Keibukwo Investments Limited v Chuma (Environment and Land Appeal 15 of 2019) [2024] KEELC 13539 (KLR) (13 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13539 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ENVIRONMENT AND LAND APPEAL 15 OF 2019

AK BOR, J

NOVEMBER 13, 2024

BETWEEN

KEIBUKWO INVESTMENTS LIMITED .... APPELLANT

AND

DANIEL KIMUTAI CHUMA .... RESPONDENT

JUDGMENT

1. Being dissatisfied with the judgment of Hon. S. N. Mwangi, Senior Resident Magistrate delivered on 9/10/2019, the Appellant lodged this appeal. The grounds of appeal set out in the Memorandum of Appeal are that the Learned Magistrate ignored the central evidence which demonstrated the circumstances under which the Appellant became legally interested in the land known as Rumuruti Township/Block 3/140 (the suit property) and in particular, the evidence demonstrating the existence of an agreement for the sale of the Suit property by the Respondent to the Appellant.

2. Further, that the trial court ignored the Appellant's evidence that he held the letter of allotment in the Respondent's name from 1998 until they met for renegotiation of the contract in 2015 and 2016 and that during the meeting, the Respondent did not dispute the fact that the Appellant was to continue holding the letter of allotment as it continued to process the title. The Appellant contended that the court ignored the evidence that it had performed its part of the bargain by facilitating the preparation of the title which efforts and consideration entitled it to half the suit property with the option of buying the other half at Kshs. 1,500,000/= based on the stand premium paid by the Appellant as well as the land rent.

3. The other ground of appeal was that the trial court ignored the evidence that since 2009, the Appellant had been in possession of the suit property through Mr. David Koskei Barusei who testified as PW2 and who took care of the land until 2018. Further, that the Appellant was engaged in the survey and processing of the title in performance of its obligation under the agreement of purchase. That in recognition of the existence of the agreement for sale of the suit property, the Respondent delivered

to the Appellant the documents for processing the title being a copy of his National identity card and passport photos through Nanyuki Express Cab Services on 22/4/2016.

4. The appeal was canvassed through written submissions. In its submissions, the Appellant contended that the evidence showed that it performed all the tasks necessary for the preparation and issuance of the title under the agreement of the parties which it would not have undertaken had there been no agreement. In addition, that it expended appreciable amounts of money in facilitating the processing of the title which was the consideration in performance of the contract. The Appellant contended that there was evidence that the parties had agreed to reduce the agreement into writing but the Respondent failed to execute the agreement. The Learned Magistrate was faulted for ignoring the maxim that equity considers as done that which ought to have been done.

5. In addition, the Appellant faulted the Learned Magistrate for failing to recognise and apply the relevant law particularly the proviso to Section 3(3) of the *Law of Contract Act* which states that that subsection does not apply to a contract and that it does not affect the creation of a resulting, implied or constructive trust. The Learned Magistrate was faulted for failing to enforce the agreement of the parties by granting the reliefs sought in the plaint. The Appellant sought to have the judgment delivered on 9/10/2019 set aside and to have judgment entered in terms of the plaint dated 8/8/2018. The Appellant also sought the costs of the appeal and the suit in the memorandum of appeal dated 6/11/2019.

6. The appeal was canvased through written submissions. The Appellant submitted that it was invoking the jurisdiction of this court under the principles set in Selle & Another v Associated Motor Boat C Ltd & Another [1968] EA 123 on the duty of the appellate court to reconsider the evidence, evaluate it and draw its own conclusions while bearing in mind that it had neither seen nor heard the witnesses and should therefore make due allowance in this respect.

7. The Appellant submitted that it was not in dispute that the suit property was allotted to the Respondent vide the letter of allotment dated 22/5/1996. It submitted that the Learned Magistrate failed to consider the fact that from the time the letter of allotment was issued until 2017 when the Respondent processed a lease over the suit property, the letter of allotment was under the care of Mr. David Some Barno, who is a director of the Appellant. That this was based on the oral agreement whose effect was that through its director, the Appellant would facilitate the preparation of all conveyancing documents, payment of the requisite fees and effect the completion of the conveyancing process antecedent to the issuance of the title over the suit property. The Appellant urged that under the law any person conducting such acts had to be in possession of the letter of allotment.

