



**Simon v Simon (Environment and Land Appeal 34 of 2021)
[2023] KEELC 20195 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20195 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL 34 OF 2021**

**EM WASHE, J
SEPTEMBER 20, 2023**

BETWEEN

OLENKARIE SIMON APPELLANT

AND

OLENKARIE SIMON RESPONDENT

JUDGMENT

1. The Appellant herein through the Memorandum of Appeal dated 3rd February 2020 (hereinafter referred to as “the Grounds of Appeal”) has challenged the judgement of Hon. R.M. Oanda, Principal Magistrate (hereinafter referred to as “the Trial Magistrate”) in the Trial Court proceedings known as (Kilgoris Principal Magistrate’s Court Environment & Land Court Case No. 29 of 2018) (hereinafter referred to as “the Trial Court proceedings”) on the following grounds:-
 - i. The Learned Trial Magistrate erred in law and fact by not taking cognizance of the fact that the Appellant’s title L.R.No. Transmara/Shartuka/1548 still exists legally.
 - ii. The Learned Trial Magistrate failed to exhaustively consider the Appellants evidence that he legally owns the land known as L.R.No. Transmara/Shartuka/1584 which land he occupies together with his family members up to date.
 - iii. The Learned Trial Magistrate erred in law and fact by not Appreciating and upholding the sanctity of the appellant’s title no. L.R.transmara/Shartuka/1584.
 - iv. The Learned Trial Magistrate erred in law and fact by failing to exhaustively consider the Sections of [Land Registration Act](#), No. 3 of 2012 quoted in the Appellant’s submissions.
 - v. The Learned Trial Magistrate erred in law and fact by not following precedents set by the Honourable Justice S. Okongo in similar cases whose judgements were supplied to him.



- vi. The Learned Trial Magistrate erred in law and fact by not taking cognizance of the facts that the Appellant acquired his title deed No. Transmara/Shartuka/1548 legally and procedurally through allocation in terms of Section 7 of the Land Act, 2012 and as a Shartuka Group Range Member No. 28.
 - vii. The Learned Trial Magistrate generally failed to consider and/or analyse critically, the evidence advanced by the appellant through his testimony and exhibits produced.
 - viii. The Learned Trial Magistrate erred in law and fact by believing the Respondent's erroneous assertion that the Appellant's title deed never existed and had been cancelled when no order was produced specifically addressed itself to parcel no. L.R.NO.Transmara/Shartuka.1584.
 - ix. The Learned Trial Magistrate properly takes cognizance of the fact that the confusion in demarcation and allocation of Shartuka Group Ranch was caused by the 2nd demarcation but proceeds to inter alia, grant the Respondent an order for eviction from the Appellant's own Title No. Transmara/Shartuka/1584.
 - x. In view of what is stated in ground 9 above, the Learned Trial Magistrate erred in law and fact and misdirected himself when he issued an order of eviction against the Appellant from his own land.
 - xi. If the Appellant only occupies and stays on part of the Respondent's suit property, the Learned Trial Magistrate should not have issued a blanket order of eviction.
 - xii. The Learned Trial Magistrate erred in law and fact by concluding that the Sharuka Group Ranch anomaly was sorted out through a Court process when the decisions supplied by the Respondents never stated so.
 - xiii. The Learned Trial Magistrate erred in law and fact by failing to take cognizance of the fact that the Respondent had disguised and masked the matter as a land dispute when in the real sense, the intention was and has been to dislodge him (Appellant) from the parcel No. Transmara/Shartuka/1584.
 - xiv. Generally, the Learned Trial Magistrate erred in law and fact by not exhaustively considering the Appellant's written submissions and all the relevant authorities supplied.
 - xv. In the circumstances, the Learned Trial Magistrate gravely caused a miscarriage of justice and misdirected himself on the laws governing ownership of land.
2. In conclusion therefore, the Appellant sought the following Orders upon determination of this Appeal;-
 - a. The Appeal herein be allowed and judgement and orders of the Trial Magistrate delivered on the 16th of January 2020 in Kilgoris MLC & E No. 29 of 2018 Be Set-aside And/or Quashed Wholly.
 - b. The Honourable Court be pleased to substitute therefore an order dismissing the Respondent's suit No. MLC & E 29 of 2018 in its entirety and with costs.
 - c. Costs of this Appeal be borne by the Respondent.
 3. The hearing of this Appeal was canvassed by way of written submissions with the Appellant filing his submissions on the 10th April 2023 while the Respondent filed his on 13th June 2023.



