



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)**

**CIVIL APPEAL NO. 154 OF 2018**

**BETWEEN**

**ANDREW RIMBA CHENGO.....1<sup>ST</sup> APPELLANT**

**HARRISON MATHO FONDO.....2<sup>ND</sup> APPELLANT**

**MASHA DYLER GONA.....3<sup>RD</sup> APPELLANT**

**AND**

**1. KASUNGU NYUNDO.....1<sup>ST</sup> RESPONDENT**

**2. KASSIM NYUNDO.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from a judgment and decree of the Environment and Land Court**

**at Mombasa (A. Omollo, J.) delivered on 31<sup>st</sup> August 2017**

**in ELC No. 238 OF 2012)**

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**JUDGMENT OF THE COURT**

***The appellants, Andrew Rimba Chengo, Harrison Matho Fondo (Harrison) and Masha Dycler Gona*** who represent the ***Waparwa Clan*** are aggrieved by the decision of the Environment and Land Court (A. Omollo, J.) which granted ***Kazungu Nyundo and Kassim Nyundo, the 1<sup>st</sup> and 2<sup>nd</sup> respondents*** who were from the ***Amwathoya Clan*** rights and interest in a parcel of land situated in ***Kayafungo/ Mwanamwinga (the suit land)***.

The origins of the suit are to be found in a dispute over ownership of the suit land, which according to the appellants, was occupied by Charo Ruo the first ancestral owner, their grandfather from the Waparwa clan. They claim that their grandfather allowed Kasungu Nyundo's grandfather, one Nyundo Baya, a returning military officer from World War I, to settle upon and cultivate the suit land; that in 1973 Nyundo Baya left the land, only for his descendants to return some 30 years later, on 27<sup>th</sup> September 2012, to lay claim to the suit land, and that while doing so, they instigated their clan members to invade the suit land, subdivide and cultivate it to the appellants' detriment.

The appellants further claimed that, immediately after Nyundo Baya left the suit land in 1973, one Chome Ngala, subsequently laid claim to the same land. In pursuit of this claim, he filed *Land Civil Case No. 17 of 1973 (the Chome Ngala dispute)* in the District Magistrates court at Kaloleni against Ndana Chonze and Charo Rua of the Waparwa clan, claiming to have inherited the land situated at Mwanamwinga in Kayafungo location from his grandfather; that in a judgment rendered on 25<sup>th</sup> October 1973 the Kaloleni court dismissed Chome Ngala's suit for failing to establish a claim over the suit property. Dissatisfied with the trial court's decision, Chome Ngala filed an appeal in the Resident Magistrate's court in *Civil Appeal No. 7 of 1975* which decision upheld the judgment of the trial court, as did the High Court in *Civil Appeal No. 21 of 1977*. The appellants' stated that the courts in the Chome Ngala dispute having determined that the Waparua clan was the rightful inhabitants of the suit land meant that the respondents were estopped from claiming ownership over it. The appellants therefore sought the following orders;

**“a) a declaration that the Plaintiffs are the rightful legal and beneficial owners of the suit land situate in Kayafungo/Mwanamwinga;**

**b. a permanent injunction do issue against the Defendants their servants and agents restraining them by way of permanent injunction from entering, subdividing, wasting, damaging, intruding, trespassing or interfering with the Plaintiffs’ piece of land situate at Kayafungo/Mwanamwinga; and**

**c. a mandatory injunction do issue compelling the respondents their servant and agents to demolish the erected structures and give over vacant possession of the said parcel of land situate at *Kayafungo/Mwanamwinga*;**”

In their defence, the respondents stated that the suit land which they occupied was ancestral land, and that its boundaries were well defined, and that they had at all times been in occupation of the suit land.

During the trial, Harrison Fondo testified on behalf of the appellants, and to a large extent reiterated the contents of the Plaint, save to add that Nyundo Baya left the suit land in 1973, but Kazungo Nyundo remained on the land; that after he left, his uncle, Kadenge came and occupied the land. Kadenge filed another suit claiming ownership which was subsequently dismissed by the Land Dispute Tribunal; that later in 2012, the respondents built houses on the suit land. In cross examination, he stated that the same land the respondents were living on was the same land that was occupied by their father, and that the decision in the Chome Ngala dispute, conclusively determined that the Waparwa clan were the legal owners of the suit land.

