



Ojwang & 2 others v Wadaywa & another (Suing as Legal Representative of the Estate of Nicanor Wadayua Angugo (Deceased)) (Environment and Land Appeal E006 of 2024) [2024] KEELC 13613 (KLR) (5 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13613 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E006 OF 2024
AY KOROSS, J
DECEMBER 5, 2024**

BETWEEN

**PETER ODUOR OJWANG 1ST APPELLANT
ERICK NYAMIRA OJWANG 2ND APPELLANT
HELLEN ATENO OJWANG 3RD APPELLANT**

AND

**JOSEPH MUNDA WADAYWA 1ST RESPONDENT
ONYANGO ANGUGO 2ND RESPONDENT
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF NICANOR
WADAYUA ANGUGO (DECEASED)**

(Being an appeal against the judgment of the Hon. SPM L. Simiyu delivered on 21/2/2024 in Siaya CM ELC Case No. 64 of 2019)

JUDGMENT

Background of the appeal

1. To contextualize the appeal, before the trial court, the appellants and 2nd respondent were the defendants whereas the 1st respondent was the plaintiff.
2. From the proceedings, the appellants and the 1st respondent are first cousins, while the 2nd respondent is their distant relative. Joseph Munda Wayadwa (Joseph) was and still is an administrator of the 1st respondent's estate.



3. By the law firm of M/s. Mugoye & Associates Advocates who were and still are on record for him, the 1st respondent filed an amended plaint dated 26/09/2022.
4. In it, it was asserted the 1st respondent who died on 29/08/2004 had shares over land parcel no. South Gem/Dienya/658 (658) and South Gem/Dienya (714). Cumulatively, these 2 properties shall be referred to as “suit properties.”
5. It was averred that at 1st registration, Washington Ojwang (Washington), Justo Nyamira (Justo), and Jeremiah Okello (Jeremiah) were registered as owners of 658 while Nathan Nangongo (Nathan), Olao Ohato (Olao) and Wilson Ohato (Wilson) were at 1st registration registered as the owners of 714.
6. However, it was contended these registrations were anchored on trusteeship as they held the suit properties in trust for the Anyungo family. From the record, it appears except for Wilson, all these persons are deceased.
7. It was contended that without the consent of the extended Anyungo family, the appellants had through probate proceedings, succeeded Washington’s estate, transferred Washington’s share in 658 to their names, and trespassed on 658. Further, they stated the 2nd respondent had succeeded Richard’s estate.
8. They pleaded trespass against the appellants and 2nd respondent but a scrutiny of the particulars thereof implies their claim was either on illegalities or fraud. It was stated the 1st appellant had subdivided 658 to create South Gem/Dienya 1753 (1753) and South Gem/Dienya 1754 (1754). Jointly, these properties shall be referred to as “subdivisions of 658”.
9. Consequently, the 1st respondent sought the following reliefs from the trial court: -
 - a. A declaration that the 1st respondent is entitled to a share of land parcel no. 658, 1753, 1754, and 714.
 - b. A permanent injunction restraining the appellants and 2nd respondent from interfering, transferring, alienating, occupying, and/or in any other way dealing with the 1st respondent’s possession and or interests over 658, 1753, 1754, and 714.
 - c. Costs of the suit.
10. The appellants and 2nd respondent strenuously opposed the claim and because they were self-represented, their defences were wanting in form and not drawn in the usual way.
11. Be that as it may, in an undated defence filed on 28/01/2022, the 1st appellant asserted 658 was registered in the names of Washington, Justo, and Jeremiah as tenants in common with each one of them having a 1/3rd share.
12. He averred the appellants were Washington’s children from his 3 households. He stated they had succeeded his estate through probate proceedings which had resulted in the subdivisions- Washington’s 1/3rd share in 658 was registered in the appellants’ names while 1753 which was two-thirds of 658 was registered in the names of Justo and Jeremiah.
13. He contended that Jeremiah’s share in 1753 was through probate proceedings, succeeded by his brother Angugo Obwolo.
14. He averred that 658 was never ancestral land and none of the 1st registered proprietors ever held it in trust for the 1st respondent and that the 1st respondent’s ancestral parcels of land were South Gem/Dienya/657 (657) and 714 which were registered in Nathan’s names.



15. Further, he stated Nathan's estate had been succeeded, and the 1st respondent who was a beneficiary thereof had received a subdivision of 657 which was South Gem/Dienya/1328 (1328).
16. The 2nd respondent's amended defence dated 26/09/2022 was headed as a replying amendment. He asserted the 1st respondent was never a beneficiary of 658 and 714 and that these parcels were never held in trust for him. He contended that the 1st respondent's rights lay in 657 of which he had acquired a portion thereof.
17. He asserted he was a grandson of Obwolo Ongugo (Angugo Obwolo is his son) who was not even Nathan's brother. He contended he was not a trespasser but a beneficiary of the suit properties.
18. Additionally, he asserted that Nathan and the 1st respondent never raised concerns during their lifetime about the occupancy of the suit properties.
19. The matter was slated for hearing and all parties testified. The 1st respondent testified a PW1 and his evidence was led by his relatives Jared Opanga Nyamria (PW2) and Beatrice Odhiambo Opanga (PW3). The 1st respondent also produced several documents which were marked as PEX1-PEX9.
20. The 1st appellant testified as DW1 and his evidence was led by Dickson Ochola Odhek who testified as DW2. To augment his case, the 1st appellant produced several documents which were marked as DEX1-13. The 2nd respondent also testified and his evidence was led by Wilson and Peter Olango Odera.
21. Upon closing parties' cases and submissions being filed, the trial court reserved the suit for judgment. In the challenged judgment, the learned trial magistrate found the suit properties belonged to the patriarch Angugo Mlangua (Mlangua), and his descendants including the 1st respondent were entitled to a portion thereof. As a result, the 1st respondent was granted the reliefs sought in his plaint.

Appeal to this court

22. Being aggrieved by the impugned judgment, through the law firm of M/s. Ken Omollo & Co. Advocates who are on record for them, the appellants moved this court on 7 grounds of appeal set out in the memorandum of appeal dated 13/03/2024 faulting the learned trial magistrate on grounds inter alia: -
 - a. Failing to appreciate the 1st respondent did not prove his case on a balance of probabilities.
 - b. Failing to appreciate she did not have jurisdiction to interfere with orders issued by the probate court by issuing orders of cancellation of registration over the 658 and the subdivisions.
 - c. Failing to appreciate the orders issued were adverse to persons not made parties to the proceedings some of whom were deceased.
 - d. Failing to appreciate the plaint was bad in law and an abuse of the court process.
 - e. Failing to appreciate the orders conflicted with those issued in Kisumu CM P& A 461 of 2017.
 - f. Failing to identify issues for determination and deciding on those issues.
 - g. Failing to appreciate there was no suit capable of being determined as it had been struck out.
23. In the memorandum of appeal, the appellants urged this court to set aside the impugned judgment and its consequential orders and substitute it with an order dismissing the 1st respondent's case. He also sought for costs of the appeal.



Parties' submissions

24. On 21/05/2024, the court directed the appeal to be canvassed by written submissions, and in compliance, the appellants' counsel filed 2 sets of submissions respectively dated 2/09/2024 and 26/09/2024 and the 2nd respondent who acts in person filed his dated 24/09/2024.
25. Despite Mr. Otieno, counsel for the 1st respondent being granted leave file submissions by 1/10/2024, he did not comply and when the matter came before the court on the scheduled date of 1/10/2024, there was no attendance by the 1st respondent's counsel. Therefore, the appeal was reserved for judgment.
26. Notwithstanding this, the 1st respondent without seeking an extension of time to file his submissions out of time, filed it on 30/10/2024 which was long after the appeal had been reserved for judgment.
27. This court is also uncertain if they have been served upon the other parties. For reasons they have been filed out of time without leave and bearing in mind it will occasion prejudice to the other parties, the 1st respondent's submissions shall not be considered.
28. The appellant's submissions collapsed grounds (b) and (e) of the appeal into a singular ground. Although ground (a) appears abandoned, it was argued as part of ground (d) of the appeal whilst the other grounds were argued separately.
29. The 2nd respondent rehashed his pleadings before the lower court and introduced new evidence. The new issues challenged the legality of probate proceedings over Washington's estate, the exchange of parcels of land, and court proceedings in ELC NO.64 of 2019. Leave to introduce new evidence on appeal was never granted and these new pieces of evidence shall be disregarded.
30. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the appellants' and 2nd respondent's arguments as contained in their submissions. The judicial precedents and provisions of law that were relied upon by them in buttressing their arguments will also be considered.

Issues for determination

31. Being a 1st appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Steered by the principles enunciated in the well-cited case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected herself and thus arrived at an erroneous decision, undoubtedly exercised her discretion wrongly and occasioned injustice by such erroneous exercise.
32. Recalling the role of an appellate court, I have carefully considered the records and appellants' and 2nd respondent's submissions, and the grounds of appeal. The issues arising for determination are those contained in the grounds of appeal.
33. Ground (a) of the appeal shall be handled on its own. The grounds of appeal that shall be handled together are inter alia, (b) and (e); (c) and (d) and lastly (f) and (g).

Analysis and determination

a. Ground (a)

34. This was the crux of the issue for determination. The appellants' counsel contends that the 1st respondent did not explicitly plead the appellants and the 2nd respondent held the suit property in trust for him or other family members.



35. Their submission contends that apart from this shortcoming, the 1st respondent's witnesses failed to lead evidence on how Washington and by extension, the appellants held the suit property in trust for him and that in any case, trust was not proved. These arguments raise 3 questions- Was trust pleaded? Was evidence led on it? Was it proven?
36. On the 1st limb that questioned the 1st respondent's pleadings, I respectfully disagree with the appellants, paragraphs 9 and 10 of the 1st respondent's amended plaint explicitly pleaded trust over the suit property by stating as follows: -
9. The plaintiff avers that Washington Ojwang (deceased), Justo Nyamira (deceased), and Jeremiah Okello (deceased) were registered on the property known as Title Number South Gem/Dienya/658 to hold in trust on behalf of Anyungo family.
10. The plaintiff avers that Nathan Nangongo (deceased), Olao Ohato (deceased), and Wilson Ohato were registered on the property known as Title Number South Gem/Dienya/714 to hold in trust on behalf of Anyungo family.”
37. I must mention that though the 1st respondent was inelegant in his pleadings by not making known the nature of the trust he claimed from the appellants and the 2nd respondent, it was deduced from evidence that the nature of the trust he claimed was customary trust.
38. He was clear in his contention the appellants and 2nd respondent held the suit properties and subdivisions of 658 in trust for Mlangua's family.
39. On the 2nd limb and being guided by the Court of Appeal decision of Chumo Arap Songok v David Kibiego Rotich [2006] KECA 106 (KLR) which held that though courts are bound by their pleadings, courts can pronounce judgment on matters canvassed before it by parties to the suit and made an issue by the evidence adduced and submissions of the parties, I find that the issue before the trial court was on customary trust and the learned trial magistrate did not err.
40. I will now deal with the 3rd limb. Customary trusts are overriding interests, an encumbrance on the land, and are expressly recognized in Sections 25, 28, and 62 of the [Land Registration Act](#). These provisions of the law read as follows: -

Section 25: -

“(1)The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—(a)to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and(b)to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2)Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee. Emphasis added.”



Section 28: -

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- a. deleted by [Act No. 28 of 2016](#), s. 11(a);
- b. trusts including customary trusts;
- c. rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- d. natural rights of light, air, water and support;
- e. rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- f. deleted by [Act No. 28 of 2016](#), s. 11(b);
- g. charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- h. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- i. electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- j. any other rights provided under any written law.

Provided that the Registrar may direct the registration of any of the liabilities, rights and interests hereinbefore defined in such manner as the Registrar deems necessary.” Emphasis added.

Lastly, Section 62: -

“(1) Subject to any restriction on a person’s power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but enforceable and subject to which the deceased proprietor held the land, lease or charge, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor of the land lease or charge with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.

(2) The registration of a person as provided in section 61, shall relate back to and take effect from the date of the death of the proprietor.” Emphasis added.

41. The Supreme Court of Kenya in *Isack M’inanga Kiebia v Isaaya Theuri M’lintari & another* [2018] eKLR held that in determining whether a customary trust has been established, a court must be satisfied that certain elements exist. These principles are non-exhaustive and they are: -

1. The land in question was before registration, family, clan or group land



2. The claimant belongs to such family, clan, or group
 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”
42. In a recent decision, the Court of Appeal in *Diasproperty Limited & 5 others v Githae & 10 others* [2024] KECA 318 (KLR) reiterated the holdings of various decisions on customary trust and stated: -
- “Reference was made to the decisions in *Mumo v Makau* [2002] IEA 170 and [*Kanyi Muthiora v Maritha Nyokabi Muthiora, NRB Court of Appeal Civil Appeal No. 19 of 1982*](#). In these cases, it was reiterated that the law never implies, and the court never presumes, a trust unless it is a case of absolute necessity, and where, by the conduct of the parties, they intended to create a trust.”
43. By Sections 107- 109 of the [*Evidence Act*](#), the persons claiming trust have the onus of proving it and the court can never imply trust but give effect the intention of the parties to create such a trust for the benefit of a group of other family members.
44. Once the 1st respondent contended that the appellants and the 2nd respondent held the suit properties in trust for the Mlangua family, the evidential burden shifted to the appellants and the 2nd respondent to dislodge this line of evidence by rebutting it. Importantly, determining trust is a matter of evidence.
45. This shifting of evidential burden was elucidated by the Court of Appeal decision of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR where the court stated: -
- “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”
46. Upon hearing the parties, the learned trial magistrate found that it was intended for Mlangua’s descendants who were registered as proprietors of land, to hold it in trust for those who were unregistered. She also found the suit properties and subdivisions of 658 were Mlangua’s lands and his descendants were entitled to it.
47. I have considered the evidence that the 1st respondent placed before the trial court and I find that the trial magistrate made a grave error in her assessment of the evidence that was before her.
48. Though I agree with the learned trial magistrate that the suit properties were at the time of registration family land that was derived from Mlangua. In the context of this case, the trusteeship was extinguished at 1st registration when some of his grandsons were registered as proprietors of various parcels of land including the suit properties.
49. The 1st respondent claimed customary trust over the suit properties and subdivisions of 658 because he was Nathan’s son and Mlangua’s great-grandson.



50. From the evidence, Nathan was one of the grandsons of Mlangua who on the dissolution of the trusteeship at registration, was registered as proprietor of various parcels of land that were derived from Mlangua's extinguished trusteeship particularly 714 and South Gem/Dienya/657 (657). In effect, Mlangua's trusteeship was terminated and no claims could be made against it.
51. Since the 1st respondent is Nathan's son and as held in the Court of Appeal decision of *Mbui Mukangu v. Gerald Mutwiri Mbui* (Civil Appeal 281 of 2000) [2004] KECA 155 (KLR) (10 December 2004) (Judgment) that customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations, his claim could only lay against Nathan's parcels of lands.
52. From the evidence, it appears that Nathan's trusteeship in 657 was dissolved when his estate was succeeded by his beneficiaries who included the 1st appellant and Washington. Yet it was strange that 1/3rd of 714 which is owned by Nathan was not subjected to probate proceedings and it appears a full inventory of his estate was not disclosed as required by Section 51 (2) (h) of the *Law of Succession Act* (LSA).
53. In my humble view, being a dependant of Nathan's estate as defined by Section 29 (a) of the LSA, his interests in 714 should have been appropriately dealt with by the probate court and not the trial court.
54. As to 658 and its subdivisions, Wilson who just as Nathan was Mlangua's grandson testified that Nathan, other family members, and himself were present during adjudication, and parcels of land were registered to the names of various family members.
55. It was his evidence during the land adjudication process, they did not have any disputes and it was intended for each family member to be registered in their respective parcels as evidenced by the green cards of the suit properties and of 657. His evidence was reliable and was not dislodged.
56. During his lifetime, the 1st respondent did not have qualms with the registration. From the evidence, it emerged he initially occupied 714 which Nathan owned and, and still owns 1/3rd thereof. In other words, Nathan put the 1st respondent in occupation and possession of 714 and not 658.
57. Although it was undisputed he occupied in 658, it arose from undisputed evidence that Washington who was then registered as the owner of 1/3rd thereof and other undisclosed family members permitted him to occupy a portion thereof around 1988. Thereafter, the 1st respondent vacated 714 and occupied 658.
58. The 1st respondent and his witnesses testified that his relocation from 714 to 658 was attributed to Luo culture. However as held in the Court of Appeal decision of *Robert Maina Murogo, Sammy Munene Murogo, Ephraim Kinyua Murogo, Jackson Kinyua & Anthony Njau Murogo v Simon Munene Mbugugia substituted party for Joyce Wagichugu Mbugugia* [2018] KECA 463 (KLR), it was incumbent for the 1st respondent to prove such customary law by expert evidence which he did not.
59. In any case, such customary rights were determined at 1st registration. The permission by Washington or other undisclosed family members did not turn the 1st respondent's license into any legal estate.
60. In concluding on this ground, I find that the 1st respondent did not tender sufficient evidence to establish that the appellants held 658 or the subdivisions thereof in trust for him. I find since Nathan's estate has been succeeded, and as a beneficiary, the probate court is the most appropriate court to determine his rights over Nathan's 1/3rd ownership over 714.



61. I also find two-thirds of 714 that are registered in the names of Olao and Wilson are not held in customary trust for him. This ground of appeal succeeds.
- b. Grounds (b) and (e)
62. These grounds were on the jurisdiction of the trial court sitting as an ELC court and questioned whether the court could overturn the proceedings of probate court over Washington's estate that issued a certificate of grant in Kisumu Succession Cause no.461 of 2017.
63. The jurisdiction of the ELC is derived from Article 162(2) of *the Constitution* and Section 13 of the *Environment and Land Court Act* (ELC Act). This court has exclusive jurisdiction over all matters relating to environment and land including land's use ownership, use, tenure, title, overriding interests, and occupation amongst others.
64. In the instance of parcels of land that have been the subject of probate proceedings, the ELC has jurisdiction over overriding interests in land. By Section 62 of the ELC Act, it has jurisdiction to determine customary rights of land. See generally the recent Court of Appeal decision of Diasproperty Limited & 5 others v Githae & 10 others [2024] KECA 318 (KLR).
65. Importantly, a court of law can only deal with matters that are allowed by *the Constitution* or statute. The Supreme Court of Kenya in Samwel Kamau Macharia v Kenya Commercial Bank & 2 Others, Civil Application No. 2 of 2011 expressed itself in the following terms: -
- “A court's jurisdiction flows from (sic) either *the Constitution* or Legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
66. The appellants' counsel has argued that the pleadings as filed were bad in law since they sought to challenge the decision of the probate court. The 2nd respondent also weighed in on this issue and argued the probate proceedings were illegal.
67. Although I agree with the appellants that the 1st respondent's pleadings indeed challenged the legality of the probate proceedings, the 1st respondent did not seek any reliefs that allegedly arose from such an alleged illegality.
68. The learned trial magistrate properly steered away from the probate proceedings and instead dealt with the issue of customary trust whose jurisdiction was conferred to her by the statute particularly Section 62 of the ELC Act, I find these grounds of appeal fail.
- b. Grounds (c) and (d)
69. The right to a fair hearing is underpinned in Article 50 of *the Constitution*. The Supreme Court of Kenya decision of Kidero & 4 others v Waititu & 4 others [2014] KESC 11 (KLR) recognized that this right is buttressed on the rules of natural justice, which includes the concept of audi alteram partem (hear the other side, no one is to be condemned unheard) and nemo iudex in causa sua (no man shall judge his own case).
70. The 2nd respondent was silent on this but the appellants contended that the learned trial magistrate in contravention of the law, made findings on 714 notwithstanding none of the registered owners thereof were made parties to the proceedings.



71. On this, I concur with the appellants. Further, the registered owners of 1753 who are Justo, Angungo Obwolo, and Wilson were not made parties to the proceedings. It is worth noting that the 2nd respondent is Angungo Obwolo's son and is not a registered owner of the suit property.
72. Even if this court has found the 1st respondent did not prove his claim of customary trust over the suit properties, it was the duty of the learned trial magistrate to determine if the rule of natural justice was violated, and if so, she should have declined to issue orders against parcels of land whose registered owners or administrators of their estates were not made parties to the suit.
73. Thus, I find that the learned trial magistrate fell in error in not considering the right to a fair hearing. I also find the learned trial magistrate erred in issuing orders against land parcel no. 714 and 1753. These grounds of appeal succeed.
- d. Grounds (f) and (g)
74. The 1st limb is on the body of the judgment. Counsel for the appellants contended the impugned judgment did not comply with the provision of Order 21 Rule 4 of the Civil Procedure Rules and argued that this was a fatal error. The 2nd respondent did not address this issue. This provision of law provides as follows: -
- “Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”
75. I must agree with the appellants that the impugned judgment did not identify issues for determination as required by law but instead merely provided statements of the case, analysis and determination.
76. Order 21 Rule 4 of the Civil Procedure Rules is couched in mandatory terms. So where does that leave us in the circumstances of this case? In my humble opinion, recourse can be found in Section 78 of the [Civil Procedure Act](#) which outlines the authority of an appellate court and it states: -
1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
 - a. to determine a case finally;
 - b. to remand a case;
 - c. to frame issues and refer them for trial;
 - d. to take additional evidence or to require the evidence to be taken;
 - e. to order a new trial.
 2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”
77. The Civil Procedure Rules is silent on non-compliance. A careful perusal of the records demonstrates as an appellate court, I can adequately reassess the evidence, pleadings, and the law and identify issues as I have already done. Although I find the trial magistrate erred in not framing issues, I find that this ground has been dealt with by this appeal.
78. On the 2nd limb, the 2nd respondent was similarly silent on it but the appellants argued the amended plaint was filed out of time. Having considered the record, I find this ground is overtaken by events.



79. On 15/06/2022, the learned trial magistrate granted leave to the 1st respondent to file an amended plaint on or before 29/6/2022. He did not comply but on 28/09/2022, the trial court extended time by directing it be served within 3 days. During the trial court proceedings, the appellants were silent on this issue and cannot at this point be heard to complain. This ground of appeal fails.
80. Ultimately and for the reasons and findings stated above, I find the grounds of appeal were partly successful. I hereby set aside in entirety the judgment and decree of the learned trial magistrate rendered on 21/2/2024 which allowed the 1st respondent's claim and hereby substitute it with an order dismissing the 1st respondent's claim. It is trite law costs follow the event and since all parties are relatives, each party shall bear their respective costs of the appeal.
81. Ultimately, I substitute the trial court judgment by issuing the following final disposal orders: -
- a. That the 1st respondent's claim before the trial court is hereby dismissed.
 - b. Each party shall bear their respective costs of this appeal and the lower court's claim.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 5TH DAY OF DECEMBER 2024.

HON. A. Y. KOROSS

JUDGE

5/12/2024

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

N/A for the appellants

N/A for the respondents

Court assistant: Ishmael Orwa