4. The origin of this Appeal is the Trial Court Judgement which was determining the Respondent's Plaint dated 26th of June 2013 seeking the following prayers;-
 - i. Declaration that the Plaintiff is the registered and/or beneficial owner of L.R.No. Transmara/Shartuka/209.
 - ii. An Order of eviction against the Defendants, agents and/or servants from L.R.No.Transmara/Shartuka/209.
 - iii. Permanent injunction restraining the Defendant either by themselves, agents, servants and/or anyone under the Defendants from entering upon, re-entering, trespassing onto, cultivating, building structures, interfering with and/or in any other manner dealing with the suit land, that is , L.R.No.Transmara/Shartuka/209 and/or any portion thereof.
 - iv. General damages for Trespass
 - v. Interest on (iv) hereof at Court rates.
 - vi. Costs of this suit be borne by the Defendant.
 - vii. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.
5. The Appellant in the Trial proceedings on the other hand denied the Respondent's allegations by filing a Statement of Defence dated 16th August 2013.
6. In the Statement of Defence dated 16th August 2013, the Respondent in the Trial Court proceedings pleaded that he was a registered owner of the property known as L.R.No.Transmara/Shartuka/1584 which had been allocated to him by way of allocation and duly titled on the 27th September 2009.
7. The Respondent further pleaded that he occupies the demarcated acreage of L.R.No.Transmara/Shartuka/1584 and had not entered, trespassed and/or interfered with the Appellant's property known as L.R.No.Transmara/Shartuka/209.
8. In the conclusion of the Statement of Defence dated 16th August 2013, the Respondent sought the entire Plaint dated 26th of June 2013 to be dismissed with costs.
9. The hearing in the Trial Court proceedings commenced on the 07/06/2018 before the Trial Magistrate.
10. The Respondent in the Trial proceedings called two witnesses namely Samuel.n.meitoi (PW 1) who was the Plaintiff and Robert Sanduki (PW 2) who was an officer from the District Land Registrar's office.
11. The PW 1 testified on the 07/06/2018 where he confirmed that he was the registered and beneficial owner of the property known as L.R.No.Transmara/Shartuka/209 and produced a Copy of the Title and a Certificate of Official Search as Exhibits 1 and 2.
12. PW 1 stated that he entered into the property known as L.R.No.Transmara/Shartuka/209 on or about 09/01/2012 and has been occupation upto date.
13. PW 1 informed that Trial Court that demarcation and allocation of Shartuka Group Ranch was faced with a lot of challenges in terms of the allocation list as well as the acreage allocated by the officials which resulted to a lot of litigations.



14. To this end, PW 1 produced a total of 10 Rulings, Judgements and Decrees from different Courts who previous handled the issue of the allocation list relating to the original Shartuka Group Ranch.
15. Further to that, PW 1 produced a Gazette Notice No. 6331 dated 08/06/2011 from the Chief Land Registrar and a Demand Letter from the Respondent's Advocate to the Appellant dated 20/06/2013.
16. PW 1 further testified that the Appellant's property known as L.R.No.Transmara/Shartuka/1584 was cancelled through the Gazettement No.6331 dated 08/06/2011 and therefore, the same did not exist in law and the Appellant is therefore occupying the property known as L.R.No.Transmara/Shartuka/209 and should be evicted forthwith and injuncted from any further trespass and/or forceful occupation of the said property.
17. In cross-examination, the Respondent stated that the Appellant was a registered member of Shartuka Group Ranch.
18. PW 1 confirmed that the Appellant was the one in occupation of the property known as L.R.No.Transmara/Shartuka/209 having forcefully evicted him from the said property sometime in October 2012.
19. PW 1 stated that he had built a house on the property known as L.R.No.Transmara/Shartuka/209 although he was not sure if it still existed or had been demolished.
20. PW 1 further stated that his father is still in occupation of a portion of the property known as L.R.No.Transmara/Shartuka/209 to date.
21. During the cross-examination, PW 1 stated that his father was never a member of Shartuka Group Ranch but stays and/or occupies land in Shartuka Group Ranch.
22. PW 1 informed the Trial Court that he was one of the parties that instituted the High Court proceedings at the Kakamega High Court although the property number 209 was not in the Order that was issued by the Honourable Court.
23. PW 1 stated that the original sub-division of Shartuka Group Ranch was undertaken by Joel Tasur who was the Chairman in 1992 but this process was stopped by the Court.
24. He was allocated land in the second sub-division which was undertaken by Moses as the Chair of the Allocation Committee.
25. PW 1 confirmed that he did not report any trespass by the Appellant to the police.
26. In re-examination, PW 1 reconfirmed that he was allocated the property known as L.R.NO.Transmara/Shartuka/209 by the second Committee chaired by the Moses.
27. PW 1 testified that the Appellant occupies two parcels of land known as Plot.409 and 64.
28. According to PW 1, Plot No. 1584 does not exist as all titles above 1000 we thrown out through a Gazette Notice which included Plot.No. 1584.
29. The next witness was PW 2 who was an official from the District Land Registrar, Transmara West.
30. PW 2 informed the Trial Court that the property known as L.R.No.Transmara/Shartuka/209 was indeed registered in the name of the Respondent and a title deed duly issued on the 05/08/2011.
31. PW 2 produced a certified copy of the Green Card of the property known as L.R.No.Transmara/Shartuka/209.