Thereafter the respondents took the stand, and called 5 witnesses. The first was Kazungu Nyundo who stated that he was from the Wathoya Clan, and that the first occupant of the suit land was one, Mithanze; that he knew Harrison, who referred to him as, ‘*in-law*’. He further stated that they were born on the land and that his father and grandmother were also born and buried there; that they had continued to live on the land they inherited from their grandfather Baya. He further stated that his mother was from the Waparwa clan, and a sister to Fondo. He was aware of the Chome Ngala dispute, but contended that it concerned a different piece of land. His view was that if the appellants laid claim to the suit land, they should disclose the members of their family that lived on the land, and how they came to be there. He also stated that, he was not aware of any agreement signed by his grandfather Nyundo, allegedly selling the suit land to the appellants’ grandfather.

**Kassim Nyundo**, testified that the appellants did not live on the suit land, but lived on other land to the east of the suit land. He further stated that the Chome Ngala dispute was not related to this case, and that after the case was determined, 5 homesteads had to be relocated, but that their occupation of the suit land had remained undisturbed. He went on to state that both himself and his father were living away from the suit land and only returned in 2012.

He took issue with the appellants’ claim, which he said, failed to ascertain the dimensions and location of the land in question.

**Kahindi Gonangoli, DW3**, is from the Waparwa Clan. He stated that their neighbours were Kazungu Nyundo of the Wathoya Clan, the Nawangari clan and the Bamanya clan, and that the appellants did not have any land in Mwanamwinga; that their land was adjacent to the respondents’ land, and that the dispute between the appellants and the respondents had nothing to do with Waparwa land.

**Henry Martin Yaa, DW 4**, a former assistant Chief for Kinangoni sub location is from the Wamangari clan, that neighbours the Amwathoya and Waparwa clans. He stated that the land was unadjudicated and did not have any title deeds. As far as he was aware the portion of land in dispute belonged to the Amwathoya clan. He was not aware of any sale of land by Nyundo to the Waparwa clan, or the existence of a sale agreement signed by Nyundo Baya. On the agreement produced in court, he stated that it did not have Nyundo Baya’s signature.

Lastly, **Zembe Kazungu, DW 5** is a farmer from the Mawale clan, which neighbours the Wamathoya clan to the north. He stated that the Waparwas are located in Mwanamwinga Kibwabwani while the Wamathoya are settled in Kinangoni; that the suit land belongs to the Wamathoya, and that as far as he was aware no sale had taken place between the Wamathoya, and the Waparwas. He further stated that the land in the area was still unadjudicated, and was yet to be surveyed, and that it therefore remained community land. In his view the suit land was not the same land referred to in the Ngala Choma dispute.

Based on the evidence, the trial court framed two issues for determination; i) whether the suit land was the same land referred to in the Chome Ngala dispute; and ii) whether the appellants sufficiently established that the suit land belonged to them.

On the first issue, the trial judge opined that;

**“The evidence from the proceedings in the Kaloleni case does show that the defendant’s father at one point lived on the land claimed by Chome Ngala having been allowed to do so by the 2<sup>nd</sup> plaintiff’s grandfather. The 1<sup>st</sup> Defendant admitted he inherited the land he lives on from his father Nyundo Baya. Therefore, based on this evidence, there is a possibility that the land then in dispute in case no 17 of 1973 has a correlation to the land currently in dispute herein and occupied by the defendants.**

The learned judge then concluded;

**“Consequently, my finding is that the land the Plaintiffs are claiming is known part of which is currently occupied by the defendants.”**

With regard to the second issue, the learned judge observed that both the appellants and the respondents lived on the land where their fathers before them had lived; that the claim that the respondents' grandfather returned the suit land to the appellants' grandfather was unsubstantiated, as no agreement was produced to support the assertion. The court concluded that the respondents were entitled to occupy it by virtue of their ancestry, whether or not they had at one time moved away from the land.

