



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC APPEAL NO. 1 OF 2018**

**(Being an appeal from the Judgment and Decree of P. Biwott (Senior Principal Magistrate in CMCC No. 572 of 2007 delivered on 12/3/2018**

**GABRIEL G. ODHIAMBO.....APPELLANT**

**VERSUS**

**WILSON CHEPKWONY.....RESPONDENT**

**JUDGMENT**

**The Appellant's Case**

**1.** The appellant being dissatisfied with the judgment of the Senior Principal Magistrate in **CMCC No. 572 of 2007** filed a Memorandum of appeal dated **3/4/2018** in which he raised the following grounds:-

**(1) The Trial Learned Magistrate erred in law and in fact when he failed to find that Plot No. 513 and 514 did not belong to the plaintiff as per the records kept and produced in court by one of the Directors of TUWAN FARM LTD the custodian of all records regarding to the said company.**

**(2) The Trial Learned Magistrate erred in law and in fact when he failed to find that the defendant lawfully purchased Plot Nos. 513 and 514 from one EDWINA MARY ANYANGO OBARE who was selling on behalf of her sons who owned the plots herein and who are recognized by TUWAN FARM LTD as the lawful owners of the plots in question.**

**(3) That the Trial Learned Magistrate erred law and in fact when he failed to find that the plots the subject matter of CMCC No. 572/2007 were part of the ¼ of an acre initially purchased by EDWINA MARY ANYANGO OBARE from KIPKORIR A. MAINA one of the original members of TUWAN FARM LTD.**

**(4) That Trial Magistrate failed to find that the family of KIPKORIR MAINA has never come up with a claim that the land the subject matter of the CMCC No. 572/2007 was never sold to EDWINA MARY ANYANGO OBARE since TUWAN FARM LTD indicates the names of her sons.**

**(5) That the Trial Learned Magistrate failed to weigh evidence on probability.**

**2.** The appellant prayed for the appeal be allowed and the plaintiff's case be dismissed with costs.

**3.** There is a cross-appeal by the respondent filed on 28/3/2019. However a look at the notice of cross-appeal on page 10 of the record revealed that it is just a denial of the grounds set out above. In summary the notice of cross-appeal reaffirms the respondents' faith in the judgment delivered by the magistrate's court and no extra claim is made.

**4.** The genesis of this appeal is the judgment and decree of the Chief Magistrate's Court at Kitale in **Kitale Chief Magistrate's Court Civil Case No. 572 of 2007**.

**5.** The summary of that dispute is follows: the plaintiff (who is now *the respondent*) filed a suit against the defendant (who is now *the appellant*) on the **3/12/2007**. For ease in this judgment the parties will be simply referred to as "*the appellant*" and "*the respondent*." The respondent claimed that he and other persons purchased Tuwan Farm Ltd otherwise known as **LR. No. 8813/L.R. 13058** in **1996** and each shareholder was allocated **3.4 acres** upon subdivision and issued with a share certificate; the respondent's share was then subdivided into several portions which included plots **Nos. 513 and 514** of which the respondent claimed to have always been in possession and use; in 2017 the appellant interfered with the respondent's quiet possession of the suit premises on the grounds that the said plots belonged to him; he occupied and began construction thereon hence the suit in **Kitale SPMCC No. 572 of 2007** in which the following orders were sought by the

respondent against the appellant:

- (1) **An order that Plot No. 513 and 514 into Tuwan Farm Ltd into Kitale Municipality belong to the plaintiff.**
- (2) **Vacant possession of Plot Nos. 513 and 514.**
- (3) **A permanent injunction restraining the defendants, his agents and all servants from occupying, constructing, developing or dealing in any manner with plot nos. 513 and 514 Tuwan farm Ltd.**
- (4) **Costs and interest.**

6. On **20/12/2007** the appellant filed a defence through the law firm of Ms. George Wambura & Co. Advocate. In his defence the appellant denied the claim and claimed to be the “legal occupier” of plots **Nos. 513 and 514** and that the area in question was then under adjudication and that the court had no jurisdiction to entertain the suit. He further averred that he bought the two plots from one **Edwina Mary Anyango Obare** and the records of Tuwan Farm Ltd have been amended to reflect him as the owner thereof.