32. PW 2 further referred to the Letter dated 14/09/2013 from the District Land Registrar to the firm of Oguttu Mboya & Company, Advocates which was addressing the issue of Parcel No. 1584 and 209 within Shartuka Group Ranch.
33. In the letter dated 14/09/2013, the District Land Registrar informed the firm of Oguttu Mboya & Company, advocates that Parcel No. 1584 did not exist and the only Parcel that existed was Parcel. No. 209.
34. In cross-examination, PW 2 confirmed that the letter dated 14/09/2013 stated Plot.No. 1584 was sharing a boundary with Plot.No. 209.
35. However, according to PW 2, all parcels of land between Parcel No. 907 up to 1700 were all cancelled vide Kakamega HCC Miscellaneous Application No.103/2003
36. PW 2 however did not produce the alleged Order cancelling all the parcels No. 907 to 1700 but made reference to Page 32 of the Plaintiff's documents to confirm the same.
37. PW 2 informed the Trial Court that he was not aware whether the Plaintiff was a member of Shartuka Group Ranch or not but was sure that the property known as L.R.No.Transmara/Shartuka/209 does exist.
38. When asked about its location on the ground, PW 2 informed the Trial Court that the Land Registrar could not identify it on the ground.
39. In re-examination, PW 2 confirmed that he did not have the Court Order in Court.
40. After PW 2, the Respondent in the Trial Court closed their case.
41. The Defence hearing began on 16/05/2019 with the evidence of only the Appellant (DW1).
42. DW 1 informed the Trial Court that he was 50 years old with three wives and 27 children all staying on the property known as L.R.No.Transmara/Shartuka/1584.
43. DW 1 stated that he is the registered owner of the property known as L.R.No.Transmara/Shartuka/1584 pursuant to an allocation done by Shartuka Group Ranch which he was Member No. 28.
44. DW 1 produced the list of members of Shartuka Group Ranch and the Area List of Shartuka Group Ranch.
45. DW 1 denied knowledge of the Respondent who alleged to be the owner of the property known as L.R.No.Transmara/Shartuka/209.
46. DW 1 testified that the Respondent who was the registered owner of the property L.R.No.Transmara/Shartuka/209 was making claims that he was occupying a portion of his property yet he was only in occupation of the property known as L.R.No.Transmara/Shartuka/1584.
47. DW 1 informed the Trial Court that the Respondent's claim in the Trial Court proceedings was that the property known as L.R.No.Transmara/Shartuka/1584 had been cancelled through the High Court proceedings.
48. However, DW 1 denied knowledge or participation in the High Court proceedings emanating from Kakamega High Court and/or Kisii High Court as the property known as L.R.No.Transmara/Shartuka/1584 was never a subject of these proceedings.