8. The Appellant added that the agreement was entered into in respect of two different properties being the suit property in this appeal that was registered in the Respondent's name and Rumuruti Township/Block 3/137 which was registered in the name of Joachim C. Chemngotie. The Appellant submitted that Joachim Chemngotie entered into the agreement with the Appellant through its director, Mr. David Some Barno, in respect of both properties and who represented himself to the Appellant's director Mr. David Some Barno as being a representative of the Respondent. That upon entering into the agreement, the original letter of allotment over the suit property was presented to the Appellant's director, Mr. David Some Barno and remained in his possession until 2016 after he had undertaken all the survey work and processed the registry index map (RIM) which would facilitate the processing of the lease. That it was at that point that the Respondent proceeded to neglect the agreement, processed a lease over the suit property and refused to take any action on the agreement.

9. The Appellant argued that in the course of the trial, the Respondent did not denounce or deny the fact that the original letter of allotment over his property reposed with the director of the Appellant, Mr.

David Some, and that his only contention was that in 2013 he reported to the police that he had lost his letter of allotment. Further, he claimed that he learned during the first hearing of the suit before the trial court that Mr. David Some was in possession of his letter of allotment. The Appellant was emphatic that there was no evidence tendered before the trial court by the Respondent to show that as a result of the alleged loss of the letter of allotment and the report made to the police in 2013, that the Respondent ever applied to the Chief Land Registrar for reconstruction of the letter of allotment or placement of a caution to preserve his right pending reconstruction.

10. The Appellant contended that there being a substantiated claim by the Appellant that through its director it held the original letter of allotment over the suit property from 1998 when Joachim Chemngotie presented it to him on behalf of the Respondent until 2015 and 2016 when the Appellant met with the Respondent to renegotiate the agreement and when the Respondent agreed to have the letter of allotment continue to repose with the Appellant to facilitate conclusion of the obligation by the Appellant, which was not sufficiently controverted by the Respondent in writing in the pleading filed in court or through evidence that the version of events by the party who produced evidence in support of its claim which in this case was the Appellant should have stood before the eyes of the trial court.

11. The Appellant went on to argue that the failure by the trial court to regard this critical evidence that would speak to the reason why the Appellant was in possession of the original letter of allotment over the suit property clearly showed that the trial court failed to appreciate the weight of the circumstances as admitted or proved and as such was plainly wrong and that this warranted interference by this court. The Appellant relied on Peters vs Sunday Post Ltd [1959] EA 424 where the court held that the Appellate court exercised the jurisdiction to review the evidence to determine whether the conclusions of the trial court should stand with caution if there was no evidence to support a particular conclusion or if it was shown that the trial judge had failed to appreciate the weight or bearing of circumstances admitted or proved or where the court had plainly gone wrong then the Appellate court would not hesitate so to decide.

12. The Appellant reiterated that it had established that it was in possession of the original letter of allotment over the suit property and upon notification to the Respondent, sometime in 2016 the parties met for purposes of renegotiating the agreement for the disposition of the suit land to the Appellant. Further, that as at 2016, the Appellant had finalized the process of survey and had received the RIM over the Suit property which had been sealed and released to the National Land Commission (NLC) for preparation of the lease and that the Respondent was required to present to NLC passport size photographs and a copy of his identity card which were to be annexed to the copy of the lease. The Appellant maintained that these documents were sent by the Respondent through Nanyuki Cab Services on 22/4/2022 and addressed to the Appellant's director to facilitate the processing of the title over the suit property.

13. The Appellant contended that although the Respondent purported to deny ever sending the parcel to the Appellant's director, he was at pains to explain why the Appellant had in its possession a copy the consignment note confirming that he sent the parcel and further, that he struggled to explain how the Appellant had a copy of his national identity card and passport size photographs. The Appellant invited the court to infer that this action was an indication that the Respondent consented to the continued processing of the title by the Appellant coupled with the fact that the Respondent preferred to have the Appellant proceed with the title processing as it continued to hold the original letter of allotment. The Appellant contended that at that point the Respondent should have gone back to the police to report that the letter of allotment was in the Appellant's possession.

14. The Appellant submitted that the oral agreement between the Appellant and the Respondent was for the Appellant to facilitate the processing of a title over the suit property by undertaking all prerequisites such as survey work and the actual processing of the title in favour of the Respondent. As consideration for this task, upon completion of conveyancing, registration and issuance of title, the Respondent was to grant the Appellant half the suit property with the option to purchase the other half at a consideration of Kshs. 1,500,000/=. The Appellant submitted that of the Kshs. 50,995/= indicated in the letter of allotment, the Respondent only paid Kshs. 5,000/= on 24/7/1996 and could not raise the balance of Kshs. 45,995/= and the Appellant paid this balance on 2/3/2012 and was issued receipt number. 2702434.