7. This court must determine the issues that arise from this appeal which are as follows:-

- (a) **Whether in the light of the available evidence the learned trial magistrate erred in failing to find that plot Nos. 513 and 514 did not belong to the respondent.**
- (b) **Whether the learned trial magistrate erred in failing to find that the appellant lawfully purchased the two plots from Edwina Mary Anyango Obare.**
- (c) **Whether the learned trial magistrate erred in failing to find that there was no dispute that the land had been sold to the said Edwina Mary Anyango Obare.**

8. In determining this appeal this court recognizes that in a first appeal its role, as stated in **Selle -vs- Associated Motor Boat Co. Ltd. [1965] E.A. 123**, is to reconsider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

9. At the trial **PW1, Wilson Chekwony** testified. His evidence was that he joined the land buying company going by the name **Tiwan Farm Ltd** and became a shareholder by virtue of paying a membership fee of **Kshs.1030/=** in **1966** for which payment he obtained an original receipt in his name and a certificate for **3.4 acres**. He averred that the suit land was of agricultural user and he was allocated **52 plots**. He averred that the directors gave him a certificate bearing plots **Nos. 513 and 514**. He started living on the plots in **1974** and remained in quiet occupation till the year **2007** when he learnt that the appellant was in the process of erecting structures on his plots. He averred that he had not sold the land to the appellant or to **Edwina Mary Anyango Obare** and he therefore attempted to stop him from developing the plots but in vain hence the suit. He sought an eviction of the appellant from the suit land and a declaration that the land belongs to him. Upon cross examination by Mr. Njoroge for the appellant he asserted that he lives both at Tiwan Farm and at Bomet and that he comes to Tiwan Farm to collect rent and goes back to Bomet. Between 1966 and 1974 he had not been allocated any land. He subdivided his share of **3.4 acres** in **1990** into **52 plots** which were all equal in size that is **75 x 23 feet**. According to him in his evidence on cross examination Tiwan Farm Ltd was dissolved after allocating its members plots but the office still exists. He denied being a member of Tiwan Farm Urban Project which, according to his testimony commenced in 1990 with the demarcation of roads and which interfered with and reduced members’ acreages, including his, by compelling them to cede land for roads. He testified that he only learnt in 1990 that his land had been subdivided into 52 plots.

10. **PW2**, one **Richard Arap Koross**, testified on **18/8/2011** and stated that he was the **Chairman Tuwan Farm Ltd** in the year **2003**. His evidence was that the Tuwan Farm was bought in **1966** and in **1974** it was subdivided among **101** members with each getting **3.4 acres**; however in the year **1982** the said Farm was converted into a housing estate within Kitale Municipality and the **3.4 acres** were subdivided into small plots **7 metres by 21 metres**. However in his evidence he conceded that this history was not known to him until 1998 when he became the chairman. He claimed that the respondent was one of the **101** original members and that they were issued a membership certificates which he signed on **29/3/2003**. According to him the certificate shows the number of plots within the former parcel measuring **3.4 acres**. He singled out plot **No. 513 and 514** as belonging to the respondent and produced the original certificate as **P. Exhibit 3**. He corroborated the respondent’s evidence on the procedure of becoming a member of Tuwan Farm and produced a certificate as allegedly issued to the respondent as **P. Exhibit 2**. In his evidence he stated that the respondent was issued with plot **No. 3/66** in which the description “**66**” stood for the year of purchase. That plot was **3.4 acres** and was subdivided to give birth to plots **Nos. 513 and 514** among others. In cross examination by Mr. Kibe for the appellant he conceded the current management took over the company in 1992 and gave their names but maintained he is still recognized as one of the original owners who reside in Bomet. He alluded to the existence of a splinter group in the management and averred that up to 2003 there were two parallel offices in respect of the Farm. On re-examination he maintained that the respondent had fenced his **3.4 acres** but plots were hived from that land by the surveyors. He denied that he was invited to any meeting or to participate in the Tuwan Urban Project and maintained that Tuwan Farm Ltd and Tuwan Urban Project were two distinct groups.

11. **PW3, Samuel Kipkosgei Arap Koros**, testified on **3/11/2011**. His evidence was that the respondent was, just like his father, was an original member/shareholder of Tuwan Farm Ltd; the entire Farm was **347 acres**; each member got **3.4 acres** on subdivision; that he lived on the said Farm just as did the respondent; that the respondent contracted him to erect a building for him in 1980 on the same plot where the appellant has constructed his structures and that the said plot of **3.4 acres** allocated to the respondent was subdivided into plots **Nos. 513 and 514**. According to the witness he has no knowledge and does not recollect the respondent informing him at any time that he has sold any portion of his land. On cross examination the witness admitted that all the **101** original members were of the Kalenjin ethnic group but conceded that some of the original members subsequently sold their shares. However, he would not know if the particulars of the buyers were included in the company record. He corroborated the evidence of the other witnesses that after subdivision of the Tuwan Farm Ltd land the company expired or was dissolved and gave way to Tiwani Farm Urban Project. The 1973 committee of Tuwan Farm Ltd was dissolved

