Case Number:	Civil Appeal 151 of 2006
Date Delivered:	03 Oct 2014
Case Class:	Civil
Court:	Court of Appeal at Eldoret
Case Action:	Judgment
Judge:	Wanjiru Karanja, George Benedict Maina Kariuki, Philomena Mbete Mwilu
Citation:	Fredrick Wakhungu Wanyama & 7 others v Joash Kisianganyi Wanyonyi & 11 others [2014] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Uasin Gishu
Docket Number:	-
History Docket Number:	H.C.C.C. No. 8 of 1997
Case Outcome:	Appeal Dismissed
History County:	Trans Nzoia
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT ELDORET

(CORAM: KARANJA, G.B.M. KARIUKI & MWILU, JJ.A)

CIVIL APPEAL NO. 151 OF 2006

BETWEEN

FREDRICK WAKHUNGU WANYAMA

(Legal representative of **JAMES WANYAMA***)*

STEPHEN WAFULA WANYAMA

(Legal representative of **JAMES WANYAMA***)*

LEAH SIKHOYA NDEMAKI

(Legal representative of **ALEXANDER NDEMAKI MASIKA***)*

ELIUD MAUMO

(Legal representative of **NAHASHON WATULO MASIKA**

MAURICE NGOME MASIKA

(Legal representative of **NAHASHON WATULO MASIKA***)*

JUDITH NAKHUMICHA NAHASHON

(Legal representative of) **NAHASHON WATULO MASIKA***)*

SUASAN NAMUKI MABONGA

STANLEY MAYIKA MABONGA.....APPELLANTS

AND

JOASH KISIANGANYI WANYONYI

DAINA NASAMBU WANYONYI

DINA WASIKE

SAMSON WANYONYI

JUSTUS MURESIA

PATRICK MAMAI

STEPHEN WATWATI

BEATRICE WANYAMA WATWATI

PAUL NAMUNYU

NEDI WANYAMA

PIUS KIMUNGUI

LENAHA NASIPONDI MAMAI.....
RESPONDENTS

(An appeal from the judgment of the High Court of Kenya at Kitale (Nambuye, J)

dated 2nd November, 2004 but delivered by Jeanne Gacheche J.

in

H.C.C.C. No. 8 of 1997 *(formerly* ***ELDORET H.C.C.C. NO. 167 OF 1989)***

****

JUDGMENT OF THE COURT

INTRODUCTION:

The **appellants** have appealed against the judgment of the High Court of Kenya at Kitale (R. Nambuye J, as she then was) which was delivered on her behalf by Jean Gacheche J on 2nd November, 2004.

The gist of the dispute giving rise to the suit in which the judgment appealed from was delivered is the sub-division and share allocation of the suit properties known as Mbai Farm LR. No's. 6651/2 and 66697 situated within Trans Nzoia District (**"the suit property**") to the partners, members or co-owners of the suit property. The dispute revolved around the amount of money paid as shareholding by each of the partners. On the one hand, some of the partners claimed that they had contributed more money than the others were prepared to acknowledge. On the other hand the respondents were asserted that the full amount each member was supposed to pay was Ksh 5,000/= and that whereas a few of the members paid less, none of them paid more than the Ksh. 5,000/=. Since the size of the portion of land each member was to be allocated was dependent on the amount of money paid, it was imperative for each party to prove by way of adduction of evidence, the exact amount of money paid towards the

purchase of the said properties.

It was however common ground that some four members who intended to contribute the 5,000 shillings agreed upon, had ran into financial difficulty and only managed to pay lesser amounts which we shall tabulate later on in this judgment.

The respondents in this appeal, who were the plaintiffs before the High Court, commenced their claim vide a plaint which was later amended and filed on 2nd November, 2004. In the amended plaint they sought, inter alia, a declaratory order to the effect that the partners, members or co-owners of the suit properties were twelve as stated in the Trans Nzoia District Land Control Board consent granted on 11th April 1980. The respondents also sought orders that the suit properties be sub divided/surveyed equally among the 1st, 2nd, 3rd, 4th and 6th plaintiffs and the 1st, 2nd and 3rd defendants and that the 7th, 8th, 9th and 10th plaintiffs and the 4th and 5th defendant's jointly be given a share of land equivalent to their respective contributions as tabulated in Paragraph 17 of the amended plaint. The respondents further sought an order that each partner/member stays on the portion of land he/she had occupied since 1965.

However, the appellants by a defence and counter-claim dated 13th February, 1990 and filed on 14th February, 1990 denied that the respondents resided on the suit properties and that in any case the claim was time barred under the Limitation of Actions Act. They contended that some respondents had no locus standi in the matter on account of the fact that they were not administrators of the estates of the deceased partners or members. They further contended that the late ***Enos Wanyama, Pius Kimungui and the late Mamai Masakalia*** paid Kshs. 1,808/-, Kshs. 3,592/- and Kshs. 2,870 respectively but the sums had been refunded to each of the three who later left the suit properties.

As regards the Trans Nzoia District Land Control Board consent granted on 11th April, 1980 the appellants stated that the consent was obtained fraudulently in that the partners, members or co- owners of the suit properties were not party to it.

The appellants counterclaimed that the partners, members or co-owners who were not residing on the farm contributed an equal amount of money and were entitled to different portions of the suit properties. They therefore sought the dismissal of the suit and further an order that the Trans Nzoia District Land Control Board consent granted on 11th April, 1980 be declared null and void, and that an order be made that the subdivision approved by the Ministry of Lands and Housing in 1992 be followed.

In their reply to defence and counterclaim the respondents denied that there was any lawful subdivision in 1992 or any other year sanctioned by the consent of the Land Control Board and contended that the lawful partners, members or co-owners of the suit properties were twelve in number. The respondents contended that the appellants' claim against the Trans Nzoia District Land Control Board consent granted on 11th April, 1980 was bad in law and was time barred and as such the appellants were not entitled to the reliefs sought. The respondents asserted that the rightful owners of the suit land had not approved or consented to the issuance of the subdivision map of 1992 purportedly approved by the Ministry of Lands or any other map.