The appellants were dissatisfied with the decision of the trial court and now seek to set aside that decision on the grounds that the trial judges;

**i. Did not have jurisdiction to award unadjudicated land to the respondents, which powers are the preserve of the Land Adjudication Act and the Land Consolidation Act, and in disregard of the proper procedures for ascertaining and recording rights and interests in unadjudicated land in terms of the Land Adjudication Act and the Land Consolidation Act;**

**ii. In wrongly awarding the respondents the suit land yet they had not filed a counter claim, and neither had they claimed ownership.**

**iii. In finding that the suit land was not the same as the property referred to in the sale agreement dated 2<sup>nd</sup> September 1973 in the Choma Ngala dispute;**

**iv. In finding that the suit land belonged to the appellants' grandfather, and at the same time awarding the suit land to the respondents; and**

**v. In allocating the suit land to the respondents without determining the boundaries and size.**

Both parties filed written submission which were highlighted by **Mr. John Bwire**, learned counsel appeared for the appellants, while learned counsel **Mr. Stephen Jumbale** represented the respondents.

Learned Counsel **Mr. Bwire**, submitted that the gist of the appeal was that, the appellants had sought a declaration that the suit land belonged to them, but after finding that they had not established their claim, the trial court wrongly determined that the respondents were entitled to the suit land.

Counsel submitted further that the trial court lacked jurisdiction to determine the suit, since the suit land was unadjudicated land, and the determination of rights and interests in unadjudicated land was the preserve of the adjudication officer. The case of ***M'ithana M'tguringa vs Murithi M'amburubua [2016] eKLR***; was cited in support of the assertion that though the court found that the land had not undergone adjudication, it had nevertheless wrongly gone ahead to allocate the suit land to the respondents. In the alternative, it was argued, the court ought not to have determined the issue but should have deferred to the recently enacted Community Land Act and regulations which governed land adjudication and the manner of determination of disputes in respect of such land.

Another complaint was that, in the absence of a counter claim, the court was wrong to award the suit land to the respondents; that the respondents had not pleaded or prayed for an award of the suit land; that instead, the learned judge should have merely dismissed the appellant's suit.

As to whether the land was the same as the land in the Chome Ngala dispute, the proceedings from the Kaloleni court trial that were produced showed that their grandfather Nyundo Bayo testified that the suit land belonged to the Waparwa clan, and that this was confirmed when the Kaloleni court visited the land.

Learned counsel **Mr. Jubale** submitted that the Environment and Land Court had jurisdiction to hear and determine the dispute. It was argued that since the appellants contended that the suit land was clan land, by virtue of clan land being community land, the court had jurisdiction to determine the dispute. It was further argued that the suit having been filed in 2012, after the Community Land Act was enacted in 2016, its provisions could not be applied retrospectively. Further that, the appellants having subjected themselves to the jurisdiction of the trial court, they could not now be heard to complain that the court lacked jurisdiction.

It was pointed out that the appellants' claim was founded on the alleged sale of the suit land to the appellants' forefathers by way of a sale agreement dated 2<sup>nd</sup> September 1973 following which they acquired rights over the private property of Fondo Kabondo. Counsel asserted that the learned judge correctly concluded, that their claim failed to establish a nexus between the suit land and the documents that referred to one Anderson Lumba Chengo who was not a purchaser; that in any event, the appellants had admitted that the respondents had remained on the suit land long enough for the matter to have been caught up by limitation.

Finally, it was argued that the court did not award the suit property to the respondents, but merely reached a finding on the weight of evidence that the suit land was their ancestral land.

In reply, Mr. Bwire submitted that the suit land was partly occupied by the respondents who later abandoned it and despite the boundaries and size of the land not having been defined; the learned judge nevertheless awarded it to the respondents.

This is a first appeal, and as stated in ***Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212***;

**“On a first appeal from the High Court, the Court of Appeal shall reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen or heard the witnesses and should make due**

**allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on the record and not to introduce extraneous matters not dealt with by the parties in evidence.”**

This Court will not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the Judge was shown demonstrably to have acted on a wrong principle in reaching the finding he did. (See. *Abok James Odera t/a A. J Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.*

We have considered the grounds of appeal, submission by counsel and the authorities cited. What can be discerned is that the appeal turns on the question of whether firstly, the Environment and Land Court had jurisdiction to hear and determine the suit and secondly, whether the appellants established their claim to the suit land on a balance of probabilities, and finally, whether the learned judge awarded the suit land to the respondents.

With respect to the question of jurisdiction, without it, a court has no power to take a step towards determining a matter. It must down its tools the moment it holds the opinion that it is without jurisdiction. (See. *Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd [1989] eKLR.* A court’s jurisdiction flows from the Constitution or legislation or both. (See. *Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others [2012] eKLR.*

As to whether the Environment and Land Court should have determined the suit, the appellants’ argue that, since the dispute concerned unadjudicated community land, the court lacked jurisdiction to hear it and ought to have ordered that it be referred for adjudication under the Land Adjudication Act, or under the Community Lands Act.

The appellants’ complaint in the dispute before the trial court was that the respondents had invaded their land, erected structures and were cultivating the land. They had sought to be declared the legal and beneficial owners of the suit land, and to have the respondents restrained from entering and occupying the land. They also sought an injunction to compel the respondents to demolish the structures that had been erected.

In our view, neither the Land Adjudication Act nor the Community Land Act were applicable to the circumstances of this case. We say this because, firstly, the dispute concerned community land or clan land, and under the Environment and Land Court Act, the court was sufficiently empowered to determine disputes in respect of such land.

**Article 63 (2) of the Constitution defines “community land” as;**

**“(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.**

**2. Community land consists of--**

**a. land lawfully registered in the name of group representatives under the provisions of any law;**

**b. land lawfully transferred to a specific community by any process of law;**

**c. any other land declared to be community land by an Act of Parliament; and**

**d. land that is-**

**i. lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;**

**ii. ancestral lands and lands traditionally occupied by hunter-gatherer communities;**

**or**

**iii. lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62**

**(2).”**

Pursuant to **Article 63 (2), section 13** of the *Environment and Land Act* specifies that;

**1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

**2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes?**

a. ....;

b. ....;

c. ....;

d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e. any other dispute relating to environment and land. (emphasis ours)

Therefore, the court having been specifically empowered to hear disputes concerning community land, it was therefore entitled to hear and determine the dispute herein.

Secondly, though the suit land was described as being within an unadjudicated area, there is nothing to show that the Kayafungo/ Mwanamwinga area had been declared a land adjudication area within the meaning of **section 5** of the **Land Adjudication Act**. This being the case, **section 30** of the Act did not prohibited the court “...*from entertaining any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final...*”

Thirdly, on the submission that the dispute should have been ceded over to a Community Land adjudication officer, it cannot be overlooked that by the time the suit was filed on 26th October 2012, the Community Land Act had not been enacted. It did not commence operations until 21<sup>st</sup> September 2016. By suggesting that the dispute be referred to a community land adjudication officer, would in effect be to seek to apply the Act retrospectively. As to whether such Act can be applied retrospectively is a matter that would be governed by **Interpretation and General Provisions Act**.

**Section 23 (3) (a)** specifies;

**“(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—**

**a. revive anything not in force or existing at the time at which the repeal takes effect...;”**

In the case of **Samuel Kamau Macharia and Another vs Kenya Commercial Bank Ltd and 2 Others, SCK Application No. 2 of 2011 [2012] eKLR** the Supreme Court observed;

**“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”**

What this means is that an Act cannot be applied retrospectively, unless such application is expressly provided for by the Act. In the case of the Community Land Act, no such provision was enacted which would infer that the Act would be applicable from the date of operationalization, which in this case was after the date the suit was filed, or the cause of action arose. The result is that the provisions of the Community Land Act are not applicable to the circumstances of this case.

In view of our findings above, we are satisfied that, the Environment and Land Court was adequately clothed with jurisdiction to hear this suit.

Having so found, the next issue is whether the appellants established their ownership of the suit land on a balance of probabilities. Alongside this issue we will also determine; (i) whether the suit land in dispute herein was the same land referred to in the agreement dated 2<sup>nd</sup> September 1973, and subject to the land in dispute referred to in the Choma Ngala dispute belonging to the appellants’ grandfather; ii) whether the learned judge wrongly awarded the respondents the suit land yet they had not filed a counter claim, and neither had they claimed ownership; and iii) whether the learned judge allocated the land to the respondents without determining the boundaries or size of the land.

The dispute revolves around the suit land which is part of an unadjudicated piece of land situated in Kayafungo/ Mwanamwinga area. It is alleged that its first ancestral inhabitant was Charo Ruo from the Waparwa clan. After World War 1, the appellants claim that Charo Ruo allowed the respondents’ grandfather, Nyundo Baya, a returning military officer to settle upon, and cultivate the suit land. The appellants’ case is that Nyundo Baya remained there until 1973, when he informed Charo Ruo that he had found another piece of land, and would move away to settle on the recently identified land; that before vacating the suit land, he entered into a sale agreement dated 2<sup>nd</sup> September 1973 where he agreed to sell the cashew nut and coconut trees planted thereon to Fondo Kapombe; that the agreement

further alleged that thereafter, no one from his lineage would lay claim to the suit land in the future.

Soon thereafter, one Chome Ngala from the Mwitwa clan claimed the recently vacated suit land, on the premises that he had inherited it from his grandfather. The claim paved way for the Chome Ngala dispute that was heard and determined by the court at Kaloleni. After hearing the parties, the Kaloleni court found that the suit land belonged to the Waparwa clan and that Chome Ngala had not established ownership. After the Chome Ngala dispute was determined, the appellants claimed that the respondents returned and invaded the suit land in 2012, thus provoking this suit before the trial court.

So as to determine whether the land in the Chome Ngala dispute was the same land upon which the dispute herein centres, will require a reexamination of the evidence that was before the trial court.

According to the appellants who are from the Waparwa clan, the suit land is situated in Kayafungo/Mwanamwinga, while the respondents who are from the Wathoya clan, claim that their land is situated in Mwanamwinga/Kinagoni. As observed by the learned judge, there is nothing in the evidence that showed a relationship between the suit land and the land the respective parties occupied, and though the witnesses were conversant with the location and boundaries of each clan, they did not provide a sketch map or other evidence or state the actual location of the suit land for the benefit of the court. Consequently, the land being unadjudicated, made it difficult to ascertain from the evidence the location of the suit land relative to the land the appellants' occupied, particularly for the reason that unlike the trial court in the Chome Ngala dispute case which visited the disputed land to ascertain its exact location, no site visit was undertaken in the instant case.

But if the judgment of the District Magistrate's court at Kaloleni is anything to go by, and as discerned by the trial judge in the instant case, there is some correlation between the appellants' land, the land the respondents occupied and the suit land. Excerpts from the District Magistrate's judgment are instructive. It stated;

**“D.W.2 was Nyundo Baya. He stayed on the land in dispute. His father had asked for and had been allowed to stay and cultivate by Kapambo Rua Safari. They stayed there for long without having (sic) disturbed. It (sic) is of the Mwatoya by clan.”**

And later it stated,

**“D.W. 2 Nyundo Baya was born on the land in dispute. His father had been given land by Kapambo Rua Safari. He was allowed to plant any tree on that land. When leaving he sold the trees to Samuel Kitsao a man of the Aparwa clan.”**

In addition, Kazungu Nyundo stated that Nyundo Baya was his grandfather and that they inherited the suit land from him. There is also the evidence of Kahindi Ginangoli, DW3, a farmer of the Waparwa clan who stated that one of their neighbours was Kazungu Nyundo.

Much as the respondents' deny that the suit land differs from the land referred to in the Chome Ngala dispute, we agree with the learned judge that the respondent's grandfather, Nyundo Baya, was given land by Charo Rua Safari, the appellants' grandfather. So that if the land that the respondents are living on was inherited from their grandfather, Nyundo Baya, then the conclusion to be drawn is that the land given to Nyundo Baya by Charo Ruo, the appellants' grandfather, is the suit land. It is also the land the Kaloleni court referred to in the Chome Ngala dispute.

This would bring us to the question of whether the suit land was returned to the appellants' grandfather. It is the appellants' claim that when he was leaving the suit land, Nyundo Baya sold trees to **Fondo Kapombe**; and that a sale agreement signed by Nyundo Baya dated 2<sup>nd</sup> September 1973 showing he left the land to Fondo Kapombe. The respondents' response to this allegation is that no such transaction took place.

Besides the Kaloleni court's judgment indicating that Nyundo Baya sold trees to Samuel Kitsao, the only other evidence supporting the sale of trees was the sale agreement. And in ascertaining the veracity of its contents, this is what the learned judge had to say;

**“Now the validity of and inference from the agreement. The Plaintiffs are attempting to enforce an agreement signed on September 1973. First they were not parties to this contract neither do they have letters of administration of the estate Fondo Kapombe who is referred to as the buyer. On this account, they cannot enforce any rights accruing from that agreement. Further the contract/ agreement to recover land had a lifespan was (sic) twelve years from the time the right accrued as provided for under Section 7 of the Limitations of Actions Act. Since the 2<sup>nd</sup> Plaintiff's own evidence was that the 1<sup>st</sup> Defendant continued to stay on this land by virtue of having married his step sister, his right to claim this land based on the 1973 agreement was extinguished by operation of law. The Plaintiffs are time barred from enforcing any rights accruing from the said agreement. None of them can therefore derive any rights as by law provided in accordance with the Law of Succession Act Cap 160. Therefore, any reliance to this agreement does not add any value to the plaintiff's case in terms of conferring any beneficial and or legal rights over the disputed land.”**

We agree. An analysis of the agreement does not disclose that the concerned parties signed it. And though the appellants claim that it was an exhibit in the Chome Ngala dispute, it bears no indication that it originated from those proceedings. This is also apparent because the judgment refers to the purchaser as being one Samuel Kitsao while the sale agreement bespeaks of Fondo Kapombe who did not testify. As such, the sale agreement cannot be relied upon to prove that Nyundo Baya left the suit land to the appellants' grandfather.

Without the existence of a valid agreement, nothing shows Nyundo Baya returned the suit land to the appellants' grandfather. To the contrary, the evidence points to Nyundo Baya's family having remained in occupation of the suit land. Kazungu Nyundo's evidence is that he did not at anytime leave the suit land. He stated that he had continued to live there had over the years. In Kassim Nyundo's case he stated that he had never lived at home but his grandfather "...never left to go anywhere..." and that, he was living on the land with his father since 2012 when they returned to the suit land.

In view of the above, we agree with the trial court that the appellants did not establish their claim of ownership over the suit land. The appeal against the findings of the Environment and Land Court is therefore dismissed.

We turn to the final issue of whether the learned judge awarded the respondents' the suit land. Having found that the appellants' had not established their claim over the suit land, the learned judge concluded, "...it is my finding that the Defendants are entitled to this land by virtue of their ancestry..."

In the plaint, the appellants had prayed for a declaration that the appellants were the rightful legal and beneficial owners of the suit land. They also sought a permanent injunction to restrain the respondents from entering and occupying the land, and a further mandatory injunction to compel them to demolish the structures they had erected were incapable of being granted.

The respondents on the other hand merely filed a defence. They did not file a counterclaim for ownership rights, yet the learned judge found that they had established a beneficial interest in the suit land. Parties are bound by their pleadings. See Galaxy Paints Co. Ltd vs Falcon Guards Ltd (2000) EA 885. The judge having found that the appellants had failed to establish their interest in the suit land ought simply to have dismissed the suit and stopped there. By thereafter concluding that the respondents were entitled to the suit land, the learned judge went on to wrongly bestow the respondents with ownership of yet to be adjudicated land.

In sum, the appeal succeeds in part, and we make the following orders;

- i. The appeal against the judgment of the Environment and Land Court dated 31<sup>st</sup> August 2017 is dismissed, save that the appeal against award of the suit land to the respondents is allowed.
- ii. We order each party to bear their own costs.

**It is so ordered.**

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of May, 2020.**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true Copy of the original.*

Signed

**DEPUTY REGISTRAR**