due to wrangles. He concurs with the evidence of PW2 that there was provision for roads and parking. He further testified that the respondent's house was demolished due to old age and he relocated to an unstated place. According to him plots Nos. 513 and 514 were not identifiable when the respondent contracted him to build a house in 1980. With that evidence on the record the plaintiff closed his case.

**12.** On 25<sup>th</sup> June, 2015, the matter proceeded to defence hearing. The appellant did testify as DW1. His evidence was that he only came to know the respondent during the lower court case and that he bought plots **No. 513 and 514 on 16/4/2007 for Kshs.220,000/- each** which consideration he paid in full. He produced the sale agreement as **D. Exhibit 3**. According to him the plots were in the names of the seller's children and she sold them on their behalf. The children were witnesses in the making of the agreement and so was a representative of Tuwan Farm Ltd and he was given share certificates for those plots on 8/5/2007. The share certificate he was given bore the numbers for both plots. It is dated 8/5/2007. He produced the transfer dated 20/5/2011 from Edwina M. A. Obare to himself. The same is witnessed by 5 persons who are described as the "directors" of Tuwan Farm Ltd. He also produced an original receipt dated 19/9/2007 issued in his name as **D. Exhibit 5** the same is for Kshs.2,000/- which is expressed to be survey fee for the two plots. A letter allowing him to pay the surveyor's fees was produced as **D. Exhibit 4**. It is stamped and signed by one Jackson T.Z. Cheminingwa the Senior Chief Municipality Location. According to the witness the area chief was involved in the receipt of the survey fees. He further averred that he purchased the plots in vacant possession and developed them. He denied that the respondent owned the plots. According to him records at Tuwan Chief's office show that the sons of Edwina had shares in respect of the plots.

**13. DW2, Edwina Obare**, testified on 10/9/2015. She stated that the respondent is his neighbour in Tiwan. She admitted having sold the suit land to the appellant. She maintained that she bought the land from one **Kipkorir Maina for Kshs.3,000/-**; that the land comprised a ¼ of an acre; she produced the agreement between her and Kipkorir Maina as **D. Exhibit 6**. Subsequently plots in the area were given numbers and her plot was subdivided into 5 plots whereupon she was issued with share certificate **No. 575 dated 5/1/1994** bearing plot **Nos. 511, 513, 514, 515 and 516**. When the time back for her to return upcountry she gave plots **Nos. 513 and 514** to her sons George Odhiambo Obare and Musa Obiero Obare respectively and notified the Tiwan Farm office whereupon two separate share certificates, one for each plot, were issued in her sons' respective names. Those certificates were produced as **D. Exhibit 8(a) and 8(b)**. Her sons subsequently consented to her sale of the two plots. The said written consent were produced as **D. Exhibit 9(a) and 9(b)**. She identified **D. Exhibit 3** as the agreement entered into between her and the appellant. She confirmed that the respondent was issued with a share certificate upon the transfer of the land to him. According to the witness the survey exercise caused many people to be shifted from the land they originally occupied; even her house was affected and that is how she found herself in a new area. Schools came up after the survey work and some plots were reduced in size. In her view every resident was affected and Tiwan Farm officials were involved. After she was shown her plots she gave them to her children and also cultivated before she sold them. She maintained that the respondent was also issued with some plots. The respondent never lodged any complaint against her and only came to claim her plots much later. According to her she did not know the difference between Tiwan Urban Project and Tuwan Farm Ltd.