Background

The record of appeal shoes that sometime in 1964 six persons identified the suit property for purchase. By an agreement dated 21st of December 1964, L. Pratt Leach and G. N. Herbert on one hand agreed to sell the suit properties to **Johnstone Mabonga (DW4), James Wanyama (DW2), Alexander Ndemaki (DW2), Nahashon Watulo (DW3), Dixion Watwati** now deceased **(PW4)**, and **Justus Muresia (PW1)** as purchasers on the other hand.

Pursuant to the sale agreement the suit properties were on the 14th May, 1965 transferred from the vendors to the purchasers as tenants in common in equal shares for the purchase price of Kshs. 168,000/=. The titles to the suit properties were severally encumbered on account of loans owed to the Land and Agricultural Bank of Kenya and the Agricultural Finance Corporation until the 5th August, 1975 when all the encumbrances were confirmed to have been cleared from the suit properties' titles. In the process of purchasing the property the founder members agreed to bring in more members to enable them raise the purchase price. The founder members added eleven (11) other members, that is, **Joseph Kasembeli, Peter Malaka, John Sitati, Patrick Sitati, Jefunea Yasele, Enos Wanyama, Pius Kimuguni, Jackson Masakani, Patrick Wamai, Nelson Wanyonyi Namaswa and Paul Namunyu.**

Each of the members including the founder members agreed to contribute Kshs. 5,000/- each towards the deposit and purchase price of the suit property. Before the encumbrances had been removed some members failed to meet their monetary contributions towards their respective shareholding targets and as a result some resigned and left the group. Those who chose to leave the group were, **Jephenea Yasele, Joseck Kasembeli, John Sitati, Patrick sitati, Peter Malaki and Johnson Kambeli.** Upon their exit, each was refunded their share contributions in full. However, there were those who failed to pay the full contributions but remained in the group and claimed a share in the suit property. These were, **Pius Kimungui, Enos Wanyama,Jackson Masakari and Johnstone Mabonga**. However it is not in contention that **Johnstone Mabonga**, completed the payment in full later on. Subsequently, a disagreement arose between the existing members who had fully paid their contribution and those that remained and claimed a share of the property despite their failure to pay the full amount.

Sometime in 1973 through minutes of several meetings, the members who had paid the full contributions made a resolution that the remaining three members who had failed to pay the full amount for the shares be refunded their contributions. This matter was brought before the District Officer who asked the other members to give the three members a short time to complete their payments. However, the members declined except for **Johnstone Mabonga** who supported the extension of time. Later it was passed that the contributions of **Pius Kimungui** be refunded through the advocate while that of **J. Masakari** be refunded by **N. Namaswa** and **P. Namunyu** at his home. The three denied having received the said refunds.

Consequently, with the support of **Johnstone Mabonga** they filed Eldoret HCCC No. 52 of 1974 which sought a declaration that a partnership existed between the members and an order that it should be dissolved or wound up with fair payments to them if any were found due. However, this case was not prosecuted and, on the motion of the defence, the same was dismissed for want of prosecution and as such, the matters in issue raised in that suit and the rights of the three ‘partners’ remained

unresolved.

After the dismissal of the case, the members went to the Land Control Board to have the paid up members registered as proprietors of the suit property. The application for consent from the Land Control Board enumerated 12 members, including the three that had not paid their contribution in full. The application for consent led to a series of arbitral proceedings before a panel of elders under the chairmanship of the District Commissioner of Trans Nzoia which are titled civil case No. 52/73 Mbai farm. In these proceedings **Justus Muresia**, confirmed that no receipts were issued when the members were buying the land but that their share contributions were being recorded in a book.

In presenting the **respondents'** case the **Late Nelson Namaswa** testified that nine members completed payments of their shares and they were the only ones who subdivided that farm amongst themselves in 1975 and also shared the 200 heads of cattle each receiving 11 heads of cattle and the remaining 101 heads of cattle were sold off to pay the loan. He also confirmed that, **Pius Kimungui, Emos Wanyama and Jackson Masakari,** did not complete the payment of their shares and therefore they were not allowed to enter or build on the land and so they remained outside the farm.

This is corroborated by evidence of a local arrangement in 1976 where the nine partners, members and co-owners, who had fully paid for the said suit property, subdivided it and gave to each member a subdivided portion for each to develop. However the three who had failed to meet their financial obligations, sought to be included in the sub-division based on their contributions which were less than Kshs. 5,000/= for each. This was not agreeable to all the members, especially the founders that is, **Justus Muresia, Dickson Watwati, Nahashon Watulo, Johnstone Mabonga, Alexander Ndemaki, James Wanyama, Nelson Namaswa, Paul Namunyu and Patrick Wamai.**

The dispute was referred to elders and the District Officer who ruled that the share contribution would remain at Kshs. 5,000/- and that the three exiting members be given land in proportion to their contributions.

The elders made a finding that the farm records were being kept in a book, and that the receipts produced by **Ndemaki** were forgeries and were made in furtherance of a conspiracy by a few members to get more land than they were entitled to. The elders ruled that all members apart from a few had paid ksh 5,000/= and were therefore entitled to equal portions of the land, and that those who had paid less than the ksh 5,000/= would get portions that were proportionate to their contributions.

This award was filed in Kitale SRMCC No.34 of 1988 for adoption as judgment of the Court. The same was however challenged by **James Wanyama Masolo, Johnstone Mbonga, Alexander Ndemaki and Nahashon Watulo Masiwa** who felt aggrieved by the decision, by way of a Notice of Motion on 23rd November, 1988 seeking orders that the elders' award be set aside or in the alternative it be declared a nullity. On 12th January, 1989, the application was allowed primarily on the ground of lack of jurisdiction on the part of the elders' as there was no formal referal to the elders from the court. The setting aside of the elders award led to the filing of Eldoret High Court Civil Case No. 167/89 which was later transferred to Kitale and given a new case No. Kitale High Court Civil Case No. 8 of 1997. This is the case whose decision is now before us on appeal.

Meanwhile, **James Wanyama Masolo,** in the name of Mbai Farm, applied for the Land Control Board consent for subdivision of the Mbai Farm which was approved and issued in 1990. Thereafter, some parties rushed to court seeking to quash the said consent vide Eldoret High Court miscellaneous application Number 24 of 1990. The application was dismissed and being aggrieved by the dismissal, **James Wanyama Masolo (DW1)** moved to the Court of Appeal and filed Civil Appeal No. 143 of 1992 seeking the same relief. The appeal is still pending awaiting the outcome of this appeal.