15. That in a bid to defeat the Appellant's actions, the Respondent alleged that he paid this sum vide cheque number 024065 dated 24/6/2014 for Kshs. 45,995/= and cheque number 026229 dated 25/8/2014 for Kshs. 45,959/= drawn in favour of the Commissioner of Lands. The Appellant maintained that the cheques were never utilised since no receipts were presented to the trial court confirming the payments. The Appellant added that through Kiget & Co. Advocates, the Respondent wrote to the Commissioner of Lands on 6/3/2017 expressing his desire to pay the stand premium for the suit property of Kshs. 45,900/= and attached cheques number 011523 dated 23/2/2017 payable to the Commissioner of Lands. According to the Appellant, this was confirmation that the earlier cheques issued on 25/8/2014 was never utilised. It maintained that the letter dated 6/3/2017 was never presented to the Commissioner of Lands.

16. The Appellant maintained that the Respondent did not pay the balance of the stand premium. It argued that the Respondent's proprietorship of the suit property was premised on the payment effected by the Appellant otherwise the allotment to the Respondent would not be proper as well as the resulting title. According to the Appellant, this was evidence that it performed its obligation under the agreement in relation to the payment of any requisite fees necessary for processing the title.

17. The Appellant contended that it also paid the sum of Kshs. 165,760/= as land rent which was due by 7/1/2016 because the Respondent was unable to pay that sum. The Appellant relied on the interbank transfer and the payment slip dated 21/12/2016 in support of this. It maintained that the payment was effected for and on behalf of the Respondent.

18. The Appellant submitted that when the suit property was allotted to the Respondent vide the letter of allotment dated 22/5/1996, it was un-surveyed and was described Uns. Residential plot number D Rumuruti Township and that it was the Appellant that engaged J. R. R. Aganyo & Associates Licensed Land Surveyors to undertake the survey of the suit property. Further, that the Appellant handed over the original letter of allotment to George Njera Onyango who undertook the survey which resulted in the suit land being given parcel number Rumuruti Township/Block 3/140 which is the number appearing on the lease dated 10/5/2017 held by the Respondent.

19. The Appellant challenged the Respondent's contention that he instructed the surveyor while questioning how the Respondent could have demonstrated ownership yet his letter of allotment got lost in 2013. The Appellant pointed out that the letter of allotment was crucial for the Ministry of Lands to authenticate the allotment. The Appellant adverted to the fact that when questioned as to the instructions to the surveyor, the Respondent confirmed that he did not know whether Mr. Onyango had been sent by another person. It maintained that there was no evidence of the Respondent having instructed the surveyor.

20. That based on the instructions to undertake survey and having made payments, it was evident that indeed the Appellant performed its obligations under the agreement. The Appellant contended that had the trial court considered the evidence it would have appreciated that there was an agreement

between the parties or otherwise it would have been bizzare for the Appellant to undertake the aforementioned activities over a property that it had no interest in and rights to.

21. The Appellant submitted that during the trial the Appellant presented and relied on the testimony of David Koskei Barsei who testified as PW2 and who had been tasked to take care of the suit property by the Appellant since 2009 and the fact that he was given a copy of the letter of allotment by the Appellant in case any other person went to the land claiming ownership. The Appellant pondered that if it did not have any interest over the suit property why would the Respondent have allowed PW2 to occupy the Suit property since 2009 at the instance of the Appellant without the Respondent demanding that PW2 vacate the suit property or without the Respondent claiming that he was illegally on the land. The Appellant maintained that it undertook the measures to protect the suit land owing to the interest it had over the land and that as a result of the agreement between the parties, the Respondent allowed an agent of the Appellant to occupy and protect the suit property.

22. The Appellant submitted that it had established that it paid the balance of the stand premium stated in the letter of allotment and that it also paid the land rent for the land which had accrued from 1996 to 2016. Additionally, that it engaged a surveyor who undertook the survey of the land and went ahead to employ PW2 to take care of and protect the suit property pending processing of the title. The Learned Magistrate was faulted for not taking this evidence into account in arriving at its decision.