**14. DW3, Erastus Bruce Mhabare** (should be **Mwawali**, going by other related records), testified on 10/9/2015. He testified that he was director of Tuwan Farm Ltd since 1998; that both the appellant and respondent were known to him; that the Farm became a slum and the government provided a surveyor to subdivide the land and make room for public utilities; that everyone give out **31.7%** of their land for public utilities, that is schools, roads and churches so on between 1990 and 1991; that some members were displaced. However the surveyor drew a map and beacons were placed on the ground; that plots Nos. 513 and 514 appear in the map and a committee existed to show members their plots after the survey exercise. Thereafter share certificates were issued by Tiwan Farm III Urban Project and there is a farm register that shows that initially George Obare and Musa Obare owned plots Nos. 513 and 514 respectively and that they are not owned by the respondent. He produced a copy of the register as **D. Exhibit 13**. According to him the respondent was issued with other plots and not the two plots subject matter of this suit. In his evidence on cross examination DW3 stated that Tuwan Farm Ltd and Tiwan Urban Project are different entities but clarified that he was a director of Tuwan Farm Ltd and not Tiwan Urban Project. However in re-examination he also clarified Tuwan Urban Project came up because of change of use and also because there were no plot numbers. The plot numbers came up in 1992 when the map was drawn and people were settled on their respective plots. He maintained that the Urban Project came up with the list of plots to streamline ownership and that the certificates issued to Edwina's children are genuine. He maintained that the rubber stamp that had been used for Tuwan Farm Ltd was also subsequently used for Urban Project. At the end of his evidence the defence closed its case.

**15.** Parties were then directed to file and serve their submissions and judgement was delivered on 12<sup>th</sup> March, 2018.

**16.** In his judgment, the trial Magistrate reviewed the evidence and held that the respondent is the owner of the **2 plots No. 513 and 514**. The appellant was ordered to give vacant possession and he was also injunctioned from dealing with the 2 plots in any manner whatsoever. The appellant was also ordered to pay costs.

#### **The Submissions of the Parties in this Appeal**

**17.** Both the appellant and respondent filed their submissions on the **24/5/2019** and **17/7/2019** respectively. I have considered those submissions which largely dwell on the facts on the case.

#### **Determination**

**18.** In order to determine this appeal the history of Tuwan Farm Ltd becomes relevant. The Farm has acquired a variant of names in the course of these proceedings: "Tiwan" "Tiwani" "Diwan" and "Diwani", but this court prefers to and will refer to it by its recognised official name, "Tuwan Farm Ltd". In summary the facts as perceived by this court are that a group of **101 Kalenjin** speaking persons joined hands to purchase and did purchase **LR No. 8813** which they subsequently subdivided among themselves in equal portions measuring **3.4 acres** each. Apparently this informal subdivision was not captured in the survey records, but each individual member knew of the extent of his entitlement.

**19.** As time went by, sales of portions of land by different members became common and the population in farm increased. The subdivision and sale of plots and the increase in the number of persons interested in the resultant subdivision was not matched by corresponding efforts on the part of the concerned authorities to ensure proper planning of the area occupied by the Farm. This continued for a period of 17 years

after the informal distribution of the land among the original 101 members in 1973.

**20.** The authorities only appear to have woken up from their deep slumber in the year 1990 when the then Kitale Municipal Council conceived of the Tuwan Farm Urban Project. This was a project which according to the available evidence took up the responsibility of causing the suit land to be formally subdivided amongst the persons then interested in land within the farm, having regard to the need for reservation of land for public amenities such as roads, churches, hospitals and the like.

**21.** The survey exercise was commissioned to Kamwara licensed surveyors by the government. This surveyors firm subdivided the land, made provisions for public amenities, drew a survey map for the area and allocated numbers to the individual plots created. Subsequently a committee under the Tuwan Farm Project showed the residents their plots under the new subdivision scheme. That is how the plots subject matter of this suit came about.

**22.** A sample extract of the register whose copy was produced by DW3 as **D. Exhibit 14** showed that some arithmetic went into the exercise of determining of how much land each member listed in the register had at the end of the exercise. The particulars evident in that register reflect the shares (in square feet) that the members originally had, the area they had sold, (in square feet) the area remaining (in square feet), the standard deduction of land measuring **31.7%** of every members' land computed as a percentage of its size at that time and the area (in square metres) that remained after the deduction of **31.7%**.

**23.** I have examined that register and found that the entry **No. 873** therein reflects the name of the respondent herein as well as his identity card number and the indication that the final land he remained with after the exercise was 101 square metres. However it appears that the respondent and some few other people never signed the last column in that register. It would appear to this court that since the sales conducted by the original members did not reflect numbers of the resultant informal subdivisions sold, the situation on the ground was chaotic, with the plots bearing different sizes and shapes and no proper amenities such as roads to serve them.

**24.** This is the situation that the Tuwan Farm urban Project apparent came in to cure, and it appears to have succeeded only that it was with concomitant pain of surrender of chunks of land by members in favour of better planning.

**25.** It would also appear to this court that persons who were resident on the land at the time of the commencement of and during the survey commissioned by the Tuwan Farm Urban Project had definite advantage over any absentee landlord, besides the Tuwan Farm Urban Project appeared to consider sale agreements and transfers informally entered into between the plot holders and persons who originally held the land.

**26.** It was by virtue of the latter aspect of management of the Farm affairs that **Edwina Mary Anyango Obare** was recognized as purchaser from one **Kipkorir A. Maina** of a **1/4 acre** of land on 17/9/1978 as the sale agreement produced as **D. Exhibit 6** shows.

**27.** She was apparently in possession of the land by the time survey took place in 1990 and her plot was subdivided into 5 portions though she was also affected by movement occasioned by the exigencies of the re-planning of the land to create space for public amenities.

**28.** The first official document she appears to have obtained after the exercise from the Tuwan Farm Urban Project was share certificate **No. 575** issued on **5/1/1994** in her name bearing plots **Nos. 511, 513, 514, 515** and **516**. She caused plots **Nos. 513** and **514** to be transferred to her two sons **George Odhiambo Obare** and **Meshack Otieno Obare** whereupon share certificate numbers **2437** and **2438** respectively were issued in their names. No further history is given as to what happened to plots **Nos. 511, 515** and **516** and as they are not relevant to the respondent's claim in the lower court case this court will not dwell on them.

**29.** On the other hand the evidence produced by the respondent comprised of **P. Exhibit 1** a receipt issued by Tuwan Farm Ltd for Kshs.1030/=, a farm member certificate dated 29/2/2003 in his name bearing the letterhead Tuwan Farm Ltd 1996 and a farm member certificate dated **25/9/1974** showing that the respondent was issued with plot **No. 3** reflecting his one share in the company. That is the only evidence availed at the hearing in the trial court by the respondent. In my view the respondent did not concern himself with, or participate in, the affairs of Tuwan Farm Urban Project which commenced in 1990 and which led to the subdivision and re-planning of the land formally purchased by Tuwan Farm Ltd. This observation is buttressed by an examination of the extract of register produced as **D. Exhibit 14** in which the signature of the respondent does not appear. Whether the respondent willingly refused to sign that list or was simply absent at the appropriate time is subject to debate but it is clear from assertions in his evidence during the proceedings in the lower court which gave rise to this appeal that he was not in favour of the Tuwan Farm Urban Project. Indeed the magistrate in his judgment summarized the situation as follows:

**“The plaintiff demonstrated that he paid Kshs.1030/= required for each member of Tuwan Farm in 1966. He was issued with certificate PExh 2. He did not recognize Tuwan Farm Urban Project.”**

**30.** In **Kitale ELC No. 7 of 2013 Joshua Njunge Nganga -vs- Wilson Chepkwony and 3 Others** a case in which the respondent herein was named as first defendant, this court observed as follows:

**“Herein lies the 1<sup>st</sup> defendant's problem. He would not recognize a project that was conceived in order to attempt to create order out of chaos that had developed over the years in Tuwan Farm, yet despite his disapprobation of that phenomenon, he never even passively followed up the exercise in order to be able to trace in which plots his land that remained would be contained. Meanwhile the plot in question was registered in John Kipkoech Kelong (sic) and remained vacant until purchase by the plaintiff. Occupation of the suit land by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants commenced only after the plaintiff purchased it.**

**The 1<sup>st</sup> defendant was entitled to his opinion regarding the Tuwan Farm Urban Project. However, the project having recognized that persons were on the ground who had bought land from original landowners, it resulted to some simple species of mathematics to determine what land size each original landowner was entitled to after taking sale and deduction of**

**31.7% from their land for public utilities purposes. It would appear that from the said arrangements the original owners and the subsequent buyers would benefit from good planning and contemporaneous processing of all title documents.”**

**31.** This court notes that the respondent's evidence at the trial court went as follows:

**“It (MFI P3) was on 29/3/2003 after the company was wound-up. It shows my plot numbers. I hear about Tiwan Farm Urban Project. I understand it is carrying out survey and allocation of my plots in Tiwan Farm. I am not a member of Tiwan Farm urban Project since I was never issued with any documents. Tiwan Urban Projects job started in 1990.”**

**32.** Later on in his evidence on cross examination he states as follows:

**“I cannot tell if Tiwan Farm Urban Project has records. In 1990 I came to learn that my plots had been subdivided into 52 plots.”**

**33.** The above evidence demonstrates clearly that a lot of developments took place either while the respondent was absent or, which going by evidence on record is highly unlikely and, in which event he may have refused to co-operate with the planning exercise, in his presence. However reference to his evidence at the beginning of his cross examination may give insight into what actually happened. this is what the record of his evidence on his cross examination states:

**“I live at Tiwan Farm and in Bomet as well. I now live in Tiwan. I admit I come to collect rent in Tiwan and go to Bomet.”**

**34.** The above statements may be construed to show that the respondent at one point ceased to reside on his land at the Farm and went to settle in Bomet. And what other better evidence on that point than that of PW2 Samuel Kipkosgei Arap Koros who stated as follows in his examination in chief:-

**“We lived on the said Farm together with him. He contracted me to build some building for him in 1980. It is in the same plot where the defendant Odhiambo had built too. I do not know the defendant at all but I have seen his building.”**

**35.** Later on in his evidence on cross examination PW2 stated as follows:

**“Chepkwony's house was demolished due to old age and he relocated his house. Plots 513 and 514 had not been labelled when I was building for him in the year 1980.”**

**36.** In re-examination PW2 stated as follows:

**“I insist where Gabriel has built is the same spot where I built a house for Chepkwony.”**

**37.** The evidence of PW1 and PW2 leave this court wondering where the respondent relocated to such that his house had to be demolished and another one built thereon in his absence without demur. The facts that remain clear is that he did not reside continually in Tuwan Farm and numerous developments occurred in his absence. If he had been present on the ground, record of his dispute with any person who attempted to physically take over his land in the 1990s would have emerged at the hearing, which never happened. This is not to say that he did not have any share of land from Tuwan Farm Ltd. He had shares, but it must be remembered that for as long as Tuwan Farm Ltd did not regularize the informal subdivision conducted in the year 1973, each allottee was bound to perpetually guard their boundaries until formal subdivision and registration of their parcels and issuance of titles thereto was done. That regularization did not happen expeditiously and by the time the government took the initiative to plan the area there was already planning chaos on the ground to the extent that the area qualified as a slum.

**38.** The respondent himself was not heard to aver at the trial that Tuwan Farm Urban Project found him residing on a fenced, definite portion of any size, or that he was physically dispossessed of the same by the activities of the project officials. And therein lies his main problem: if he never participated in the Tuwan Farm Urban Project or followed up his entitlement after the subdivision of the entire farm to ensure registration in his name and issuance of share certificates over the resultant subdivisions arising out of what he considered to be the whole or part of plot **No. 3/66** which he was originally allocated by Tuwan Farm Ltd, on what basis could he then claim the suit lands herein which from the year 2000 had apparently been issued to Edwina Mary Anyango Obare and subsequently transferred to the appellant? How can his claim to those plots be reconciled with the admission that what was formerly the Tuwan Farm Ltd land was replanned, and that the survey exercise had the consequence of reducing member's acreages and displacing others from their original areas of settlement to new areas? Without any documents issued by Tuwan Farm Urban Project, the successor to the Tuwan Farm Ltd, this court does not find any basis the respondent's claim over the suit lands.

**39.** It is clear that the respondent had blissfully wished the unplanned status of the Tuwan Farm Ltd had continue and held on to old documents issued by Tuwan Farm Ltd despite the advent of the planning efforts and effects wrought by the rise of the Tuwan Farm Urban Project.

**40.** In the circumstances described above and with respect, it is not possible for this court to uphold the trial magistrate's findings that the suit land belonged to the respondent as that finding is not supported by any evidence the record. Furthermore there is an undeniably clear record of evidence of the chain of transactions which led to the transfer of the suit plots to the appellant and his taking up of possession thereof. Consequently, I find that this appeal has merit and must succeed.

**41.** In the final analysis I allow the appeal and I issue the following orders:

**(a) The judgment and decree of the honourable P. Biwott Senior Principal Magistrate in Kitale CMCC No. 572 of 2007 Wilson Chepkwony -vs- Gabriel G. Odhiambo is hereby quashed and set aside and substituted with an order dismissing the respondent's suit in Kitale CMCC No. 572 of 2007.**

**(b) The respondent shall bear the costs of this appeal and the suit before the trial court in Kitale CMCC No. 572 of 2007.**

**Dated, signed and delivered at Kitale on this 30<sup>th</sup> day of September, 2019**

**MWANGI NJOROGE**

**JUDGE**

**30/9/2019**

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bisonga holding brief for Kaosa for Applicant

N/A for the Respondent

**COURT**

Judgment read in open court.

**MWANGI NJOROGE**

**JUDGE**

**30/9/2019**