THE FACTS/ EVIDENCE:

Let us now revisit the evidence adduced before the trial Court as we are enjoined to do under Rule 29 of this Court's Rules, and as repeatedly affirmed by this court in its decisions. (See **Selle vs. Associated Motor Boat Company (1968) E.A. 123 at page 126**), where this Court held;

"…….. this Court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect…" See also Jivanji vs. Sanyo Electrical Company Ltd. (2003) KLR 425

At the hearing, the **respondents** presented evidence in support of their claim through a total of twelve witnesses. However we will consider the testimony of 11 witnesses as **Francis Mungo Waswa (PW12)** did not complete his evidence. **Justus Barasa Muresia (PW1)(Muresia)** testified that he had resided at Mbai Farm since 1965. With regard to the membership of the Mbai Farm, he stated that initially there were six pioneer members only. However due to the acquisition of the Mbai Farm they were forced to increase membership to enable them pay the deposit, the balance of the purchase price and the cost of movable assets.

PW1 confirmed that the group increased their membership from 6 to 17 members. The new 11 members were **Joseph Kasembeli, Peter Malaka, Joash Sitati, Patrcik Sitati, Jefunea Yasele, Enos Wanyama, Pius Kimungui, Jackson Masakabi, Patrick Wamai, Nelson Wanyonyi Namaswa and Paul Namunyu**. He confirmed that these new members enabled the group to raise the deposit of Kshs. 48,000/= but they were left with a balance of Kshs. 120,000/=. To raise that balance, they borrowed loans from the Land and Agricultural Bank of Kenya and the Agricultural Finance Corporation. These loans subsisted until the 5th August, 1975 when all the encumbrances were confirmed to have been cleared from the suit properties' titles. However, **Joseph Kasembeli, Peter Malaka, Joash Sitati, Patrick Sitati, Jefunea Yasele** exited the group before the completion of the loan payment. This left 12 members in the group who according to him constitute the membership of Mbai farm to date.

However, PW1 confirmed that there was a dispute with regard to the membership of the three members, **Pius Kimungui, Enos Wanyama and James Masakari**. To settle the dispute with the support of Johnstone Mabonga the three filed Eldoret HCCC No. 52 of 1974 which sought a declaration that a partnership existed between the members and that it should be dissolved or wound up with fair payments to them if any WERE found due. However, this case was not prosecuted and on the motion of the defence, the same was dismissed for want of prosecution and as such it did not resolve the matters

in issue and the rights of the parties. **Muresia (PW1) contended** that it was not correct that the members were nine. He confirmed to the court that there were twelve members.

With regard to contributions and share allocation of the land he stated that the pioneer members took occupation of the Mbai Farm in 1965. It was agreed that each of the members, both the pioneer and the additional members, were to contribute Kshs. 5,000/- each towards the deposit and purchase price of the Mbai Farm. Consequently, each of the members should obtain equal shares of the Mbai Farm. However, he acknowledged that of the 12 members, only 9 members paid up the contribution of Kshs. 5,000/- in full. These members were: **Justus Muresia, Alexander Ndemaki, James Wanyama, Dickson Watwati, Nahashon Watulo, Nelson Namaswa Wanyonyi, Paul Namunyu and Patrick Wamai and Johnstone Mabonga.** He confirmed that the rest of the members had made contributions as follows: **Pius Kimungui – Kshs. 3,592/-; Jackson Masakari – Kshs. 2,870/-; Enos Wanyama – Kshs. 1,808/-.** He confirmed that in 1973 the members had made a resolution that the three members who had failed to pay in full for their shares be refunded their contributions. It was passed that the contributions of **Pius Kimungui** be refunded through the advocate while that of J. Masakari be refunded by N. Namaswa and P. Namunyu at his home. These refunds were never effected. He stated that the failure to pay in full did not affect their membership and therefore they had a right to the share of Mbai Farm in proportion to their contribution. He therefore disputed the appellants' allegations that the pioneer members had paid Kshs. 70,000/- as in and of themselves they could not raise Kshs. 48,000/=.

Muresia pegged his testimony to the Mbai Farm minute book and an extract of the minute book which were produced as exhibits 1 and 2 respectively.

With regard to the Land Control Board consents, **Muresia** testified that the consent of 1980 was not obtained fraudulently. He stated that the members had agreed that they would share out the land once the debt had been fully settled. The distribution was to be according to a member's contribution. Moreover, the 1980 application for the consents had been necessitated by the directive from the Head of State that all sleeping partners were to be included in the registration of the property. Subsequently, all the members had George Kapten, advocate apply to the Land Control Board as a result of which six other members were included in the Mbai Farm title. The six members were **Nelson Namaswa, Patrick Wamai, Paul Namunyu, Jackson Masakari and Enos Wanyama** and **Pius Kimungui.** He, however, contested the consents for sub-division obtained in 1990 as a fabrication of the appellants as there was no resolution for such an application or subdivision of the Mbai Farm. Moreover, the application form was not signed by all the members of Mbai Farm and also the hearing for the consent was not attended by all the members. He relied on the application for consent of the Land Control Board dated 16/1/1980 attached to a list of all the 12 members, Minutes at the Land Control Board and Letters of consent dated 11/4/1980 which were all produced as evidence before the court.

He confirmed that the titles of land were issued in the name of the pioneer members only and the other six members, **Paul Namunyu, Wamai, Enos Wanyama, Pius Kimungui, Jackson Masakari, Namaswa** were not included. Despite being shown receipts of refund that tally with the contributions of

the three disputed members, he denied the fact that the three received their refund of contributions towards the share of the Mbai Farm. He stated that although the others were not fully paid up members, they participated as members in meetings. He further cast doubt as to the authenticity of the appellants' exhibits that lacked his signature and those of other members.

Paul Namunyu (PW2) one of the additional members maintained that he is a fully paid up member and asserted that the members paid an equal amount for equal shares. He stated that the only thing remaining was for a survey to be conducted and the land be demarcated for the registration of his portion of Mbai Farm.