23. The Appellant submitted that the suit was founded on an agreement entered into on 20/7/1996, before the commencement of Section 3(3) of the *Law of Contract Act* which precludes the institution of a suit upon a contract for the disposition of an interest in land unless the contract was in writing, signed by the parties and attested by a witness who was present when the contract was signed by the parties. It relied on Section 3(3) of the *Law of Contract Act* which stipulates that sub-section 3 does not apply to any agreement or contract made or entered into before the commencement of that section.

24. The Appellant went on to argue that given that the oral agreement was between the Appellant and Mr. Joachim Chemngotie in his capacity as the Respondent's representative and based on the fact that Joachim had passed away, upon meeting with the Respondent in 2015 to 2016 he noted that since times had changed and the value of the property had appreciated and that parties needed to renegotiate the terms of the agreement, they agreed to vary the amounts at which the Appellant was to purchase the other half of the suit property from Kshs. 400,000/= to Kshs. 1,500,000/=.

25. That noting the requirement to have the agreement reduced into writing, the parties nominated advocates to reduce the agreement into writing which the Respondent failed to execute citing the reason that the widow of Joachim Chemngotie had to be present since he had entered into the original agreement with the Appellant on the Respondents' behalf. The widow failed to execute the agreement which is the basis upon which the trial court found that there was no agreement stating that it could not see any common intention to enter into a sale agreement with regards to the suit property. The Appellant was emphatic that the failure to put the agreement between the Appellant and the Respondent in writing did not defeat the fact that there was an existing oral agreement and that the parties had intended to be bound by a written one post negotiations. The Appellant invited the court to take note of the fact that the agreement was prepared and that it was the Respondent who failed to execute it.

26. Further, that by the time the parties were renegotiating, the Respondent had already benefited from the oral agreement of 1996 since the stand premium and the land rent had been paid and the suit property had been surveyed at the instance of the Appellant and the land was ready for title processing. The Appellant urged that where there was a conflict between a rule of law contained in a statute and a rule of equity, those of equity were to prevail.

27. It argued that where the equitable principle was at play such as this instance where the Appellant who was a party to an oral agreement and fully performed its obligation and there was a renegotiation of a single term of the agreement during a period when agreements were required to be in writing and the party who already benefited from the oral contract bailed out of the execution of the written agreement in order to frustrate the other party, then the rights and obligations are to be determined by an equitable perception of their relationship and not the rule of law which would have an adverse effect on the Appellant. The Appellant relied on Walsh vs Lonsdale [1882] 21 Ch D 9, where the court held that in England, equity treats as done that which ought to be done and that the intending lessee would be a lessee in equity and would have an equitable estate in the land.

28. The Appellant argued that what the Respondent sought to do and was allowed by the trial court in its judgment to do so was to approbate and reprobate the substance of both the oral agreement and intended written agreement yet when those benefited the Respondent he never challenged their existence and validity and was only denouncing the agreement to defeat the Appellan'ts rights and to avoid his obligations under the agreement. The Appellant implored the court to come to its aid urging that it would be contrary to the law for the Respondent to benefit from the actions of the Appellant under a contract, and then when it was its turn to act on his obligations, deny the Appellant its benefits. The Appellant relied on an extract from the Law of Estoppel and Res Judicata, 4th Edition by M. Mohir & A. C. Moitra where the authors stated that a party could not be allowed to blow hot and blow cold or to approbate and reprobate. That where one knowingly accepted the benefits of a contract or a conveyance or of any order, he was estopped from denying the validity of or the binding effects of such contracts or conveyance or order upon himself.

29. The Appellant submitted that the Respondent had benefited from the substance of the oral agreement between the Appellant and Mr. Joachim Chemngotie as the Respondent's representative and that he now held a lease over the suit property owing to the fulfilment of the undertakings by the Appellant and was purporting to defeat the resulting rights of the Appellant and run away from fulfilling his own obligations on the premise that the renegotiated agreement and the single issue of monies payable was not reduced into writing yet he is the one who failed to execute the agreement.

30. The Appellant argued that the trial court based its judgment and decision on form rather than substance and the intent of the parties yet it was an accepted principle of equity that equity looked at intent rather than form and that it looked at the substance of the transaction rather than its form. Further, that equity imputes an intention to fulfil obligations and was associated with notions of fairness, morality and justice. It urged that the trial court did not appreciate the substance of the transaction between the parties and it therefore arrived at a decision that helped a party which had already benefited to run away from his responsibilities. Further, that notwithstanding any form relating to the agreements, the Appellant had actually performed its contractual obligation and ensured that the Respondent obtained a lease over the suit property and had thus discharged its duty.

31. It urged that in the circumstances of this case, it was immaterial whether or not the renegotiated agreement as to monies payable did not conform as to form as long as it was demonstrable that the intention between the parties was that as a result of the fulfilment of the obligations under contract, the Respondent equally had obligations to fulfil and could not be allowed to use form to defeat the obligations.

32. The Appellant urged that the conduct of the parties spoke to their intent under the oral agreement of 1996 and the intended written agreement of 2016 and that the parties cannot be allowed to defeat the intention. That where a party has by his words and conduct made a promise or assurance to another with the intention to create legal relations and that party acts on the promise or assurance to the benefit

of the other party, then the promise or assurance cannot be reverted and he is bound to fulfil his end of the bargain. The Appellant relied on Benjamin Ayiro Shiraku v Fozia Mohammed [2012] eKLR in which Havelock J cited Denning LJ in Comb v Comb [1951] 2 KB 215.

33. The Appellant submitted that in as much as the renegotiated agreement was not reduced into writing, the substance of the oral agreement through which the Respondent allowed the Appellant to incur expenses and expend its time facilitating various processes leading to the issuance of a lease over the suit property in the Respondent's name, the Respondent cannot turn around and assert that the oral agreement was invalid or that the intended written agreement was unenforceable because the law and equity dictated acceptance of the obligations notwithstanding form or any other challenge. Further, that the Appellant having acted on the agreement and the Respondent having benefited from it then it could be inferred in equity that the parties proceeded on the presumption that they were bound by the agreement and that that which ought to have been done had been done. The Appellant invited the court to interfere with the finding of the Learned Magistrate.

34. The Appellant also submitted that the oral agreement of 1996 as covenanted between the Appellant and the Respondent through his representative Joachim Chemngotie was that the Appellant was to undertake the conveyancing processes and pay the requisite fees to facilitate issuance of a title in the name of the Respondent following which the Respondent would transfer half of the suit property and the Appellant would then purchase the other half at the initially agreed upon sum of Kshs. 400,000/= which increased to Kshs. 1,500,000/= upon renegotiation in 2016. The Appellant emphasised that the existence of an oral agreement between it and the Respondent was not a contestable issue because the processes undertaken by the Appellant towards obtaining the lease document held by the Respondent had not been disputed by the Respondent through evidence.

35. It urged that the Appellant having performed its end of the bargain to the benefit of the Respondent, guided by the substance of the resultative obligation of the Respondent, the Respondent became a trustee of the Appellant of half of the suit property and the other half upon effecting the right to purchase it as agreed in the trust resulting, implied and construed by the oral agreement of 1996. The Appellant maintained that the failure to have the renegotiated agreement reduced into writing did not in any way vitiate the substance of the agreement nor did it vitiate the resulting, implied and construed trust over the suit property as held by the Respondent in favour of the Appellant.

36. The Appellant pointed out that the proviso to Section 3(3) of the *Law of Contract Act* stated that that subsection would not affect the creation of a resulting, implied or constructive trust. It maintained that the oral agreement created a resulting, implied and constructive trust over the suit property in its favour and that Section 3(3) of the *Law of Contract Act* was therefore not applicable. The Appellant faulted the Learned Magistrate for failing to apply the proviso.

37. The Appellant concluded that the party with a valid claim which the trial court should have upheld was the Appellant having expended resources and time to actuate its obligation under contract of which actions the Respondent currently enjoyed proprietorship and holds a lease over the suit land and that it would best serve the interest of justice if the Appellant's rights and interest and the Respondent's obligation under the contract espoused in the plaint dated 8/8/2018 were given effect by this court.

38. On its part, the Respondent submitted that the Appellant sued him for specific performance of an oral agreement entered into between it and the Respondent on or about 20/7/1996 for the sale of the suit property and that the suit was dismissed with costs precipitating this appeal. The Respondent associated itself with the findings of the Magistrates Court and added that under Order 42 Rule 13(4) of the Civil Procedure Rules, the judge must be satisfied that certain documents are on the record and that they have been served on the parties before allowing the appeal to go for hearing. Those documents

include the memorandum of appeal, pleadings and the notes of the trial magistrate made at the hearing. The proviso states that the judge may dispense with the production of any document which is not relevant other than those in paragraph a, b and f.

39. The Respondent submitted that the Appellant had properly submitted on the role of this court on appeal to reconsider the evidence, evaluate it and draw its own conclusions. The Respondent submitted that the evidence contemplated was contained in the documents produced before the trial court and in the testimonies given on oath before the trial court. He went further to submit that the documents produced at the trial can be found in the record of appeal but as to whether they were admitted into evidence by the trial court, this could only be verified from the notes of the magistrate at the trial. Further, that the testimonies of the witnesses who testified at the oath are to be found in the notes of the trial magistrate which this court must reconsider and re-evaluate.

40. The Respondent submitted that the notes of the magistrate taken at the trial were an integral part of a record of appeal and were therefore relevant and their production could not be dispensed with. That in the absence of those notes, this court could not be in a position to wholly reconsider and evaluate the evidence tendered during the trial. The Respondent's advocate mentioned that having come on record in the appeal, they were at pains to argue the appeal for lack of the trial court's notes since they had not participated in the trial.

41. The Respondent urged that the Appellant had not included the notes of the trial court in the record of appeal and further that the court had not dispensed with the production of any document or the notes of the magistrate at the trial. Further, that the Appellant had not given any explanation as to why the notes were missing from its record of appeal. That without the notes, the Respondent was only left to agree with the trial court's analysis of the evidence produced before it and the findings the court arrived at. The Respondent invited the court to dismiss the appeal and uphold the decision of the trial court or strike out the appeal with costs to the Respondent.

42. The court had initially reserved the 24/10/2024 for delivery of the judgment. When it retreated to write the judgment, it discovered that the proceedings from the trial court were missing. It mentioned the matter on 24/10/2024 when the Appellant's advocate confirmed to the court that there were no proceedings in the record of appeal because the magistrates court file got lost in the registry. The court notes that the Respondent did not take up the issue of the missing proceedings before the appeal was allowed to go for hearing so as to bring his argument within the ambit of Order 42 Rule 13(4) of the Civil Procedure Rules. The proviso to that section grants the court discretion to dispense with the production of any document which is not relevant other than those in paragraph a, b and f. This would mean the notes of the trial magistrate made at the hearing can be dispensed with.

43. The issue for determination is whether the court should allow the appeal and set aside the findings of the Learned Magistrate contained in the judgment delivered on 9/10/2019. The duty of this court in determining the appeal as was stated in Selle & Another v Associated Motor Boat C. Ltd & Another [1968] EA 123 is to reconsider the evidence, evaluate it and draw its own conclusions while bearing in mind that it had neither seen nor heard the witnesses and make due allowance in this respect.

44. In addition, the court is required to review the evidence adduced before the trial court to determine whether the conclusions of the trial court should stand, establish if no evidence was adduced to support a particular conclusion or if the Learned Magistrate failed to appreciate the weight of admitted or proved facts or if the trial court went wrong. The Appellant confirmed to the court that there were no proceedings in the record of appeal because the magistrates court file got lost in the registry. The court file is kept in the custody of the registry and its loss cannot be attributed to the Appellant unless there is good reason to do so.

45. The evidence adduced before the trial court encompasses the documents produced and the testimonies given before the trial court. This would incorporate the evidence in chief, cross examination and re–examination that took place during the trial. While it may be argued that the written statements which were adopted by the witnesses at the trial comprised their evidence and are in the record of appeal, the fact of the matter is that that evidence had not been tested by cross examination and the notes of the trial court would be germane in establishing what facts were challenged during cross examination and the objections, if any, taken to the production of certain documents.

46. It would therefore be necessary for this court to look at the proceedings and notes of the trial magistrate for purposes of reconsidering and re-evaluating the evidence adduced before the trial court so as to determine whether the conclusions of the trial court should stand. Without the benefit of the proceedings from the trial court, it is impossible for this court to reconsider and evaluate the evidence tendered and make a fair determination in this appeal. It would serve the interests of justice if this case were heard de novo in light of the loss of the trial court's file.

47. The court sets aside the judgment and decree of the Senior Resident Magistrate delivered on 9/10/2019. The suit is remanded to the Nyahururu Chief Magistrates Court for hearing and determination.

48. Each party will bear its costs of the appeal.

DELIVERED VIRTUALLY AT NAIVASHA THIS 13TH DAY OF NOVEMBER 2024.

K. BOR

JUDGE

In the presence of: -

Mr. Mukuha Kamau holding brief for Mr. Miller Bwire for the Appellant

Ms. Njeri Wahome holding brief for Mr. M. Gikunju for the Respondent