the trial court erred in making positive orders in favour of the respondent when he had no counterclaim and when the question of whether he should get part of the suit property did not arise. Besides, the trial court was wrong in granting the appellant half of plot No 1437 when the appellant had not made any claim on that plot.

30. On whether the maxim aequitas est quasi aequalitus, was applicable in this case, it must be borne in mind that equity is no longer merely meant to cure the limitations of the common law, but has now been elevated to constitutional edict under Article 10 of our Constitution. Having said that, it is my view that courts ought to be cautious in the application of equity as the same is not a substitute for express legal provisions. Equity is applied where there is a gap in the law, meaning that where the plain application of the law would result in an unconscionable advantage to one party over the other. Therefore, equity is applied to avoid injustice to an apparently innocent party, where deciding otherwise would wrongly, unfairly and unconscionably allow one party in a dispute to use/abuse the law to gain an unfair advantage over the other party.

31. In this case the equity maxim of aequitas est quasi aequalitus, means that where two people demonstrate an equal right in one property, that property will be divided equally. Did this matter require application of this maxim? I do not think so. This is because, there is no manifest gap in the law that would have resulted in the appellant obtaining an unfair advantage over the respondent. The trial court, rightly found that the respondent's entry in the suit property was not occasioned by any act of the appellant who is innocent. I agree with that finding as the evidence on record points to that direction. However, I do not think that the respondent's entry was innocent as found by the trial court, because she did not present any evidence to show the basis of her entry on the suit property. In her pleadings she stated that she entered the suit property on being shown by the society, yet she neither stated the basis why she should be shown the appellant's land nor did she exhibit any evidence that it is the society that showed her the suit property. The letter written by the society in 2021 was only confirming that she was on the property. I do not think that the society could reasonably give one person's plot to another without involving the owner and without any documentation to that effect. And even if that were to happen, that would be an unlawful act as the society has no power to deal in property already allocated without consent of the owner. I am not convinced that when the late Florence John entered the suit property in 2019, she did so based on a genuine error. The respondent in the amended defence stated that the suit property is in the same area with plot 1437, yet he does not know where plot No 1437 is. If she was innocent, she would have pleaded and proved how she got plot No 1437 and demonstrated its existence and the basis of her entry on the suit property. The blurry mention of that plot in her defence and witness statement without any specifics that could point to the nexus between that plot and the respondent, clearly demonstrated that the respondent was not willing to be candid. The maxim of equity was used by the trial court on the basis that the society allegedly by mistake showed the suit property to the respondent, yet if that were the position, then the respondent would have a cause of action against the society, which would not be the case for the appellant. The respondent having not shown to be entitled to half of the suit property, on equity, my view is that she could not benefit from the maxim of aequitas est quasi aequalitus.

32. It is my finding therefore that the maxim of aequitas est quasi aequalitus, was wrongly applied by the trial court in these proceedings, as there was no demonstration that in protecting the appellant's right to the suit property, that would give the appellant unconscionable advantage over the respondent.

The advantage given to the appellant was by dint of Article 40 of the *Constitution*, and therefore the same was conscionable, and did not require the tempering of equity. The appellant having proved that he is the *bona fide* and lawful owner of the suit property, is entitled to the full and not a diminished or half hearted protection of the law. It is my finding therefore that the appellant having proved lawful ownership of the suit property was entitled to the prayers sought in his plaint in their entirety. Therefore, the trial court was wrong in giving him half of his entitlement.

33. Section 27 of the *Civil Procedure Act* provides that costs are awarded at the court's discretion but that they ought to follow the event, unless for reasons to be recorded the court orders otherwise.

34. This court will not interfere with the exercise of discretion of the trial court unless it is demonstrated that the trial court misdirected itself in some matters and therefore arrived at an erroneous decision or that it wrongly exercised its discretion leading to an injustice. It was held in the case of *Mbogo & another v Shah* (1968) EA at p.15:

> An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.

35. In the instant matter, the basis for not awarding the appellant costs were the court's consideration of the history of the matter and the remedies fashioned by the court, the fact that original defendant is deceased and her body lying at the morgue. Therefore, the question is whether the trial court was justified in departing from allowing costs to the winning party. Having found that there was no evidence presented to explain the justification of the respondent's entry on the suit property, and the appellant having been the successful party in his entire claim, I do not find any justification to depart from the provision that costs follow the event. I therefore find and hold that the trial court misdirected itself in the exercise of its discretion and therefore arrived at the wrong conclusion in awarding costs. In the premises, the appellant is entitled to costs in the lower court, as he is the successful party.

36. In the premises, I find and hold that the appeal is merited and the same is allowed. Consequently, the trial court's orders are set aside and the appellant's claim as presented in his plaint is allowed in its entirety with costs.

37. For avoidance of doubt the appellant's claim before the trial court is allowed in the following terms;

    a. A declaration be and is hereby made that the Plaintiff is the rightful owner of plot No 1021 measuring ½ Acres within Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited.

    b. An order of injunction be and is hereby issued to restrain the Defendants, his servants and/or agents from entering and/or committing acts of waste in plot No 1021 Muputi Farming and Ranching Co-operative Society Limited.

    c. The defendant is ordered to demolish and/or remove all the illegal structures in plot No 1021 Muputi Farming and Ranching Co-operative Society Limited within 60 days from the date of this judgment, and in default eviction to issue against the defendant.

    d. Costs of the suit are awarded to the appellant.

38. The costs of this appeal are hereby awarded to the appellant.

39. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 13TH DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Kimeu holding brief for Mr. Mutua for appellant

Mr. Omino for respondent

Abdisalam – Court Assistant