Lenah Mamai (PW3) based her testimony on the information passed on to her by her late husband. She testified that she was the holder of the Grant of letters of administration to the estate of her late husband issued to her at Kitale on 18th February, 1992, which she produced as exhibit No. 8. She claimed that her late husband was involved in the purchase of Mbai Farm and paid for shares in the suit properties of Kshs. 2, 870,020 but she did not have any receipts. She testified that her husband resided on the farm but upon his death in 1986, he was buried at a place called Chwele. She further denied knowledge of her late husband being refunded shares in 1973.

Beatrice Wanyama Watwati (PW4) and **Stephen Wekesa Watwati (PW5)** premised their locus standi in the matter and right to present the case on behalf of the deceased **Dixion Watwati** who died on 26th May 1989 on a Grant of letters of administration issued on 6thFebruary, 1991 (exhibit 9). They confirmed their knowledge of the deceased as a founder member. However, their testimonies showed that none of them were part of the deceased's life at the time of the purchase or contribution towards the suit properties. They did not have any receipts to support the contribution. However they relied on farm records to show his contributions. They confirmed that they were settled at the farm.

Diana Nasambu (PW6) and **Joash Wanyonyi Kisiangani (PW7)** the wife and son respectively of the late Nelson Wanyonyi Namaswa testified as his legal representatives. They produced a Grant issued on 16th March, 1998 and confirmed that they resided on Mbai Farm but had no records to show that the deceased was a member of the Mbai Farm. However, they both confirmed that he resided at the Mbai Farm but when he died he was buried at Namwela.

Patrick Wamai (PW8) testified that he resided on the Mbai Farm since 1974. He corroborated the fact that the membership was initially comprised of six and he was among those that were incorporated to assist the group to ease the financial burden of the purchase price. He confirmed that he paid his share of Kshs. 5,000/- in full. He paid the sum in two parts, Kshs. 3,200/- and completed the balance later in 1968, but was not issued with any receipt. He further confirmed that there was a ledger book that was used to record the payments that were made.

Methodeus Pius Wasike Kimungui (PW9) (Kimungui) testified that he only paid Kshs. 3,592.60 and did not receive any receipt for the payment. He participated in the group activities as a member from 1965 and was given the position of chairman of the group in 1968 and further as a farm manager between 1968 and 1969. This was recorded in minute No. 135 of 68. He corroborated **Muresia's** evidence on the fact that there were disagreements on the share allocation of the Mbai Farm especially to the members who had not completed their contributions. The disagreements continued till 1974 when **Mabonga** filed a suit to settle the dispute but it was dismissed for non-attendance. Further

he confirmed that another dispute arose in 1980 as a result of the Head of State's direction to register sleeping members. The arbitrator who came to resolve whether to remove the three members who had not paid in full concluded that the land should be shared out in accordance to their share contribution. He confirmed that he has not been refunded to date and claimed a share of the farm in accordance with his contribution together with others who had paid less.

On cross-examination he denied ever knowing the advocate Lindsell or ever going to his offices to receive any money. He further stated that his contribution was Ksh 3,592/- contrary to the alleged receipted refund of Kshs. 3,500/-.

Shem Mutai Muthami (PW10), an officer in charge of records at the office of the District Commissioner's office in Trans Nzoia presented to the Court the application for the consent of the Land Control Board dated 16/1/1980 in respect of Mbai Farm. The application was by the six original members seeking transfer and registration of Mbai Farm to the pioneer members and the additional six with a clear indication of each member's contribution. However, the application form had only appended on it the signatures of two pioneer members. The Board deliberated on the application on 11th April 1980 under minute 4/80 section C where all the applicants attended with their advocates. There were no objections raised and the consent was granted. On cross-examination, **Muthami (PW10)** confirmed that there was a second application before the Land Control Board on 9/3/89 requesting for the subdivision of the Mbai Farm into individual agricultural portions, school, dip and roads. The applicant was **James Wanyama Masolo (DW1)** and the registered owner was indicated as Mbai Farm with only one signature appended. This application was considered under minute C. The consent was deferred as only some of the members appeared. The members present were advised to come with all the members. The hearing before the board came up severally and was adjourned each time for failure of attendance by all the members. On 22/2/90 when the members appeared before the board they were referred to the D. O. Saboti and Chief of Kiminini for them to enlighten the Board on the contentious issue as to whether Mbai Farm had a membership of 9 or 12 members. He verified that the documents suggested that the two consents of 1980 and 1990 were given for subdivision of the property but there seemed to be some evidence of a human error involved.

Joseph Barasa Wanyama (PW11) son of late **Enos Wanyama** listed as the 7th Plaintiff testified as a representative of the estate of Enos Wanyama evinced by grant produced as exhibit 22. He confirmed that his father Enos Wanyama settled at Mbai Farm in 1968. However, he had no record or documentation to prove contribution towards ownership of the property save for the farm records.

On their part, the appellants/defendants presented a total of four witnesses. **James Wanyama Masolo (DW1) (Wanyama)** gave the same background as to the acquisition of the Mbai Farm from Mr. L. Pratt Leach and G. N. Hebert as **Muresia (PW1**). However with regard to the membership of Mbai Farm, he confirmed that the pioneer members and owners of the Mbai farm were six in number and that there have never been any additions. In support he relied on exhibits D.1, D.2 and D.3, that is, the certificates of registration of the Mbai Farm as business name, sale agreement that he and others

signed for the purchase of Mbai Farm and titles of registration of the Mbai Farm respectively, which reflect the names of the pioneer members only.

He testified that the purchase price was Kshs. 262,000/= and the deposit required was Kshs. 82,000/-. This he explained was the total of the purchase price of Kshs. 168,000/= and loose assets of 94,000/=. He stated that despite the fact that the title of registration of the Mbai Farm indicated that the original members were tenants in common with equal shares, each of the members contributed unequal amounts towards the purchase price, in accordance with their ability. He testified that the group raised Kshs. 250,748.40\= and outlined the contributions as follows:-

1. Johnstone Mabonga- Ksh.53,797.10/=

2. James Wanyama-Ksh. 70, 256.31/=

3. Alexander Ndemaki-Ksh.45,299.30/=

4. Nahashon Watulo-Ksh.43,287.99/=

5. Justus Muresia-Ksh.20,572.80/=

6. Dickson Watwati-Ksh.18,534.90/=

He explained that each member could not have contributed Kshs. 5,000/= each as the 30,000/- which would have been raised would not be adequate payment for the deposit. He further stated that they thereafter took a loan to buy the loose assets on Mbai Farm which were worth 94,000/= and not 84,000/- as stated by PW1.

He accepted that there was an inclusion of six extra members as PW1 stated. However, he stated that they were only incorporated to assist in raising the money for farm projects, specifically, wages and weeding. He denied that they made any contributions towards the Mbai Farm's purchase price. The additional six were to contribute Kshs. 10,000/- each but were unable and therefore they were directed to contribute Kshs. 5,000/= but they failed to pay it in full.

He stated that upon their failure to pay the said Kshs. 5,000/-, a resolution was passed by the members to refund each of them their contributions. He produced exhibit D13, a minute of the meeting dated 9.8.1965 which indicates that the Mbai Farm members held a general meeting signed by the 12 members where the resolutions passed were that whoever failed to complete their 5,000/= contribution would not be a shareholder of the farm and would not attend the meetings.

In contrast to **Muresia's (PW1)** and **Kimungui's (PW9)** evidence he testified that the three who had failed to pay in full, that is, **Pius Kimungui, Jackson Mamai and Enos Wanyama** were refunded and therefore they had no claim against the Mbai Farm members. To prove the refunds, he produced several receipts marked exhibit D.10; a receipt of Kshs. 2,870.20 dated 20th February 1973 in favour of Jackson Mamai and another of Kshs. 3592.50 dated 13 th February, 1973 in favour of Pius Kimungui. However there was no receipt in favour of Enos Wanyama's refund. He also relied on a letter dated 13/4/1967 written by Nahashon Namaswa and a letter dated 26/3/1971 (marked as exhibit D.11)

signed by the pioneer members addressed to the three concerning the refund of their contributions which indicated that the three were refunded Kshs. 2500/-, 1600/-, and 3200/- respectively. He explained the variance between the letter dated 26/3/1971 and the receipts through a declaration of an interest of 6% in favour of the contributions that increased the final amount refunded to each of them as indicated on the receipts produced. He further relied on a letter dated 30/10/72 which forwarded Pius Kimungui's payment through his advocate known as Lindsell.

He stated further that those who were not refunded that is, **Paul Namunyu**, **Nelson Namaswa and Paul Wamai** are still on Mbai Farm. However, he clarified that they were not on the farm as full members because they failed to meet the deadline set for the full payment of the Kshs. 5,000/=.

With regard to the consent, **Wanyama, (DW1)** contested that the consent of 1980 did not have the authority of all the pioneer members on the titles of registration. He testified that he did not fill in the application form for the consent. He only came to know of the consent application form in the suit No. HCCC 24/90 at Eldoret High Court. He indicated to the court that the 1980 consent application form was made by **Nelson Wanyonyi, Namaswa, Pius Kimungui, Dickson Watwati** and **Justus Muresia**. He contended in his testimony that the only registered members on the title that executed the form were **Justus Muresia, and Dickson Watwati**. The rest purported to be members and owners and yet they were not registered owners. He stated that he did not know of this application until 1983 at an arbitration before the District Officer, Mr. Limo.

However, he maintained that the consent issued in 1990 and the sub-division map drawn by an undisclosed person but signed by **DW1 (Wanyama)** as the owner of the farm and marked as an exhibit was valid. He also confirmed that exhibit marked D.32 demonstrated approval from the Department of Lands Nairobi vide letter dated 3rd November, 1992**.**

In disagreement with the testimony of (**PW11)** that **Wanyama's** son resided on the farm, he stated that **Enos Wanyama** had never resided on the Mbai Farm. He claimed that **Watwati** was buried at the Farm; Namaswa's family resided on Mbai Farm but Namaswa was buried at Namwela Farm, while ***Pius Kimungui*** was not recognized and was chased away from the Farm in 1969.***Nahashon Watulo Masiwa (DW2) Watulo*** one of the pioneer members reiterated the events that led to the purchase of the farm and identified the six original proprietors as indicated on the titles of registration. He corroborated the evidence of ***Wanyama (DW1)*** and confirmed that receipts were issued in acknowledgement of the members' contributions towards the purchase of the farm. He produced his receipts in evidence of the contributions that were being receipted. He denied that Masakari's family resided at Mbai Farm.

He stated that he was the first chairman of the group and the Mbai Farm and his secretary had been Alex Ndemaki. On cross examination he stated that members would hand over money and be issued with a receipt on the same day. He acknowledged that the first receipts were not printed Mbai Farm but before the ones they produced were issued, the old ones were destroyed. He denied that the receipts were a fabrication. He claimed he was entitled to 197 acres but only occupied 40 acres at the moment. On re-examination he verified that he did not fabricate the receipts and he made the payments on the

date indicated on the receipts.

Susana Namuki Mabonga (DW3) widow of the late ***Johnstone Mabonga*** produced a Grant of letters of administration issued to her on 31st August 1995 as exhibit D. 32. She narrated that she married her late husband in 1961 as the fourth wife and that she settled at Mbai Farm with him. The late husband died on 22nd September, 1994. She confirmed the deceased was a founder member of Mbai Farm. She also had knowledge that Masakari was buried at Namwela at a place called Namukholo. She produced receipts No. 225 of Kshs. 10,995.30 dated 13 th June 1964, No. 252 of Kshs. 40,990.00 dated 21st December, 1964 and No. 231 of Kshs. 1,852.40 dated 8th January, 1965 adding up to Kshs. 53,797.70. She could not explain whether the deceased and the members, ***Watulo and James Wanyama Masolo***, had connived to cheat.

Maurice Lusweti Ndemaki (DW4) gave evidence on behalf of his father, ***Alexander Ndemaki***. He produced four receipts which illustrated his share contributions which he produced as D.34 a to d namely No. 227 13th June 1964 of Kshs. 8,465.150, No. 348 dated 21st February 1964 for Kshs. 32, 011.00, No. 233 dated 8th January 1965 for Kshs. 1572.80 and No. 238 dated 4th May 1965 for Kshs. 3,250.00 adding up to Kshs. 45,299.30. He however, could not shed light on the coincidence of the similar dates on the receipts of his late father's counterparts.