49. DW 1 stated that he had never been informed of any cancellation of his property known as L.R.No.Transmara/SHartuka/1584 by the District Land Registrar, Kilgoris who issued him with a Title Deed.
50. DW 1 informed the Honourable Court that the Respondent resides almost 40 Kilometers away from the property known as L.R.No.Transmara/Shartuka/1584 and is not an immediate neighbour.
51. DW 1 testified that the Respondent was not a member of Shartuka Group Ranch and it was only the registered members that were to be allocated land in Shartuka.
52. In concluding his testimony in chief, DW 1 sought the Trial Court to dismiss the Respondent's suit.
53. In Cross-examination, DW 1 confirmed that he was the Cousin of the original chairman of Shartuka Group Ranch known as Joel Ole Tasur.
54. DW 1 stated that it was the Joel Ole Tasur committee that allocated him the property known as L.R.No.Transmara/Shartuka/1584.
55. DW 1 further stated that he was aware some titles were cancelled but the property known as L.R.No.Transmara/Shartuka/1584 was not among them.
56. After the regime of Joel Ole Tasur, the chairmanship of Shartuka Group Ranch was taken over by Moses Lemashen Korinko.
57. DW 1 stated that once Moses Lemashen Korinko took the chairmanship, he also allocated land and there is a possibility that his land was also again allocated to another person.
58. DW 1 indicated that there were so many cases concerning the allocation and issuance of title deeds.
59. Nevertheless, DW 1 stated that he was issued with the title deed of the property known as L.R.No.Transmara/Shartuka/1584 in the year 2009 and has never been informed by anyone that the same was cancelled.
60. DW 1 informed the Trial Court that he has never come across any Gazette Notice that cancelled his ownership of the property known as L.R.No. Transmara/Shartuka/1584 although other properties were affected by some Gazette Notice.
61. DW 1 stated that the District Land Registrar, Kilgoris has refused to issue him with an official Search or a Certified Copy of the Green Card on the basis that the same is subject of the High Court Proceedings in Nakuru.
62. DW 1 further stated that according to the District Land Registrar, Kilgoris, the property known as L.R.No.Transmara/Shartuka/1584 is one of those that had been cancelled and/or nullified.
63. DW 1 reiterated that he is the person in occupation of the property known as L.R.No.Transmara/Shartuka/1584 and had all the rights to stay of the said property.
64. In re-examination, DW 1 stated that the second allocation exercise under the leadership of Moses Lemashen Korinko was never completed.
65. In essence therefore, the second exercise of allocation of land under Shartuka Group Ranch did not reach DW 1 property.
66. Whichever way, DW 1 stated that every member of Shartuka Group Ranch has a right to be allocated land and he got his portion as expected hence issued with a Title Deed.



67. DW 1 informed the Trial Court that the District Land Registrar, Kilgoris had not recalled the said title deed to the property known as L.R.No.Transmara/Shartuka/1584 or officially communicated the same to be cancelled.
68. DW 1 denied knowledge of any Gazette Notice that cancelled or nullified the title to property known as L.R.No.Transmara/Shartuka/1584.
69. Upon this re-examination, the Defence also closed their case and parties filed their submissions.
70. The Trial Court upon evaluating the pleadings by the parties, the oral evidence adduced orally, the exhibits produced in Court and the submissions of the parties pronounced its judgement on the 16th January 2020.
71. It is this judgement pronounced on the 16th January 2020 that the Appellant seeks to challenge in this Appeal.
72. During the hearing and determination of a first Appeal, the jurisdiction of the Appellate Court was discussed in the case of *Selle & Another-versus- Associated Motor Boat Co.ltd & Others (1968) EA 123* where the Court observed as follows;-

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”
73. On the guidance of the above finding in the cited case, this Honourable Court will now proceed to re-evaluate evidence placed before the Trial Court on the issues raised in the pleadings therein and arrive at its own independent decision.
74. A careful perusal of the pleadings filed by the parties in the Trial Court Proceedings and as well as the judgement pronounced on the 16th January 2020, this Honourable Court notes that the Trial Court did not outline or identify the issues for determination before it.
75. The Trial Court instead framed the exercise of evaluating the evidence of the parties as the core issue instead of identifying the individual issues for determination as pleaded by the parties.
76. Be as it may, this Honourable Court in the determination of this Appeal has framed a number of legal issues that must be considered in the re-evaluation of the evidence adduced at the Trial Court in its exercise of the Appellant jurisdiction.
77. The issues that are raised in the pleadings by the parties can be summarised as follows;-

Issue No. 1- Is The Respondent The Registered Owner of The Property Known As L.R.No.Transmara/Shartuka/209?

Issue.no. 2- Is The Appellant’s Title Known As L.R.No.Transmara/Shartuka/1584 Lawful And Valid In Law?

Issue No. 3- Has The Appellant Tresspassed And/or Encroached on To The Respondent’s Property Known As L.R.No.Transmara/Shartuka/209?

Issue No. 4- Is The Respondent Entitled To The Orders Sought In The Complaint Dated 26th June 2013?

Issue No. 5- Who Bears The Costs of This Suit?



78. The issues of determination having been duly outlined hereinabove, this Honourable Court will now proceed to re-evaluate and draw its independent conclusion in its mandate as the first Appellate Court.

Issue No. 1- Is The Respondent The Registered Owner of The Property Known As L.R.No.Transmara/Shartuka/209?

79. The first issue for determination emanates from Prayer No. 1 in the Plaint dated 26th June 2013.
80. The Respondent in the said Plaint dated 26th June 2013 is seeking to be declared as the registered and/or lawful owner of the property known as L.R.No.Transmara/Shartuka/209.
81. The Respondent during the hearing at before the Trial Court produced copies of the Title Deed issued 5th August 2011 and a Certificate of Official Search dated 7th June 2013.
82. On the other hand, the Appellant in its Statement of Defence dated 16th August 2013 did not despite the ownership of the property known as L.R.No.Transmara/Shartuka/209 to be in the name of the Respondent.
83. In essence therefore, it is clear and not in dispute that the property known as L.R.No.Transmara/Shartuka/209 is registered in the name of the Respondent.
84. Section 26 of the *Land Registration Act*, No. 3 of 2012 provides that a Certificate of Title must always be held as conclusive evidence of proprietorship and so this Honourable Court does make a finding that indeed, the Respondent is the lawful owner of the property known as L.R.No.Transmara/Shartuka/209.

Issue.no. 2- Is The Appellant's Title known as L.R.No.Transmara/Shartuka/1584 Lawful and Valid In Law?

85. The second issue for determination is the validity of the property known as L.R.No.TRansmara/Shartuka/1584 which is owned by the Appellant.
86. The Appellant states in his Statement of Defence dated 16th August 2013 that he is the registered owner of the property known as L.R.No.Transmara/Shartuka/1584 pursuant to an allocation by the Committee members of Shartuka Group Ranch in the original sub-division undertaken by the first Committee chaired by Joel Ole Tasur.
87. The Appellant states that he was a registered member No. 28 of Shartuka Group Ranch as envisaged in the Area List and was subsequently issued with a Title Deed of the property known as L.R.No.Transmara/Shartuka/1584 by the District Land Register on the 27th of September 2009.
88. The Respondent in this Appeal counters this allegation by the Appellant by stating that the title to the property known as L.R.No.Transmara/Shartuka/1584 was cancelled through a Court Order issued in Kakamega High Court Civil Suit No. 103 of 2003 as well as Kisii High Court Civil Suit No. 52 Of 2009.
89. In essence therefore, the Respondent as well as the District Land Registrar, Kilgoris are of the view that the Appellant's property known as L.R.No.Transmara/Shartuka/1584 does not exist at the Land Registry and the Appellant has no ownership rights emanating from the said title.
90. In reply to the allegations by the Respondent and the District Land Registrar, Kilgoris, the Appellant submits that the Gazette Notice dated 25th July 2003 as well as all the proceedings both at the Kakamega High Court Civil Suit No.103 of 2003 as well as Kisii High Court Civil Suit No. 52 OF 2009 did not include and/or touch on the validity of the property known as L.R.No.Transmara/Shartuka/1584 and



therefore, the legality of the said title was never in question either in the Gazette Notice dated 25th July 2003 or the subsequent proceedings at the Kakamega High Court Or Kisii High Court.

91. Further to that, the Appellant submitted that once the District Land Registrar issued a Certificate of Title to any individual or legal entity, the said title can not be unilaterally cancelled without the beneficiary or registered owner being notified of such an intention or allowed to defend his/her ownership thereof.
92. In essence therefore, the Appellant's position was that the property known as L.R.No.Transmara/Shartuka/1584 was legally in existence and lawful before the eye of the law.
93. To be able to objectively determine this issue, the Honourable Court now turns to the Gazette Notice dated 25th July 2003 which was the subject to the Kakamega High Court Misc. Application No. 103 of 2003.
94. The Gazette Notice dated 25th July 2003 by the Chief Land Registrar which is also captured word by word in the Ruling pronounced on the 4th of June 2004 directed the District Land Registrar, Kilgoris to apply and use the Shartuka Member Register compiled in the year 1992 as the legitimate Register and expunge any titles and/or names of any other person who was not in the Shartuka Group Ranch Ranger of 1992 as directed by the Court of Appeal in Civil Application No. 195 of 1998.
95. Based on this Gazette Notice published on the 25th of July 2003, a number of people filed the proceedings known as Kakamega High Court Misc.application No. 103 of 2003 challenging the validity of the said Gazette Notice and at the end of the said proceedings, the Honourable Court quashed the said Gazette Notice published on the 25th of July 2003.
96. However, before this Honourable Court proceeds any further, it is important to point out that the Gazette Notice published on 25th July 2003 did not specifically identify particular titles to be cancelled and/or expunged save that the Shartuka Group Ranch Membership of 1992 was what was to be used.
97. The interpretation of the Ruling in Kakamega High Court Misc.application No. 103 of 2003 was therefore to allow back and hold the validity of the membership and/or titles of all those persons who had been given land by the 2nd Committee chaired by the Applicants therein.
98. As to whether the ownership of the Respondent was affected in the Gazette Notice of 25th July 2003 and proceedings known as Kakamega High Court Misc.application No. 103 of 2003 is an issue to be proved by the Respondent and the District Land Registrar, Kilgoris.
99. As regards the Kisii High Court Judicial Review No. 52 OF 2009, in which the Respondent was a party too, the Honourable Court was dealing with a Contempt of Court Application against the Director of Survey and other Government officials as appertains the preparation of Registered Index Maps and issuance of Title Deeds.
100. However, from the facts of the said Ruling, the properties that were under litigation had been specifically pleaded therein and the Appellant's property known as L.R.No.Transmara/SHartuka/1584 was not among those subject to the Court's proceedings.
101. Unfortunately, even after this Honourable Court going through the Gazette Notice dated 25th July 2003 as well as the two High Court proceedings relied upon by the Respondent, it is not able to pick out at what point the property known as L.R.No.Transmara/Shartuka/1584 was ever affected.
102. There are two letters which cannot also escape the attention of this Honourable Court which have also been produced by the Respondent.



103. The first letter is one dated 30th April 2009 from the Chief Land Registrar to the District Land Registrar.
104. In this letter, the Chief Land Registrar is forwarding the Area List of 763 Plots which are numbered between Plots 906 to 1671 and a Registry Index Map Sheets (1-39) for processing of the title documents.
105. According to this letter of 30th April 2009, the Respondent's Plot No.1584 was indeed within those forwarded to the District Land Registrar, Kilgoris for issuance of titles.
106. The second letter from the District Land Registrar, Kilgoris dated 23rd of September 2013 is the one which alleged that the Appellant's title had been cancelled through the proceedings undertaken in Kakamega High Court and the Kisii High Court.
107. In the same letter, the same District Land Registrar, Kilgoris states that the Respondent's property known as L.R.No.Transmara/Shartuka/209 shares a common boundary with the Appellant's property known as L.R.No.Transmara/Shartuka/1584.
108. If indeed the Appellant's property known as LR.No. Transmara/Shartuka/1584 did not exist, how come it is identifiable on the ground to be sharing a boundary with the Respondent's property known as L.R.No.Transmara/Shartuka/209.
109. The only conclusion that this Honourable Court can arrive at is that the actual plot demarcated as L.R.No.Transmara/Shartuka/1584 is identifiable on the ground but the District Land Registrar, Kilgoris has purported to unlawfully and without giving the Appellant an opportunity to be heard cancelled the records of the said property thereby bring confusion and unnecessary litigations to this Honourable Court.
110. It is therefore this Honourable Court's considered view that the property known as L.R.No.Transmara/Shartuka/1584 is lawfully existing and is the property of the Appellant as contained in the Certificate of Title dated 27th September 2009.

Issue No. 3- Has The Appellant Tresspassed and/or Encroached on To The Respondent's Property Known As L.R.No.Transmara/Shartuka/209?

111. The third issue for determination is whether or not the Appellant has trespassed and/or encroached on the property known as L.R.No.Transmara/Shartuka/209.
112. According to the evidence produced before the Trial Court, the Respondent stated that he took possession and constructed a building and/or house on or about October 2012.
113. However, the Respondent stated he does not know if the said house and/or building was still existing or not.
114. Clearly, from this testimony, the Respondent is not in actual possession and seem not to have been in possession for a length period of time.
115. On the other hand, the Appellant testified that he is currently in occupation of his property known as L.R.No.Transmara/SHartuka/1584 which he has been in occupation since the demarcation exercise in the 1990s.
116. The Respondent in their pleadings did not dispute the Appellant's pleadings by way of a Reply to Defence and similarly, during the cross-examination at the hearing stage, the same was not questioned.



117. Referring to the District Land Registrar's Letter dated 23rd September 2013, the District Land Registrar recognises that the property known as L.R.No.Transmara/Shartuka/209 shares a boundary with the property known as L.R.No.Transmara/Shartuka/1584.
118. This being the case, then the only way to have proved the trespass and/or encroached by the Appellant would be by filing a Surveyor's Report clearly demarcating the said boundary and specifically proving the extent and/or manner in which such an act occurred.
119. Unfortunately, the Respondent did not table such evidence and this Honourable Court cannot make an adverse determination against the Appellant without a trace of evidence.
120. It seems that the Respondent's case was purely based on the cancellation of the Appellant's title over the property known as L.R.No.Transmara/Shartuka/1584 which this Honourable Court has declined to uphold.
121. In essence therefore, this Honourable Court hereby makes a finding that the Respondent's claim that the Appellant has trespassed and/or encroached on his property known as L.R.No.Transmara/Shartuka/209 is not merited.

Issue No. 4- Is The Respondent Entitled to The Orders Sought In The Complaint Dated 26th June 2013?

122. The fourth issue is whether or not the Respondent was entitled to the prayers contained in the Complaint dated 26th June 2013.
123. Based on the determination of this Honourable Court in issues 2 and 3 hereinabove, the Appellant's prayers No. 2,3,4,5,6 and 7 in the complaint dated 26th June, 2013 are hereby denied.
124. The Appellant is only successful in prayer No. 1 of the Complaint dated 26th June 2013.

Issue No. 5- Who Bears The Costs of This Suit?

125. The last issue is who bears the costs of this Appeal and/or the proceedings before the Trial Court.
126. It is settled law that costs follow the outcome of the proceedings.
127. In this case, the Respondent will bear the costs of this Appeal as well as the costs of the Trial Court proceedings.

Conclusion.

128. In conclusion therefore, this Honourable Court hereby makes the following Orders in relation to this Appeal:-
 - a. The Appellants Appeal Against The Judgement And/or Decree of Hon.r.m.oanda Dated 16Th January 2020 In Kilgoris Principal Magistrate's Court Environment & Land Court Case No. 29 Of 2018 Is Upheld.
 - b. The Order No. 2 of The Judgement and/or Decree of Hon.r.m.oanda Dated 16Th January 2020 In Kilgoris Principal Magistrate's Court Environment & Land Court Case No. 29 Of 2018 Is Set-aside Forthwith.
 - c. The Property known as L.R.No.transmara/shartuka/1584 is Lawful And Legally Existing.
 - d. The Said Property known as L.R.No.transmara/shartuka/1584 is The Registered And Beneficial Property of The Appellant Herein.



e. The Deputy Registrar, The Environment & Land Court, Kilgoris Do Serve A Copy Of This Judgement on The District Land Registrar, Kilgoris Within 14 Days From The Date Of Its Pronouncement For Their Knowledge And Further Action.

f. The Respondent Shall Bear The Costs of This Appeal & The Proceedings in The Trial Court.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 20TH SEPTEMBER 2023.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court Assistant: Mr.ngeno

Advocates for the Appellant: Mr.bigogo

Advocates for the Respondent: Ms.ochwal

Advocates for the Interested Parties:

