Jillo & 2 others v Duba (Environment and Land Appeal E010 of 2024) [2025] KEELC 5172 (KLR) (7 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5172 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E010 OF 2024

JO MBOYA, J

JULY 7, 2025

BETWEEN

IYAA JILLO ..... 1ST APPELLANT

HASSAN ALI ..... 2ND APPELLANT

ISSACK JIRMO ..... 3RD APPELLANT

AND

HABIBA DIMA DUBA ..... RESPONDENT

JUDGMENT

1. The Respondent herein [who was the Plaintiff in the Subordinate Court] filed the suit [the original suit] vide Plaint dated 18th November 2019. The Plaint under reference was subsequently amended, resting with the amended Plaint dated 5th June 2020 and wherein the Respondent sought the following reliefs;

    a. Declaratory orders that the Plaintiff is the sole, legitimate owner in possession of the seven acres or so of land claimed by the defendants, which are comprised in land parcel numbers B6 and B6A Kisima Area, otherwise referred to as Kambi Garba/Chechelezi.

    b. A permanent injunction restraining the defendants, their respective servants, agents, workers or members of their respective families from entering, working on, or in any other way from interfering with the said Plaintiff's property.

    c. Other, further, or alternative reliefs as may be expedient.

    d. Cost of the suit.

2. The Appellants herein [who were the Defendants in the Subordinate Court] duly entered appearance and thereafter filed a Statement of Defence dated 14th November 2019. Instructively, the Appellants denied the claims by and on behalf of the Respondent.

3. The suit before the subordinate court was heard and disposed of vide judgement delivered on 30th April 2024 whereupon the learned trial court found and held that the Respondent had duly proved her case to the requisite standard. To this end, the learned trial court proceeded to and allowed the respondent's suit in terms of prayers [a, b, and d] at the foot of the amended Plaint dated 5th June 2020.

4. It is the said judgment that has aggrieved the Appellants herein, culminating into the filing of the instant appeal and wherein the Appellants have raised the following grounds;

    i. That the learned Magistrate erred in law and in fact by failing to find that the Respondent alleged parcels of land were currently subject of an ongoing land adjudication process as such the court had no jurisdiction to hear and determine the suit.

    ii. That the learned Magistrate erred in law and in facts by failing to consider the fact that the suit property i.e. Land Parcel Agricultural Land Parcels Nos B6N and B6A situated within Meru North Kisima were currently a subject of land demarcation and adjudication process.

    iii. That the learned Magistrate erred in law and in facts by failing to put into consideration the findings of the Isiolo County Physical Planner's Scene Visit report dated 14th March 2022.

    iv. That the learned trial magistrate erred in law and in facts by failing to consider the fact that in the year 1991 the Respondent got the land when she was still a minor aged 15 years since she was born in 1976 and did not have capacity to transact on her own behalf.

    v. That the learned trial Magistrate erred in law and in facts by failing to find that the alleged subject suit land ownership documents produced by the Respondent did not adhere to the process of Land Allocation as such the said documents could no confer land ownership rights to the Respondent.

    vi. That the learned trial Magistrate erred in law and in fact in failing to consider the land ownership documents produced by the Appellants.

5. The subject appeal came up for directions on 5th March 2025, whereupon advocates for the appellants confirmed that same had filed and served the record of appeal. Furthermore, the Appellants confirmed that the record of appeal was complete and thus the appeal was ready for hearing.

6. Learned counsel for the Respondent intimated to the court that the Appellants had not filed certain important documents including a certified copy of the decree; a copy of the notice of preliminary which had hitherto been filed in the subordinate court; and a copy of the ruling relative to the Notice of Preliminary Objection. In this regard, learned counsel for the respondent posited that the said documents are critical and essential to the determination of the subject appeal.

7. Arising from the foregoing, the court proceeded to and directed learned counsel for the Appellant to file a supplementary record of appeal. For good measure, the Appellants duly complied and thereafter the appeal was set down for hearing. Furthermore, the parties agreed to canvass and dispose of the appeal by way of written submissions.

8. The Appellants filed written submissions dated 18th March 2025 and wherein the Appellants have raised and canvassed two [2] salient issues, namely; the subordinate court was divested of the requisite jurisdiction to entertain and adjudicate upon the suit; the learned trial magistrate failed to properly

evaluate the totality of the evidence tendered by the appellants and thus arrived at an erroneous conclusion.