After hearing the parties, and considering the evidence placed before it, the trial Court allowed the prayers on the amended plaint on grounds that the contributions of the incoming members had gone towards purchasing an interest in the suit property. The Court stated that:-

"…the finding of this Court that even if the incoming members raised money to pay inputs and diesel for the farm machinery no agreement was exhibited by the pioneers to show that the incomers were informed that their contributions were not going to buy them an interest in land…"

The High Court also held that all the 12 disputants were tenants in common of Mbai Farm in equal shares for those who had fully paid up their shareholding of Kshs. 5,000/-. Those who had paid less were entitled to shares equal to their contribution. The High Court further held that the dismissal of HCCC No. 52 of 1974 did not bar the Court from revisiting the issues raised in the plaint and adjudicating upon them with finality as the matters therein had not been adjudicated on and the defendants had not raised the plea of *res judicata* in their defence. Finally, the Court declared the consents obtained in April 1980 and 1990 null and void and proceeded to determine share allocation of the members and ordered for survey and subdivision in accordance with the allocations.

THE APPEAL

Dissatisfied with the decision of the learned Judge the appellants filed this appeal vide the Memorandum of Appeal dated 23rd June, 2006 which raises the following substantive grounds of law and fact:-

"1. That the learned trial judge erred in Law not to have dismissed the original 4th and 8th Plaintiffs' suit the same having been filed by persons who had no letters of administration for estates of deceased persons.

2. That the learned trial judge had no valid reasoning to have heavily relied on the evidence of PW-1 while disregarding the evidence of DW-

1.

3. That the learned Judge erred in law and fact not to have sufficiently assessed and/or analysed the evidence on record.

4. That the learned Judge had no valid reasoning to have heavily relied on the evidence of PW1 while disregarding the evidence of DW1.

5. That the learned trial Judge erred in law and fact to have found that all the disputants were tenants in common in Mbai Farm in equal shares.

6. That the learned trial judge erred in law and in fact to have found and held that the Deceased partners' shares were debts recoverable from the registered proprietors in the manner ordered in her judgment.

7. That the learned judge erred in law and in fact to have disregarded the fact that the 4th and 5th defendants had admitted by the plaint to have withdrawn Kshs. 500 leaving their share at Kshs. 4,500/-.

8. That the learned trial judge erred in law and in fact to have found that Pius Kimungui, Jackson Masakari and Enos Wanyama had not been refunded their monies.

9. That the learned trial judge erred in law and in fact to have held that the claims of the 7th, 8th, 9th and 10th plaintiffs were not time barred.

10. That the learned trial judge erred in law and in fact to have made orders not based on the pleadings and prayers in the plaint.

11. That the judgment was pronounced after the mandatory 42 days period.

12. That the judgment was written by a judge who had been suspended from the bench.

13. That the judgment was not signed by the judge who wrote the same.

14. That the judgment was read while the original 1st, 2nd and 3rd Defendants were dead and substitution thereof had not been done by the said Defendants' personal representatives."

At the hearing of this appeal Mr Wekesa wanyama, one of the appellants prosecuted the appeal on his own behalf and that of the co-appellants. He informed the Court that he was abandoning all the above grounds save for grounds 3, 4, and 14. He submitted that the main issue before the court is the determination of ownership of land. He argued that the claim by the respondentswas not supported by any documents on record. He also contended that the 1 st Plaintiff lacked *locus standi* to move the court

for the orders because he was not one of the registered members of the partnership registered in the name of Mbai Farm as shown by certificate on the record at pg. 206. He faulted the learned trial Judge for allowing other members who had not paid their contributions to benefit from the land. He contended that the learned Judge relied on a doubtful note book yet, the money that was taken as loan was not counted as any shares. He stated that the money awarded as loan should have been calculated as part of their contributions to shares. Moreover, in his view the calculations of the Judge do not agree with the documents on record. He therefore prayed that the appeal be allowed.

In opposing the appeal, Mr Simiyu learned counsel for the respondents, urged that the judgment of the High Court should be affirmed. He argued that the case was correctly determined with the reliance of evidence from two witnesses that Judge identified to guide her in the proceedings. He pointed out to the Court that this matter is an old one where properties were purchased in 1965 and had generated many suits some of which are yet to be concluded. He also informed the Court that only one of the original defendants is still alive and is very sickly, and hence the need to bring this matter to a conclusion.

He demonstrated that the Judge reasonably determined the dispute having believed PW1 more than DW1 and she gave her reasons for it. Given that the learned Judge had the chance to see the witnesses and assess their demeanor, she arrived at the right decision and assessed the evidence properly. He stated that he was in agreement with the learned Judge's finding that those who left had not been refunded their money despite the appellants' argument that those who failed to raise the Kshs. 5,000/= were refunded their money. He also confirmed to this Court that the transfers have not yet been done but the Surveyor has seen the land.

Mr. Wekesa in reply contended that the amounts were refunded. However, the Judge dismissed the receipts stating that there was no evidence that the money was ever received.

EVALUATION BY THE COURT

As can be deciphered from the above analysis and the three grounds of appeal taken up by the appellants at the hearing, this appeal largely revolves around issues of fact as opposed to points of Law.

Black's Law Dictionary defines the two terms as follows;

"Matter of fact: A matter involving a judicial inquiry into the truth of alleged facts."

In distinguishing a matter of fact from that of law Denning J. drew a boundary as to when a judge sitting on appeal can interfere with a finding of fact.

In the English case of **Bracegirdle v. Oxley (2) [1947] 1 ALL E.R. 126 at p 130** the court held that;

"The question whether a determination by a tribunal is a determination in point of fact or in

point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts was not one that could reasonably be drawn from them."

Adopting the above reasoning this Court in **William Muthee Muthami v Bank of Baroda** (Civil Appeal No. 21 of 2006) [2014] eKLR pronounced itself as hereunder:-

"As to findings made on matters of fact, this Court will only interfere where the finding is based on no evidence, or on a misapprehension of the evidence or where the learned Judge is demonstrably shown to have acted on wrong principles in reaching the finding"– See **Mwanasokoni V. Kenya Bus Services Ltd,** [1985] KLR 931.

The question we must therefore ask ourselves in this appeal is whether the learned Judge fell into error by relying on the testimony of the witnesses who appeared before her. The learned Judge is faulted for giving more credence to the evidence of PW1 as opposed to DW1. Conversely, one would ask, why believe DW1 and not PW1" We are reminded by the *locus classica* case of **Selle VS Associated Motor Boat Company (supra)** and many other decisions of this Court that the trial Judge has the best opportunity to assess the truthfulness and veracity of the evidence presented before the court as opposed to the appellate Court which has no opportunity to see and hear the witnesses as they testify. The trial Judge was in better stead to assess the demeanour of the witnesses as they testified in chief and also as they answered questions on cross examination. It was from the learned Judge's encounter with these two witnesses that she decided which one to believe and which of them was less reliable. She did not make that decision on a whim. She gave her reasons for doing so in her judgment as can be seen from the following observation.

"PW1 was fairly honest save for the evidence leading to issuance of the consent of 1980 which has been faulted. As for DW1 the court agrees with the submissions of the Plaintiff's counsel that his evidence is unreliable."

The learned Judge enumerated several reasons on the record for finding the testimony of **Muresia (PW1)** more credible than that of **Wanyama (DW1)**. The learned Judge found **DW1** to be outrightly dishonest in most of his testimony. Among other reasons, she found it impossible to believe that the members could raise the amounts as alleged by **DW1** as that would defeat the need or logic to obtain the loan from the banks. Moreover, **Wanyama (DW1)** agreed with portions of minutes and the extract of the minutes except that of the contributions by the parties, yet his signature was appended on them. It was difficult to believe him where on one hand he calls the minutes a fabrication as the former records were left in the farm house and destroyed and yet, he agreed with majority of the excerpts in the minutes

before the court.

With regard to the credibility of a witness, we call in aid this Court's decision in **Kenya Commercial Bank Ltd v Stephen Mukiri Ndegwa & another** (Civil Appeal 132 of 2008) [2014] eKLR where the Court stated;

***"Where the trial court's findings depend on credibility of the witnesses, the court will also have gauged this through cross examination and observations on the demeanor of the witnesses. The findings of the court based on credibility of witnesses will thus command considerable deference and this Court will generally be slow to interfere. See* Tayabu v. Kinanu [1983] KLR"**

The Supreme Court of Kenya in **its recent decision in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others , Supreme Court Petition No. 2B of 2014** quoting in extenso from **the Judgment of the Supreme Court of the Philippines, in the cases of Republic v. Malabanan, G.R. No. 169067, October 632 SCRA 338, 345 and New Rural Bank of Guimba v. Fermina S Abad and Rafael Susan; G.R No. 161818 (2008),** cited with approval the following pronouncement**.**

'We reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of the witness, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and to the probability of the situation. This Court cannot adjudicate which party told the truth… by reviewing and revising the evidence adduced at the trial court. Neither verbal sophistry, nor artful misinterpretations of supposed facts can compel this Court to re-examine findings of fact which were made by the trial court….absent any showing that there are significant issues involving questions of law.'

And also:

"We cannot overemphasize the commonplace that the trial Court is alone the custodian of true knowledge of witnesses and their quirks, and can pronounce on issues of credibility. Short of an appraisal of witness account appearing as absurd, or decidedly irrational, it behoves the Court sitting on appeal to respect the trial Judge's appraisal of primary fact."We are in total agreement with the above pronouncements **of the Supreme Court on this well- trodden area of the law.**

Consequently, the trial court having given sufficient reasons for finding ***PW1's*** testimony more

credible than ***DW1's,*** this Court must exercise circumspection in departing from these findings of fact. As stated in **Watt vs. Thomas** (1947) 1 ALL ER 582 House of Lords (Sir O'Connor)

"It is a strong thing for an appellate court to differ from the finding, on a question of fact of the judge who tried the case……..and who has had an advantage of seeing and hearing the witnesses. An appellate court has indeed jurisdiction to review evidence in order to determine whether the conclusion reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

The Court of Appeal has applied this principle of exercising caution in the case of **Peters –vs- Sunday Post Ltd**. [1958] EA 424, where the Court stated that:-

"while an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of the circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to so decide."

That was also the principle advanced by this Court in the case of **Astariko E.A. Abule –vs- Elijas M. Ambaisi - Court of Appeal Civil Appeal No.228 of 1998**. It is never enough that the appellate court might have come to a different conclusion. See also **Geoffrey Kihunyu Wanjura –vs- Gichiru Kiguta & another – Court of Appeal Civil Appeal No.67 of 1997**.

After a careful perusal of the evidence, the findings of the learned trial judge that the evidence of DW1 was not credible are reasonable and cannot be said to be outrightly wrong. We find no misdirection on the part of the learned judge in this aspect. We find no basis whatsoever for interfering with the learned Judge's findings of fact. We find ground 4 devoid of merit and the same must therefore fall by the wayside.

We now come to ground No.3 which is quite broad. The same cudgels the judgment of theHigh Court on the ground that the learned Judge failed to "sufficiently assess and/or analyse the evidence on record".

As stated earlier on in this judgment, this court as a first appellate Court is charged with the responsibility to revisit and re-analyse afresh the evidence adduced before the trial court and to make its own independent findings and determination. We have already rehashed the evidence of the trial court but we shall revisit it shortly. We have also no basis for interfering with the learned Judge's findings of fact unless, of course, her conclusion after considering the said factual evidence and inferences was clearly wrong. It is with that in mind that we now proceed to reconsider the said evidence and make our own conclusion as to whether the learned Judge arrived at the right decision.

As stated earlier on, this dispute is all about the members' contributions and their commensurate shares in the suit property. What were the amounts paid by each member; whether at some point some members were refunded their contributions and were not therefore entitled to any land; and ultimately whether the burden of proof was discharged to the required standard"

From the sum total of the evidence adduced before the High Court, it is not disputed that all the members were supposed to contribute Ksh 5,000/= each for the deposit of the purchase price. The record of those who paid that sum is not disputed. There was also evidence to the effect that some three members took back their deposits. It is not in dispute either that some three named members did not top up their amounts to the agreed figure of Ksh 5,000/= According to the appellants, these people were refunded their contributions. After considering the evidence of the minute books and minutes of several meetings that were produced in evidence, the trial Court was satisfied that there was paucity of evidence to prove that the said contributions were refunded.

Although the appellants dismissed the minute book (**exhibit 1)** as a fabrication and said that the correct minute book was left in a dilapidated house where it was rained on and then destroyed, we find that **DW1's** testimony confirms the accuracy of part of these minutes and therefore that holds water. In evaluating the entries, we note that minute 48/69 of the meeting held on 16/5/1969 attended by all the original members and the additional members enumerated all the contributions of the members. It confirms that all the members contributed Kshs. 5,000/= equally except **Pius Kimungui** who contributed Kshs. 3,592.60, **J. Masakari** – Kshs. 2,870.20 and **E. Wanyama** Kshs. 1,808.00. This part contribution is also acknowledged in minute 60/69 of the meeting held on 15.10.69.

In minute 22/72 of the meeting held 17.6. 72 it was reported by the Chairman that he had taken the money equivalent to the share contributions of those who had not completed payment to the advocate to have the same refunded. However, Enos Wanyama declined to receive his refund. Evidence produced for the refund of these amounts is questionable as correctly evaluated by the learned Judge; the letter from the advocate with regard to the refund is based on condition of acknowledgement of receipt. There was no proof of acknowledgment of receipt of any refunds by the three. In addition, the receipts produced were questionable and could not be verified as authentic.

The Trans Nzoia proceedings before the Panel of Elders under the Chairmanship of S.K.K. Limo, District Commissioner in Civil case No. 52/73 produced as exhibit 5, also corroborates the testimony of **Justus Muresia, Nelson Namaswa, Dickson Watwati, Johnstone Mabonga, Patrick Wamai, James Wanyama, Pius Kimungui** confirming that each member's contribution was Kshs. 5,000/= and that no receipts were issued. The so called receipts by the appellants showing payments of larger amounts than the Ksh.5,000/= were repeatedly said to be fabricated as the majority of the original members did not recognize them. In addition it was common ground that the farm records were being recorded in a book and therefore the receipts were a conspiracy by Ndemaki. The court dismissed the said receipts for lack of authenticity. Both parties also confirmed that they appeared before the District Commissioner on several occasions where it was decided that the land would be shared in accordance with each member's contribution.

We note that the learned Judge perused and elaborately analyzed the evidence produced and made findings on admissible evidence. The admission of evidence and the assessment of the documents produced indicates that the Court arrived at the correct conclusion that there were 12 members; each member was required to pay Kshs. 5,000/=; and that the three members who had not paid in full were not refunded their contributions and therefore are still entitled members. We also agree with the learned Judge that the consents to sub-divide and transfer the land were null and void ab initio. We say so because, as rightly noted by the learned Judge, the applications to the Land control Board were either made by people without the requisite authority to do so, or were based on misinformation as to

who the registered owner of the land was.

Did the respondents prove their case to the required standard"

The standard of proof in this case is on a balance of probability. In weighing whether the burden on the balance of probabilities has been discharged the House of Lords in **Miller vs. Minister of Pensions** (1947) 2 ALL ER 372 (Lord Denning J stated:-

"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of doubt. This means the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say "we think more probable than not", the burden is discharged but the probabilities are equal then it is not."

In discharging the burden of proof on a balance of probabilities this Court in the case of ***Wareham t/a A.F. Wareham & 2 others -Vs- Kenya Post Office Savings Bank (2004) 2 KLR*** pronounced itself as follows:-

"The burden of proof is on the plaintiff and the degree of proof is on a balance of probabilities. In discharging the burden of proof, the only evidence to be adduced is evidence of the existence or non-existence of the facts in issue or facts relevant to the issue. It follows that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

Guided by the principles articulated above, and after re-analysing the evidence adduced before the trial Court in its entirety, and bearing in mind that we did not have the advantage of seeing the witnesses as they testified, and therefore had no opportunity to assess their demeanor, we are satisfied that the learned Judge arrived at the right conclusion. We find no grounds to justify interference with the said findings.

On the appellants' submission that the learned Judge should have converted the money they had been granted as a loan into shares in their favour, we do not find any logic in that submission. If the appellants applied for the loan, they did so not in their private capacities but on behalf of Mbai Farm. The loan was therefore advanced to Mbai Farm and not to the individuals. From the evidence on record, the loan was repaid using the proceeds from the Farm and not from the appellants' pockets. On what basis then would the said loan be converted into shares to the advantage of the appellants to the exclusion of the other members" We find not. The learned Judge did not fall into error or misdirection in failing to convert the said loan into shares as proposed by the appellants.

On account of the foregoing evaluation of the evidence, we are satisfied that the respondents discharged their burden of proof and showed on a balance of probabilities that the agreed full member's contribution was Ksh.5,000/- and each contribution afforded a member an equitable proportion of share allocation of the Mbai Farm. That brings us to the last ground of appeal urged before us i.e ground 14. According to the appellants, the judgment was delivered while the 1st, 2nd and 3rd defendants were dead and no substitution had been done. If that was so, would that invalidate the judgment so delivered"

First and foremost, Order XXIII rule 1 of the retired Civil Procedure Rules provided that;

"The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues."

This therefore means that the suit was still subsisting as at the time the judgment was delivered notwithstanding the fact that some of the defendants had died and had not been substituted. Order XXIII rule 2 on the other hand allows the court to make an entry on the record where some parties die but still proceed with the suit at the instance of the surviving plaintiff or defendant. It is not clear from the record whether the court made such an entry in the record, but even if that was not done, that did not render the judgment invalid, more so because there was a surviving defendant who was fully represented by counsel when the judgment was delivered. It is just a procedural technicality which would not in any way affect the substance of the judgment. That ground must also fail.

In conclusion, after careful consideration of the entire evidence, grounds of appeal, and the oral submissions of the appellant and learned counsel for the respondents, we are satisfied that the learned Judge did not fall into any error of law or fact in her judgment to call for our intervention. We find this appeal devoid of merit and dismiss the same with costs to the respondents.

Dated and delivered at Nairobi this 3rd day of October, 2014.

W. KARANJA

……

JUDGE OF APPEAL

G. B. M. KARIUKI

……

JUDGE OF APPEAL

P. M. MWILU

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR