



**Kosi v Bukura & another (Environment and Land Appeal E014 of 2025)
[2025] KEELC 6264 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6264 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL E014 OF 2025
JO MBOYA, J
SEPTEMBER 25, 2025**

BETWEEN

MOHAMED MUKHTAR KOSI APPELLANT

AND

MOLU KOSI BUKURA 1ST RESPONDENT

COUNTY GOVERNMENT OF MARSABIT 2ND RESPONDENT

JUDGMENT

1. The 1st Respondent [who was the Plaintiff in the subordinate court] filed the Plaint dated 4th April 2024 and in respect of which same sought various reliefs. The reliefs sought are as hereunder;
 - a. A permanent injunction restraining the 1st defendant by himself, his employees, servants, agents from selling disposing off the plot number 483 situated at Moyale Township.
 - b. The 1st defendant be ordered to render true accounts of all monies collected from any tenant and refund back mesne profits to the plaintiff.
 - c. Mandatory orders of injunction do issue compelling the officials of the 2nd defendant to reverse back the entries made at the register green card and reverse back the land to plaintiff.
 - d. Costs of the suit.
 - e. Any other or further relief that this Honourable court may deem fit to grant in the circumstances.
2. The appellant, who was the 1st defendant in the subordinate court duly entered appearance and filed a statement of defence dated 27th March 2024. Subsequently the statement of defence under reference was amended resting with the amended statement of defence and counterclaim dated 8th August 2024. The reliefs sought at the foot of the counter-claim are as hereunder;



- i. A declaration that the 1st defendant is the lawful and or registered proprietor of the suit land that is plot No. 483 situated in Moyale Town – Moyale Sub-County in Marsabit County.
 - ii. A permanent injunction restraining the plaintiff either by himself, agents, servants and or any one claiming under the plaintiff from entering, trespassing onto, cultivating, building, interfering with and or in any other manner dealing with the suit land that is plot No. 483 situated in Moyale Township of Moyale sub county in Marsabit county.
 - iii. An order compelling the 2nd defendant and or its agents to lift any restrictions or caution placed upon the suit land by the plaintiff.
 - iv. Costs of the counterclaim to be borne by the plaintiff.
3. The suit in the subordinate court [details in terms of the preceding paragraphs] was heard and disposed of vide Judgment delivered on 2nd April 2025 whereupon the learned trial magistrate [Hon. W.K Cheruiyot – PM] found and held that the 1st respondent had duly established his claim. In this regard, the learned principal magistrate proceeded to and entered Judgment in favour of the 1st respondent.
 4. On the other hand, though there was a counterclaim that had been filed by the appellant herein, the learned principal magistrate neither determined nor disposed of the same. For good measure, the judgment rendered on the 2nd April 2025 is silent on the fate of the counterclaim.
 5. No wonder the learned counsel for the appellant has contended in one of the grounds of the appeal that the learned Principal magistrate completely disregarded the appellant's Pleading[s]; case; and evidence.
 6. It is the said Judgment which has aggrieved the appellant and thereby provoking the memorandum of appeal dated 30th April 2025. The appellant has raised the following grounds of appeal:
 - i. That the learned magistrate erred in law and in fact by advertently failing to consider the appellant's amended defence and counterclaim dated 8th August 2024, exhibits and final submissions thereon and solely chose to rely on the 1st respondent's exhibits and submissions and in so doing arrived at a completely wrong decision.
 - ii. That the learned magistrate erred in law and in fact by relying on the appellant's defence dated 27th March 2024, yet the same was amended on 8th August 2024, thus completely disregarding the appellant's case.
 - iii. That the learned magistrate erred in fact and in law by deliberating on facts not pleaded by the 1st respondent.
 - iv. That the learned magistrate erred in fact and in law by selectively disregarding the testimony of the 1st respondent in cross-examination.
 - v. That the learned magistrate erred in fact and in law by failing to deliberate on the ability of the 1st respondent to comprehend the English language in order to ascertain whether he could understand the contents of the land transfer form.
 - vi. That the learned magistrate erred in fact by belabouring on facts already admitted by both the 1st respondent and the appellant – the signing of the transfer form.
 - vii. That the learned magistrate erred in fact by stating that the land transfer form had not been signed by county officials, yet on the face of it, the same had been signed and witnessed by the ward administrator in the presence of the other witnesses and approved by the town



administrator and stamped by both the county government of Marsabit as well as the town administrator's stamp.

- viii. That the learned magistrate misdirected himself by determining that the transfer was fraudulent because one of the witnesses signing on behalf of the appellant signed the same after the other parties had signed.
7. The subject appeal came up for directions on the 3rd July 2025; whereupon the advocate for the appellant confirmed that same had indeed filed and served the record of appeal. Furthermore, learned counsel for the appellant proposed to canvass the appeal by way of written submissions. The position by learned counsel for the appellant was acceptable to the respondent. To this end, the court proceeded to and circumscribed the timelines for the filing and exchange of written submissions.
8. The learned counsel for the appellant filed written submissions dated 16th July 2025; and wherein learned counsel has highlighted six [6] key issues. Firstly, learned counsel for the appellant has submitted that the learned trial magistrate erred in fact and in law in finding and holding that the transfer of the suit property in favour of the appellant was illegal and unlawful, yet evidence was tendered to demonstrate that the 1st respondent duly and willingly executed the transfer form dated 28th August 2020. Furthermore, it was submitted that the transfer form was executed in the presence of attesting witnesses and thereafter same was actioned upon by the town administrator on behalf of the County Government of Marsabit.
9. It was the further submissions that the transfer form under reference was equally tendered and produced before the court without any objection by and on behalf of the 1st respondent. In this regard, it has been submitted that the finding by the learned trial magistrate that the transfer in question was unprocedural and fraudulent were arrived at in vacuum.
10. The second issue that has been highlighted by learned counsel for the appellant relates to whether or not the 1st respondent established and proved the plea of fraud. In particular, it was submitted that the 1st respondent neither pleaded nor particularized fraud. Furthermore, it was submitted that the 1st respondent also failed to tender and adduce plausible, cogent and credible evidence to underpin the plea of fraud. Simply put, learned counsel submitted that the findings by the learned trial magistrate on fraud were erroneous and unfounded.
11. The third issue that has been highlighted by learned counsel for the appellant touches on and concerns whether the 1st respondent proved his contention that same was illiterate and was thus incapable of understanding the contents of the transfer form which was executed by himself. In this regard, learned counsel for the appellant has submitted that though the 1st respondent pretended that same was illiterate, evidence was tendered to demonstrate that the 1st respondent was a retired army officer and same understood English. Moreover, it was submitted that the 1st respondent conceded that the military training was being undertaken in both Kiswahili; and English and hence there is no way the 1st respondent could pretend to be illiterate.
12. Furthermore, learned counsel for the appellant has submitted that it was the obligation of the 1st respondent to place before the court credible evidence to demonstrate that same [1st respondent] was incapable of comprehending/understanding the contents of the transfer document which was signed by himself. Unfortunately, learned counsel for the appellant has submitted that the 1st respondent did not discharge the burden as pertains to illiteracy and inability to understand the contents of the transfer form.



13. On the other hand, learned counsel for the appellant has submitted that the learned trial magistrate also ignored and or disregarded the pleadings, the evidence and the submissions that were tendered on behalf of the appellant.
14. To start with, learned counsel for the appellant has posited that though the appellant filed an amended statement of defence and counterclaim dated 8th August 2024; the learned trial magistrate did not allude to and or reference same in his judgment. Furthermore, it was also submitted that the learned trial magistrate did not address the issues raised vide the counterclaim.
15. Additionally, learned counsel for the appellant has also submitted that the learned trial magistrate also failed to take into account the list and bundle of documents dated 8th August 2024; and in particular, the document and evidence showing that the 2nd respondent had confirmed that the suit property lawfully belonged to the appellant.
16. Next is the issue pertaining to the contention that the learned trial magistrate proceeded to and addressed issues which were neither pleaded nor canvassed by the parties. In particular, it was submitted that the question of the design of the form and the validity of the transfer form, were never raised nor canvassed by the parties. Nevertheless, it was submitted that the learned trial magistrate proceeded to and anchored his judgment on the said issues. To this end, learned counsel for the appellant has submitted that the learned trial magistrate committed a grave error and breached the doctrine of departure.
17. The counsel for the appellant has also highlighted the question that the learned trial magistrate addressed the absence of letters of administration on the part of the appellant. In this regard, it was submitted that the learned trial magistrate proceeded to find and hold that the transfer of the suit property in favour of the appellant was equally illegal in so far as the appellant had not procured and or obtained letters of administration on behalf of the estate of his [appellant's] deceased father.
18. The final issue that has been raised by the appellant concerns the question of proof of trust. It was submitted that evidence was tendered before the trial court showing that the suit property was registered in the name of the 1st respondent to hold on trust for the father of the appellant. Furthermore, it was contended that the 1st respondent herein had himself conceded and confirmed during the elders meeting that same [1st respondent] held the suit property on trust for the father of the appellant.
19. In addition, learned counsel for the appellant has submitted that the learned trial magistrate also failed to take into account and or consider the import of section 38 (2) of the *Land Act*, 2012; which speaks to the creation of trust. Further, and in any event, it was submitted that the defect [if any], in the transfer form could not invalidate and or negate the existence of trust in respect of the suit property.
20. Flowing from the foregoing, learned counsel for the appellant has submitted that the impugned judgment by the learned principal magistrate is fraught with several errors, including failure to address the counterclaim by the appellant. In this regard, the appellant has invited the court to find and hold that the appeal is merited.
21. Learned counsel for the 1st respondent filed written submissions dated 26th July 2025; and wherein same has highlighted and canvassed three [3] key issues, namely; whether the trial court erred in finding that the suit property belongs to the 1st respondent; whether the appellant proved the existence of a trust or a valid transfer in his favour; and whether the transfer to the appellant was fraudulent, null and void.
22. Regarding the first issue, learned counsel for the 1st respondent has submitted that the 1st respondent tendered and produced before the trial court cogent and credible evidence demonstrating allotment



and registration of the suit property in his name. To this end, learned counsel for the 1st respondent has submitted that the totality of the document which were tendered by the 1st respondent including a copy of the green card form the county council of Marsabit; the plot rents payment receipts; minutes of arbitration and a letter from Muktar Kosi Bukura (deceased) dated 4th September 1994, clearly proved that the 1st respondent was the lawful allottee/owner of the suit property.

23. On the contrary, learned counsel for the 1st respondent has submitted that the appellant herein did not tender and or produce before the court any evidence to show/demonstrate that the suit property was held on trust for his/appellant's father [now deceased]. Moreover, it was submitted that if there ever existed trust then the appellant's father should have dealt with same during his lifetime, which was not the case.
24. It was the further submissions by learned counsel for the 1st respondent that other than the documentary evidence which had been tendered to confirm ownership, the 1st respondent was also the one in occupation of the suit property. To this end, it was submitted that possession; development on the land; and recognition by the local authority confirm that the First Respondent was the lawful owner of the suit property.
25. The second issue that has been highlighted by learned counsel for the 1st respondent relates to the issue of trust. In this regard, learned counsel for the 1st respondent has submitted that the appellant did not tender and produce any evidence to show that the suit property was being held on trust. In particular, learned counsel for the 1st respondent has submitted that it was incumbent upon the appellant to demonstrate trust by producing evidence, which was not the case.
26. It was the further submissions by learned counsel for the 1st respondent that the appellant herein sought to rely on the minutes arising from a meeting held in 1994. However, learned counsel for the 1st respondent has submitted that the minutes which the appellant sought to rely on were misleading and in any event, non-existent.
27. Turning to the third issue, namely; whether the transfer of the suit property in favour of the appellant was fraudulent, it has been submitted that the 1st respondent tendered evidence to demonstrate that the execution of the transfer form was procured by fraud, misrepresentation and false pretense. Moreover, learned counsel for the 1st respondent submitted that the appellant herein exploited the illiteracy of the 1st respondent and procured the execution of the transfer form without duly informing the 1st respondent of the ingredients/contents thereof. To this end, learned counsel for the 1st respondent has referenced the provisions of section 44 of the [Land Registration Act](#) which underpin the essential elements of a valid transfer form.
28. It was the further submission by learned counsel for the 1st respondent that the transfer form which was relied upon by the appellants to procure the transfer and registration of the suit property in his [appellants name] was also deficient in material particulars. Notably, learned counsel for the 1st respondent submitted that the impugned transfer form was not endorsed and or acted upon by the town management committee; and the county officials; and thus the transfer form was defective.
29. Based on the foregoing submissions, learned counsel for the 1st respondent has submitted that the impugned Judgment of the learned Principal magistrate took into account the relevant legal principles. In this regard, learned counsel for the 1st respondent has invited the court to affirm the Judgment and the consequential decree.
30. Having reviewed the record of appeal the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed on behalf on behalf of the respective parties, I come



to the conclusion that the determination of the subject appeal turns on four [4] key issues, namely; whether the 1st respondent duly established and proved his case before the subordinate court to the requisite standard or otherwise; whether the Judgment by the learned trial magistrate took into account erroneous and extraneous issues and thus violated the doctrine of departure; whether the learned trial magistrate disregarded the pleadings and evidence tendered by the appellant; and whether the appellant proved the plea of trust or otherwise.

31. Before venturing to interrogate and address the issues highlighted in the preceding paragraph, it is imperative to highlight that what is before me is a first appeal. To this end, it suffices to underscore that this court is seized of the jurisdiction to review the evidence on record and to ascertain whether the factual and legal conclusions arrived at accord with the evidence and the law. Furthermore, it is instructive to observe that this court is at liberty to arrive at an independent conclusion and, where appropriate, to depart from the conclusions and or findings of the trial court.
32. Nevertheless, it is important to underscore that even though the court is seized of the jurisdiction to depart from the factual and legal conclusions arrived at by the trial court, such departure can only be undertaken where it is shown that the findings/conclusions were arrived at on the basis of no evidence; were perverse to the evidence on record; were based on misapprehension of the evidence on record; or where it is shown that the trial court committed an error of principle which vitiates the findings under reference. Simply put, the first appellate court cannot depart from the findings and conclusions of the trial court at will.
33. The jurisdictional remit of the 1st appellate court has been the subject of various pronouncements by the Court of Appeal. In the case of *Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment)* the court stated thus;
37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions.

These provisions have been underscored in numerous decisions of the Superior Courts, among them *Peters v Sunday Post Limited [1958] EA 424*, where the predecessor to this Court expressed itself as follows:

“Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law, an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived



at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...

Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

34. Regarding the first issue, namely; whether the 1st respondent established and proved his claim before the subordinate court, it is imperative to recall and reiterate that it is the 1st respondent who approached the subordinate court challenging the transfer and registration of the suit property [Plot No 483 Moyale Township] in the name of the appellant.
35. To the extent that it is the 1st respondent who had laid the claim before the subordinate court and made the various assertions, the burden of proof lay on the shoulders of the 1st respondent to prove his case. It is common ground that the standard of proof was / is on a balance of probability. [see James Muniu Mucheru v National Bank of Kenya Limited [2019] eKLR - Civil Appeal 365 of 2017; Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR); Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] KEHC 8440 (KLR) and Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment), respectively]
36. What was the 1st respondent's case? The 1st respondent had contended that in 2020, the appellant herein took to him a written document which the appellant sought to have the 1st respondent execute. The 1st respondent posited that same inquired about the contents of the document under reference since he was illiterate and does not understand English. Moreover, the 1st respondent averred that the appellant herein informed same that the 2nd respondent [the county government of Marsabit] had



- requested for a written authority from the 1st respondent to enable the appellant pay the land rates and undertake general management of the suit property.
37. Furthermore, the 1st respondent contended that same proceeded to and executed the document on the basis of trust. In addition, the 1st respondent averred that he did so because same did not discern any issue of breach of trust from the appellant [his nephew].
38. The appellant's case turns on the question of fraud, misrepresentation, false pretence and breach of trust. Nevertheless, it is instructive to observe that the Plea that was filed by the appellant did not explicitly implead the various ingredients underpinning the causes of action that were being propagated by the 1st respondent
39. The question that arises beforehand is whether the 1st respondent herein was at liberty to canvass and or propagate a claim based on fraud. Furthermore, the incidental question is whether the learned trial magistrate could entertain and pronounce himself on the question of fraud or otherwise.
40. To start with, it is common ground that where a party, the 1st respondent not excepted, is desirous to propagate the plea of fraud then such a party is obliged to expressly plead fraud and thereafter supply the requisite particulars. Absent an explicit plea of fraud; and particulars thereof, the cause of action based on fraud is negated.
41. The necessity to explicitly implead fraud and supply the particulars thereof is highlighted by the provisions of Order 2 (4) of the Civil Procedure Rules, 2010.
42. The said provision stipulates thus:-
1. A party shall in any pleading subsequent to a plaint plead specifically any matter, for example, performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
 - (a) which he alleges makes any claim or defence of the opposite party not maintainable;
 - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
 - (c) which raises issues of fact not arising out of the preceding pleading.
 - (2) Without prejudice to sub-rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.
 - (3) In this rule, "land" includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land
43. My understanding of the wording of order 2(4) of the Civil Procedure Rule [supra] drives me to the conclusion that in the absence of an explicit plea of fraud together with the attendant particulars, the 1st respondent was non-suited.
44. The legal principle underpinning the plea of fraud has been expounded by the Court of Appeal in a plethora of decisions. In the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) the Court stated as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It



is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

45. Recently the Court of Appeal re-visited the necessity to implead fraud and to supply particulars thereof in the case of *Doshi v Chemutut & 7 others* (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment). For coherence, the court stated thus:-

In the same vein, the Court in the case of *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR reiterated that: “It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008] 1 KLR (G&F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

46. Turning to the aspect as pertains to proof, it is important to highlight that it was incumbent upon the 1st respondent to place before the court, plausible, cogent and credible evidence to demonstrate that the execution of the transfer form was fraudulent. In this respect, it is worthy to underscore that the 1st respondent’s position was to the effect that same was illiterate and did not comprehend English. In this regard, the 1st respondent posited that he proceeded to execute the transfer from without being aware of the contents thereof.
47. Put differently, it was the contention by the 1st respondent that the appellant herein induced same to execute the transfer form whose contents were in English even though the 1st respondent was not conversant with English. Moreover, the 1st respondent posited that the appellant took advantage of his [1st respondent ‘s] illiteracy to procure the offensive transfer of the suit property.
48. Did the 1st respondent prove and establish his illiteracy? It suffices to state that the 1st respondent herein is a retired army officer who currently lives and or resides in Rongai within the county of Kajiado. Furthermore, it is not lost on me that the 1st respondent herein duly testified before the trial court and indeed informed the trial court that he was in the military. Furthermore, the 1st respondent averred that the training in the military was being done in Swahili, English and military language.
49. To appreciate the testimony of the 1st respondent [PW1] as concerns [sic] his illiteracy, it is instructive to reproduce the testimony of the witness while under cross-examination by learned counsel for the appellant.

50. The witness stated thus:-

“I was in the military. The training is done in Swahili, English and our military language. I don’t understand English.”

51. While under re-examination, the 1st respondent stated thus:-

“In military, we were trained in English and Swahili. I don’t know English. I signed the transfer form. I did not know what it contained.”

52. There is no gainsaying that the 1st respondent herein undertook the military training and thereafter same worked with the military until his retirement. The fact that the 1st respondent successfully



- underwent the military training is sufficient evidence to demonstrate that the 1st respondent understood English. In this regard, the contention by the 1st respondent that same could not comprehend the contents of the transfer form is not only pretentious; but laced with dishonesty.
53. On the other hand, though the 1st respondent had also said that same is illiterate, evidence abounds that the 1st respondent is not illiterate. Suffice it to highlight that the 1st respondent testified before the trial court and underwent cross-examination in Kiswahili. I am afraid that [sic] an illiterate person could not have conducted himself in Kiswahili language.
54. Be that as it may, it is not lost on me that the 1st respondent bore the burden of proving the fraud [if any] to the requisite standard. Instructively, the plea of fraud is to be proven to a standard above the balance of probability but below beyond a reasonable doubt. Simply put, the standard of proof in matters fraud is the intermediate standard.
55. In the case of *Kuria Kiarie & 2 others v Sammy Magera* [2018] KECA 467 (KLR), the Court of Appeal expounded on the standard of proof as hereunder:-
- “26. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows;-
- “...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
56. Flowing from the foregoing, it is my finding and holding that the 1st respondent herein neither pleaded fraud in the prescribed manner nor proved fraud. To this end, I am afraid that the finding by the learned trial magistrate that the transfer of the suit property in favour of the appellant was fraudulent is not legally tenable. For good measure, the finding and holding under reference were arrived at on the basis of no evidence. Moreover, the said findings are perverse to the totality of the evidence on record.
57. Next is the issue as to whether the Judgment by the learned trial magistrate took into account erroneous and extraneous issues and thus violated the doctrine of departure. It is instructive to underscore that courts of law are called upon to entertain and adjudicate upon the issues and matters captured vide the pleadings of the parties. Simply put, a court of law cannot go beyond the four corners of the issues pleaded by the parties.
58. On the other hand, it is also common ground that the parties are similarly bound by their pleadings. To this end, the parties, just as the court of law, cannot canvass issues which were neither pleaded nor addressed in their pleadings. Moreover, the parties are also prohibited from adducing evidence that is at variance with the pleadings filed.
59. The provision of Order 2(6) of the Civil Procedure Rules, 2010; which underpins the doctrine of departure states as hereunder:-



1. No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.
(2)Sub-rule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.
60. Furthermore, the legal implication of the doctrine of departure and more particularly that parties are bound by their pleadings was highlighted in the case of Independent Electoral and Boundaries Commission & another v Mule & 3 others (Civil Appeal 219 of 2013) [2014] KECA 890 (KLR) (31 January 2014) (Judgment) For coherence the court of appeal stated thus:-

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings. For the sake of certainty and finality, each party is bound by its own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the Court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”
61. The parties before the court had framed and pleaded their issues as captured in the pleadings filed. To the extent that the parties had highlighted the issues for determination, it was incumbent upon the trial court to address the issues pleaded and not to go on a frolic on its own. Suffice it to posit that the court itself is bound by the pleadings. Furthermore, it is common ground that the court could not raise and or advert to issues other than the ones pleaded.
62. Despite the established principle under reference, it is evident that the learned trial magistrate did not only abdicate his solemn duty; but same ventured outside the pleadings and sought to determine extraneous issues. The extraneous issues thereafter coloured the judicial mind of the trial court and thus lead to a slanted/ skewed decision.
63. It is instructive to point out that the learned trial magistrate took it upon himself and thereafter addressed and determined the issue as to the design of the transfer form; the failure by the certain county official to execute the form; and the segment thereof which was left vacant.
64. On the basis of his own hypothesis, the learned trial magistrate came to the conclusion that the transfer of the suit property on the basis of the form was null and void ab initio.
65. I beg to state that the issues that had been raised by the 1st respondent turned on and concerned the fact that same executed the transfer form without knowing its contents. On the contrary, the 1st respondent did not plead the design of the transfer form, whether or not some segments of the form were left blank; and whether the form itself was valid. Simply put, these were issues that were originated by the trial court.



66. To my mind, the manner in which the learned trial magistrate generated own issues; proceeded on a hypothesis and thereafter came to the conclusion that the transfer form was null and void constitutes a grave misdirection. Similarly, the learned trial magistrate committed an error of principle which goes to the root of the impugned Judgment.[See *Odd Jobs Vs. Mubia* [1970]E.A. 476]
67. Turning to the third issue, learned counsel for the appellant has submitted that the learned trial magistrate disregarded and ignored the amended statement of defence and the counterclaim that was filed on behalf of the appellant. In particular, learned counsel for the appellant has posited that the appellant sought and obtained leave to file an amended statement of defence. The leave was granted on 19th June 2024. Thereafter, the record confirms that the appellant proceeded to and filed an amended statement of defence and counter-claim.[see the proceedings of 14th August 2024.]
68. Despite the fact that the appellant had filed a statement of defence and counterclaim, it is clear that the learned trial magistrate did not take cognizance of the amended statement of defence and counterclaim. For coherence, the learned trial magistrate referenced and took into account the statement of defence dated 27th March 2024; which had been amended and thus rendered extinct by operation of the law.
69. Additionally, it is not lost on me that the learned trial magistrate also failed to determine and dispose of the counterclaim. For good measure, the Judgment under reference does not allude to the counterclaim or at all. It is not known whether that counterclaim was dismissed or allowed.
70. In my humble, albeit considered view, it behooved the learned trial magistrate to entertain the dispute canvassed before him and thereafter to dispose of all the issues with finality. In fact, a failure to dispose of and determine all the issues placed before the court constitutes abdication [dereliction] of judicial duty.
71. In this regard, I agree with the submissions by learned counsel for the appellant that the learned trial magistrate actually disregarded and ignored the pleadings filed by the appellant; as well as the salient aspects of the appellant's case. Simply put, the complaint under reference is well grounded.
72. Next is the issue as to whether the appellant established and proved his claim based on trust. It is instructive to observe that the appellant herein filed an amended statement of defence and counterclaim. However, there is no gainsaying that the appellant did not particularly plead trust. Same also did not supply the particulars underpinning the plea of trust.
73. It is important to underscore that it was incumbent upon the appellant to comply with the provisions of order 2(4) and order 2 (10) of the Civil Procedure Rules 2010.
74. Other than the fact that the appellant did not supply the particulars of trust, it is also important to state that proof of trust requires plausible and credible evidence. However, in respect of the instant matter, the appellant did not tender any evidence to demonstrate the existence of trust. Further and in any event, the appellant's claim based on trust was so convoluted to the extent that it was not possible to discern whether the case was based on resulting trust; implied trust; constructive trust; or better still customary trust.
75. I beg to state that it is the obligation of the parties to plead their cases with reasonable precision so as to enable a court of law to comprehend the issues in dispute. Suffice it to state that it is not the business of the court to grope in darkness; and travel in wonderland to comprehend whether the parties' case could be this one or the other one. [See *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] KECA 445 (KLR)at paragraph 41 thereof.]



76. I am afraid that the plea of trust was neither pleaded in the prescribed manner nor was sufficient evidence tendered.
77. Be that as it may, it is important to recall and reiterate that I have since found and held that the execution of the transfer form dated 20th August 2020 and the consequential transfer of the suit was not fraudulent. In this regard, the transfer in favour of the appellant was lawful; valid; and thus vested ownership of the suit property in the appellant.

Final Disposition.

78. Having analysed the various issues that were captured in the body of the Judgment, it must have become evident that the impugned Judgment rendered on the 2nd April 2025; was laced with grave mis-directions.
79. Consequently, and in this regard, the Judgment invites the intervention of this court.
80. In the upshot, the final orders that commend themselves to the court are as hereunder.
- a. The Appeal be and is hereby allowed.
 - b. The Judgment of the learned Principal Magistrate dated 2nd April 2025 and the consequential decree be and are hereby set aside.
 - c. In lieu thereof, the 1st respondent's suit vide Complaint dated 4th March 2024 be and is hereby dismissed.
 - d. The Appellant's counterclaim dated 8th August 2024 be and is hereby allowed on the following terms:-
 - i. A declaration be and is hereby made that the appellant [1st defendant] in the subordinate court is the lawful and registered proprietor of plot No. 483 Moyale town-Moyale Sub-county in Marsabit county [the suit plot]
 - ii. An order of permanent injunction be and is hereby issued restraining the 1st respondent, either by himself agent servants and or anyone claiming under him from entering upon, trespassing on to building on and or in any other way interfering with the appellant's occupation, possession and use of the suit property.
 - iii. The 2nd Respondent be and is hereby ordered/ directed to discharge, remove and or vacate any restrictions/ caution placed/ registered against the title of the suit property by the 1st respondent.
 - e. Cost of the appeal be and are hereby awarded to the Appellant.
 - f. The appellant is also awarded cost of the suit and the counter-claim in the subordinate court.
81. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 25TH DAY OF SEPTEMBER 2025.

OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein/Mukami – Court Assistant



Ms. Kemboi for Appellant

Mr Onkendi for the 1st Respondent

N/A for the 2nd Respondent.