9. Regarding the first issue, learned counsel for the Appellants has submitted that during the course of hearing it transpired that the suit plots [plots that were being tussled on] fall within Ngare Mara/ Gambera Adjudication Section and thus the dispute ought not to have been entertained and/or adjudicated upon by the court. Moreover, learned counsel for the Appellants has submitted that the Appellants tendered and produced exhibits D8 and D9, which confirmed that the suit plots fell within an adjudication section.

10. On the other hand, learned counsel for the Appellants also submitted that the Respondent also tendered and produced before the court Exhibit P12 which reiterated and fortified the position that the suit plots fell within an adjudication area. To this end, learned counsel for the Appellants has submitted that the court was divested of the requisite jurisdiction to entertain and adjudicate upon the suit.

11. To this end, learned counsel for the Appellants has cited and referenced the provisions of section 30 of the *Land Adjudication Act*, Chapter 284 Laws of Kenya.

12. Additionally, learned counsel for the Appellants has also referenced the decision in the case of Stanley Gitonga v Gerald Mwithia [2013] KECA 429 (KLR); and Bhaijee & another v Nondi & another (Civil Appeal 139 of 2019) [2022] KECA 119 (KLR) (18 February 2022) (Judgment), wherein the Court of Appeal underscored that a suit filed in contravention of the provisions of Section 30 of the *Land Adjudication Act* is premature and misconceived.

13. In respect of the second issue, learned counsel for the Appellants has submitted that the learned trial magistrate erred in law and in fact in finding and holding that the respondent herein had duly proved her case to the requisite standard. In any event, learned counsel for the Appellants has submitted that the findings by the learned trial magistrate did not consider the material contradiction[s] and discrepancies that bedevilled the respondent's case.

14. Moreover, learned counsel for the Appellants has submitted that the learned trial magistrate failed to consider the report that had been filed by the County Physical Planner dated 14th March 2023 and the Report by the District Surveyor dated 22nd December 2023 and as a result of such failure, the learned trial magistrate reached and arrived at an erroneous conclusion. In this regard, it has been submitted that the findings of the learned trial magistrate do not accord with and or correspond to the evidence on record.

15. Finally, learned counsel for the Appellants has submitted that the learned trial magistrate erred in finding and holding that the Respondent herein had been duly allocated the suit plot by the County Council of Isiolo [now defunct], yet the Respondent herein was barely aged 15 years at the time of the purported allotment. In particular, it has been submitted that no allotment of land could have been issued to a minor [a person who had not attained the age of majority].

16. Flowing from the foregoing submission, learned counsel for the Appellants has implored the court to find and hold that the appeal beforehand is meritorious and thus same ought to be allowed. In this regard, the court has been invited to allow the appeal and to set aside the judgment and consequential decree of the subordinate court.

17. The Respondent filed written submissions dated 27th May 2025 and wherein the Respondent has raised and highlighted two [2] key issues for consideration and determination by the court. The issues raised by the Respondent are namely, the question of jurisdiction being raised by the Appellants herein

was neither raised nor canvased before the trial court; and that the learned trial magistrate correctly appraised the totality of the evidence on record and thus arrived at the correct conclusion.

18. Regarding the first issue, learned counsel for the Respondent has submitted that the issue pertaining to adjudication only arose during the hearing when the Respondent sought and obtained leave to file a supplementary list and bundle of documents. Instructively, it has been submitted that it is the further list and bundle of documents that brought evidence that the suit plots fell within an adjudication section. To this end, learned counsel for the Respondent has referenced the supplementary list and bundle of documents dated 21st Sep 2023 at Page 96 of the Record of Appeal.

19. Learned counsel for the Respondent has further submitted that in so far as the issue of adjudication was neither raised nor canvassed before the trial court, same cannot now be raised at this juncture. In any event, it has been posited that the raising of the issue of adjudication at this point in time is a calculated attempt to deprive the respondent of her land.

20. As pertains to the second issue, learned counsel for the Respondent has submitted that the learned trial magistrate correctly appraised and evaluated the evidence on record and thereafter came to the correct conclusion as pertains to ownership of the suit plots. Furthermore, it was posited that the Respondent indeed placed before the trial court plausible, cogent, and credible documentary exhibits underpinning the acquisition of the suit property.

21. It was the further submissions by the learned counsel for the Respondent that the reports that were tendered by both the County Physical Planner and the District Surveyor, respectively also confirmed that the Respondent was the true and legitimate owner of the suit property. On the contrary, it was posited that the reports under reference indicated that the Appellants' plots fell on a different area and thus the Appellants' claim to and in respect of the suit plots was legally untenable.

22. Finally, learned counsel for the Respondent has submitted that even though the allotment of the suit plot to the Respondent appears to have been made when the respondent was a minor, however it was posited that the letter of allotment and part development plan were issued/generated when the Respondent had accrued the majority age. To this age, learned counsel submitted that the issuance of a letter of allotment and part development plan upon attainment of the age of majority validated the allocation in Favor of the Respondent.

23. To buttress the foregoing submissions, learned counsel for the Respondent has cited and referenced the decision of Lady Justice K. Bor, Judge in the case of Galehu v Komba (Environment and Land Appeal E003 of 2021) [2023] KEELC 16506 (KLR) (28 February 2023) (Judgment), wherein the learned judge is reported to have held that in so far as the issue of age was only being taken up during the appeal, same therefore was not an issue that fell for determination by the trial court.

24. Suffice it to underscore that learned counsel for the Respondent invited the court to adopt and deploy the reason in respect of the decision in Galehu [supra].

25. In a nutshell, learned counsel for the Respondent has invited the court to find and hold that the appeal beforehand is devoid of merit[s] and thus same ought to be dismissed with costs to the respondent.

26. Having reviewed the Record of Appeal; having appraised the evidence tendered [both oral and documentary] and upon consideration of the written submissions on record, I come to the conclusion that the determination of the subject appeal turns on one solitary issue, namely; whether the trial court was seized of the requisite jurisdiction to entertain and adjudicate upon the dispute beforehand; and if not, whether the proceedings undertaken by the court and the consequential decree are a nullity ab initio.

27. Before venturing forward to analyse the issue[s] that have been highlighted, it is imperative to observe that the Appeal beforehand is a first appeal from the decision of the court of first instance, namely, the Subordinate Court. By virtue of being a first appeal, this honourable court is vested with the requisite jurisdiction to review, re-evaluate and re-analyse the findings of the court of first instance and thereafter to arrive at independent conclusions, considering the pleadings filed, evidence on record and the applicable laws. [See the provisions of Section 78 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya].

28. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to review, re-evaluate and re-analyse the findings and observations of the trial court, this court is, however, called upon to exercise necessary caution and circumspection. In addition, the court is called upon to defer to the findings of the trial court unless the findings of the trial court are informed by extraneous factors or, better still, are perverse to the evidence on record.

29. The scope and jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, the Court of Appeal for Eastern Africa elaborated on the applicable principle and stated thus;

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...".

30. Likewise, the extent and scope of the Jurisdictional remit of the first appellate court was also elaborated upon in the case of Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where the Court of Appeal held thus;

> " We also wish to be guided by the reasoning of this court in the case of Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934 thus: -
>
> "Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the house of Lords in Sottos Shipping versus Sauviet Sohold, the Times, March 16,1983.
>
> "It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said".
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> Again, in Peters versus Sunday Post Limited (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, P said at page 429:
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> "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 the advantage of seeing and hearing and the witnesses."

31. Without endeavouring to exhaust the case law that elaborate on the scope and extent of jurisdiction of the first appellate court, it is apposite to take cognizance of the holding of the Court of Appeal in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, where the Court held as hereunder;

> " As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters vs- Sunday Post Ltd [1958] EA 424. In its own words: -
>
> "Whilst 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 circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ..."

32. Duly guided by the established position [ratio] which underlines the scope and extent of the jurisdiction of the 1st appellate court, I am now disposed to revert to the subject matter and to discern whether the learned trial magistrate correctly appraised, analyzed and evaluated the evidence tendered by the parties and in particular, to interrogate whether the trial court was seized of the requisite jurisdiction to entertain and adjudicate upon the subject dispute.

33. Regarding the singular issue beforehand, it is imperative to recall and reiterate that a court of law can only entertain and adjudicate upon a matter where same is seized of the requisite jurisdiction. On the contrary, where a court of law is divested of jurisdiction, then it behoves the court to down its tools at the very earliest.

34. Moreover, it is also important to underscore that the question of jurisdiction can be discerned from the pleadings filed by the parties or better still, same can arise from the totality of the evidence tendered. Either way, it is the duty of the court to appraise itself of the law and to continuously discern the jurisdictional question. I repeat that it is the duty of the court to interrogate the question of jurisdiction.

35. Furthermore, it is not lost on me that the question of jurisdiction can even be taken and raised by the court itself. However, there is no gainsaying that when the question of jurisdiction is raised by the court, then it behoves the court to afford the parties an opportunity to speak to the jurisdictional question [See the holding of the Court of Appeal in the case of Kenya Ports Authority vs Modern Holding [EA] Limited 2018 eKLR].

36. In respect of the instant matter, it is important to highlight that during the trial the Respondent herein sought and obtained leave of the court to file a further list and bundle of documents. To this end, the Respondent thereafter filed two sets of further documents, namely, the further list and bundle of documents dated 14th July 2023; and the Supplementary list and bundle of documents dated 21st Sep 2023, respectively. [See pages 90 to 115 of the Record of Appeal].

37. On the other hand, the Appellants herein also filed a supplementary list and bundle of documents dated 17th July 2023 and wherein the Appellants introduced documents confirming that the disputed plots fell within Ngare Mara/GAMBERA ADJUDICATION SECTION. In any event, there is a letter authored by the Land Adjudication and Settlement Officer confirming that the subject adjudication section was at the demarcation and survey stage. For good measure, it is evident that the adjudication section had not reached the stage of completion in terms of Section 29(3) of the *Land Adjudication Act* [See pages 137-139 of the ROA].

38. Other than the documentation that was tendered and placed before the court, it is also worth recalling that the Respondent herein testified before the court and while under cross-examination by the learned counsel for the appellants, same [Respondent] stated thus;

> "The land is under adjudication. [PExh 12 Refereed to]. It confirms that the land was under adjudication. I have followed up the process with the department of lands. I have followed up with the adjudication process. I have gone to the chief, the lands office and the DCI.".

39. While under re-examination, the respondent is on record stating thus;

> " The confirmation letters [PExh 12-17] refer to my children. I subdivided the land through the adjudication. The 1st Defendant does not own any part of that land."

40. Other than the Respondent who adverted to the land falling within an adjudication section, the 1st Appellant herein also tendered documents at the foot of the supplementary list and bundle of documents dated 17th July 2023. Same were produced as exhibits D8-D11, respectively.

41. The documents which were tendered and produced by the appellants at the foot of the supplementary list and bundle of documents confirm that the disputed area was under adjudication.

42. Having reviewed the evidence that was taken and produced before the trial court, one key issue that comes to the fore is that the plots in dispute were under adjudication as at 16th July 2019. [See the contents of the letters at Pages 97, 101, 104, 107, and 110 of the Record of Appeal].

43. The question that does arise is whether a suit touching on and concerning interest in land that falls within an adjudication section could be filed as at the 1st November 2019, when no consent of the Land Adjudication and Settlement Officer had been obtained?

44. The answer to the foregoing question is obtainable in section 30 of the *Land Adjudication Act*, Chapter 284, Laws of Kenya. The section which is couched in peremptory terms states thus;

> " 30. Staying of land suits
>
> 1. Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act.
>
> 2. Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.
>
> 3. Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final.
>
> 4. The foregoing provisions of this section do not prevent a final order or decision of a court made or given in proceedings concerning land in an adjudication section being enforced or

executed, if at the time this Act is applied to the land the order or decision is not the subject of an appeal and the time for appeal has expired.

5. A certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is such land.

6. Every certificate purporting to be signed by an adjudication officer shall be presumed to be so signed unless the contrary is shown."

45. My understanding of provisions of Section 30(1) of the *Land Adjudication Act* [supra] drives me to the conclusion that where the disputed land falls within an adjudication section, no court is seized of jurisdiction to entertain and/or adjudicate upon a suit touching on such land. However, the provisions of the said section create two exceptions, namely, where the adjudication process has been completed and a certificate of finality in terms of Section 29(3) of the act has been issued; or where the land adjudication and settlement officer has issued a consent.

46. Other than the two exceptions which have been adverted to in the preceding paragraph, it is common ground that a court of law is divested of jurisdiction by dint of Section 30(1) of the *Land Adjudication Act* [supra].

47. In the case of Benjamin Okwaro Estika v Christopher Antony Ouko & another [2013] eKLR, the Court of Appeal stated thus;

> " That being so, the mandatory requirements of Section 30 (1) had to be complied with i.e. consent of the Land Adjudication Officer had to be obtained before filing a case in respect of a dispute on land in that adjudication section or before the court could be clothed with jurisdiction to hear it."

48. Most recently, the Court of Appeal re-visited the import and tenor of Section 30(1) in the case of Bhaijee & another v Nondi & another (Civil Appeal 139 of 2019) [2022] KECA 119 (KLR) (18 February 2022) (Judgment), where the court stated thus;

> " 13. The section therefore requires consent to be given before institution of civil proceedings concerning an interest in land in an adjudication section. The said consent is a condition precedent to a valid suit concerning disputes of land in an adjudication section and specifically requires the suits to be discontinued if started without consent. The section therefore clearly affects the power and jurisdiction of courts to hear and determine such disputes. The rationale for the said provisions is that there is an elaborate process that is laid down by the *Land Adjudication Act*, on how to determine which persons are, and the extent to which, they are entitled to interests in the land under adjudication, and it is therefore necessary that it is first employed before resort is made to the Courts, and also shielded from unnecessary and unjustified abuses. Indeed, it has been severally held by this Court that where a dispute resolution mechanism exists outside courts, the same has to be exhausted before the jurisdiction of the courts is invoked."

49. In the absence of the consent from the land adjudication and settlement officer, in accordance with the prescription of section 30 of the *Land Adjudication Act* [Supra] it then means that the suit that was filed before the subordinate court was premature, incompetent and thus legally untenable. To my mind, the suit was dead before it was filed in court.

50. It is common knowledge that jurisdiction is everything and without it, a court of law cannot entertain any proceedings and or make any orders thereunder. Nevertheless, where a court entertains proceedings and issues orders albeit without jurisdiction, such proceedings and consequential orders are a nullity ab initio.

51. The foregoing position was elucidated by the Court of Appeal in the case of Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service (Civil Appeal 244 of 2010) [2019] KECA 767 (KLR) (Civ) (10 May 2019) (Judgment) where the court stated thus:

> " 1. At the heart of this appeal is the issue of jurisdiction. It is a truism that jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
>
> 2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae."

52. Before concluding on this issue, there is one aspect that merits mention and a short discussion. The issue touches on the submission by learned counsel for the Respondent that the question of adjudication was never canvassed before the trial court and that same is now being raised belatedly in an endeavour to deprive the respondent of her land.

53. I beg to disabuse learned counsel for the Respondent of this misconception. It is evident that the issue that the disputed plot fell within an adjudication section was indeed brought before the trial court by both the Appellants and the Respondent [See pages 90-115; and pages 137-139 of the Record of Appeal]. [See also paragraph 12 of the Judgement of the Trial Court].

54. To my mind, the issue of the suit plot falling within and forming part of an adjudication section was live before the trial court and thus the trial court was obligated to address same. [See Odd Jobs vs. Mubia (1974) EA 476; Nairobi City Council V Thabiti Enterprises Limited [1997] eKLR, and Galaxy Paints Company Ltd V Falcon Guards Ltd [2000] eKLR].

55. I must have said enough to demonstrate that the trial court was divested of jurisdiction. To this end, there is no gainsaying that the impugned judgment is a nullity.

Final Disposition

56. For the reasons that have been highlighted in the body of the judgment, it must have become crystal clear that the appeal beforehand is meritorious. In this regard, the appeal is hereby allowed.

57. Consequently, and in the premises, the final orders that commend themselves to this court are as hereunder;

    i. The appeal be and is hereby allowed.

ii. The Judgment and consequential decree issued on 30th April 2024 be and is hereby set aside.

iii. In lieu thereof, an order be and is hereby made striking out the suit that was filed in the subordinate court.

iv. Each party shall bear its own costs of the appeal, considering that the issue of jurisdiction was only raised for the first time before this court despite the evidence that was within the knowledge of both parties.

v. The parties shall also bear own costs of the proceedings before the subordinate court.

vi. For the avoidance of doubt, the dispute touching on suit property [if any] can only be dealt with in accordance with the LAA, Chapter 284, Laws of Kenya.

58. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 7TH DAY OF JULY 2025.

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Mr Mutuma/ Ms. Mukami - Court Assistant.

Mr. Caleb Mwiti for the Appellants.

Mr. Mwirigi Mbaya for the Respondent.