

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCLA CASE NO. E041 OF 2023

HARRIET GACHOGA KIRIMA APPELLANT

VERSUS

MARGARET KANYIRIRESPONDENT

JUDGMENT:

1. The Appellant herein [*who is an Elder sister of the Respondent*] approached the court *vide* **Plaint** dated **8th October 2019** and wherein the Appellant sought various reliefs. The reliefs at the foot of the **Plaint** are as hereunder;

- a) *A declaration that LR. NO. KIRIMARA/KITHITHINA BLOCK 1/192 is private land hence family land and the Plaintiff's rights and occupation of the same has arisen due to her considerable long-time possession and development of 70 points of an acre of land thereon and an order be issued that 70 points of an acre be transferred to her.*
- b) *An order directing the defendant to subdivide LR. No. KIRIMARA/KITHITHINA BLOCK 1/192 and register 70 points of an acre in the names of the Plaintiff and in the event of the Defendant failing to do so, the Executive Officer of the court do sign all the requisite transfer documents to effect the transfer of 70 points of an acre of land thereof in the names of the Plaintiff.*
- c) *A permanent injunction to restrain the Defendant from interfering with the Plaintiff's portion measuring 0.70 points of an acre.*
- d) *Costs and interests at court rates.*

- e) *Any other relief this court may deem necessary.*
2. The Defendant duly entered appearance and thereafter filed a Statement of Defense and Counterclaim dated **2nd December 2019**. The Defendant sought the following reliefs at the foot of the counterclaim;
- a) *An order directed to the district land registrar to remove caution registered against KIRIMARA/KITHITHINA BLOCK 1/192 at the instance of the Plaintiff.*
 - b) *An order of permanent injunction do issue to restrain the plaintiff by herself and, or her servants, workmen, agents, heirs, personal representatives or otherwise whatsoever from dealing with, purporting to enter, access, remain on, getting ingress into, erecting any structures thereon, trespassing onto, or from in any way whatsoever interfering with the defendant's peaceful possession and enjoyment of the parcel of land known as KIRIMARA/KITHITHINA BLOCK 1/192.*
 - c) *An order directing the Plaintiff, her family, or anybody claiming under her to give vacant possession of the suit property.*
 - d) *Cost of the suit.*
3. The suit before the subordinate court was heard and disposed of *vide* Judgement rendered on **5th October 2023** whereupon the Learned Trial Magistrate [Hon. T. M Mwangi SPM] held that the Plaintiff had failed to prove her claim based on customary trust. To this end, the Learned Trial Magistrate proceeded to and dismissed the Plaintiff's [Now Appellant's] case. On the contrary, the Learned Trial Magistrate found and held that the Respondent had established/proven the counterclaim. In this regard, the learned trial magistrate granted prayers [a] and [b] of the counterclaim.
4. It is the said Judgement that has aggrieved the Appellant. To this end, the Appellant has now approached this court *vide* Memorandum of Appeal

dated **1st November 2023** and wherein same [Appellant] has highlighted the following grounds:

- i. *The Learned Trial Magistrate erred in law and fact by failing to find that suit land L.R. No. KIRIMARA/KITHITHINA BLOCK 1/192 belonged to the parties farther and the land was not the absolute property of the Respondent.*
- ii. *The Learned Trial Magistrate further erred in law and fact in that he found that the Appellant was occupying 0.7 Ha through her daughter when there was no evidence to support such a finding.*
- iii. *The Learned Trial Magistrate erred in law and fact in that he failed to find that the Appellant's entry into the suit land was lawful since part of the land belonged to her late father as demonstrated by the evidence which was adduced by the appellant and her witnesses.*
- iv. *The Learned Trial Magistrate erred in law and fact by finding that the one acre which was given to the respondent by her father was located elsewhere when there was no evidence to support such a finding.*
- v. *The Learned Trial Magistrate erred in law and fact by finding that the appellant could not claim overriding interest in the suit land since she was not in possession of part of the land when there was overwhelming evidence that she was in occupation of the land before the subdivision of the mother land.*
- vi. *The Learned Trial Magistrate erred in law and fact by finding that the appellant's occupation was not protected despite the evidence that the suit land was part of the resultant subdivision from the original land L.R NO. KIRIMARA/KITHITHINA BLOCK 1/192 as evidenced by the mutation form which was adduced before the court.*

- vii. *The Learned Trial Magistrate erred in law and fact in that he found that the appellant did not prove her case and that the respondent proved her counter-claim against the appellant.*
 - viii. *The Learned Trial Magistrate erred in law and fact that he failed to consider the appellant's submissions and the judicial authorities thereof despite the same having been relevant to the case.*
 - ix. *The decision of the trial magistrate is against the weight of evidence and is bad in law.*
5. The subject appeal came up for directions on **7th April 2025**; whereupon the Advocates for the Appellant intimated to the court that same had filed and served the Record of Appeal. Nevertheless, learned counsel for the appellant sought and obtained leave to file and serve a Supplementary Record of Appeal to include a Certified copy of the decree appealed against.
 6. On **20th May 2025**, Learned counsel for the Appellant and the Respondent reverted to court and confirmed the filing and exchange of the maiden record of appeal and the supplementary record of appeal. Furthermore, the advocates for the parties covenanted to canvass the appeal by way of written submissions.
 7. Flowing from the foregoing, the court proceeded to and issued directions pertaining to the filing and the exchange of written submissions. In addition, the court also circumscribed the timelines for the filing of the submissions.
 8. The Appellant filed written submissions dated **9th July 2025** and wherein the appellant raised two [2] key issues, *namely*; that the learned trial court failed to interrogate and properly appreciate the totality of the evidence tendered by the appellant; and the learned trial magistrate erred in finding that the Appellant was a trespasser on the suit property.

9. Regarding the first issue, learned counsel for the appellant has submitted that the Appellant and her witnesses tendered and produced plausible and credible evidence to demonstrate that a portion of the suit property was purchased and acquired by the father of the parties. Nevertheless, it was submitted that the said portion was included in and thus formed part of the suit property.
10. It was the further submission by learned counsel for the appellant that in so far as a portion of the suit property was bought by the father of the parties and same is included in the suit property; and coupled with the fact that the appellant has been in occupation of 0.70 points of an acre, the said portion was stated to be held by the respondent on trust [customary trust] for the appellant.
11. Additionally, it was submitted that the portion under reference is clearly marked on the ground and furthermore same has been under the occupation of the Appellant. In this regard, learned counsel for the Appellant has cited and referenced the decision of the Supreme Court in the case of *Kiebia v M'lintari & another (Petition 10 of 2015) [2018] KESC 22 (KLR) (5 October 2018) (Judgment)*.
12. Next is the issue of whether the respondent demonstrated and proved that the appellant was/is a trespasser. To this end, learned counsel for the appellant has submitted that the Respondent did not tender and or produce any credible evidence to demonstrate that the Appellant was a trespasser on the suit property. In any event, it was posited that the portion of the suit property constituted part of the land belonging to the father of the appellant and the Respondent, respectively.
13. Premised on the foregoing, learned counsel for the Appellant has invited the court to find and hold that the appeal beforehand is meritorious and thus same ought to be allowed. Instructively, counsel implored the court

to allow the appeal and grant the reliefs that were sought at the foot of the plaint dated **8th October 2019**.

14. The Respondent filed written submissions dated 21st July 2025 and wherein same has raised and canvassed two [2] key issues, *namely*, that the Appellant has failed to tender and produce any credible evidence that the suit property was family land or at all; and the Appellant has failed to establish/prove that same has been in occupation of a portion measuring 0.70 points of an acre.
15. In respect of the first issue, learned counsel for the Respondent has submitted that even though the Appellant contended that the suit property is family land, the appellant has however, failed to tender and or avail any plausible or cogent evidence to demonstrate that the suit property or any portion thereof belonged to their deceased father. In particular, it has been submitted that no document has been produced.
16. To the extent that the Appellant failed to tender and or produce any evidence to connect the suit property to their deceased father, it was submitted that the Appellant has thus failed to demonstrate a critical ingredient underpinning a claim of customary trust. Moreover, it was submitted that the suit property herein did not form part of the 'Will' of the Appellant's deceased father. Further and in any event, counsel posited that the father of the Appellant and Respondent died testate and if the suit property formed part of his [deceased estate] same would have been included in the will.
17. Additionally, learned counsel for the Respondent has submitted that the Respondent herein tendered and produced evidence showing that the suit property arose from the sub-division of LR. No. KIRIMARA/KITHITHINA BLOCK 1/192 [the Original Property]. Furthermore, it was submitted that the original property was

purchased/acquired by Nahashon M’Nabea Taranga and the Respondent from Mutethia Society Limited. Counsel posited that the original property that birthed the suit property did not belong to the father of the Appellant and the Respondent.

18.Regarding the second issue, learned counsel for the Respondent has submitted that the Appellant has also failed to tender evidence to demonstrate that same has been in occupation and possession of a portion of the suit property. For good measure, it has been submitted that the Appellant has merely trespassed onto the suit property and same is now seeking to rely on the previous occupation of a portion of the suit property by her deceased daughter to stake a claim to the suit property. Nevertheless, learned counsel has posited that the Appellant has no proprietary rights to and in respect of the suit property.

19.Flowing from the foregoing, learned counsel for the Respondent has invited the court to find and hold that the subject appeal is *devoid* of merit[s]. To this end, the court has been implored to dismiss the appeal with costs to the Respondent.

20. Having reviewed the Record of Appeal, the pleadings filed by the parties, the evidence tendered [*both oral and documentary*] and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the appeal turns on two [2] key issues, *namely*; whether the Appellant has established and proved the plea of customary trust or otherwise; and whether the Respondent is the lawful proprietor of the suit property and if so whether same is entitled to exclusive possession and use or otherwise.

21. Before venturing to address the thematic issues, which have been identified and highlighted in the preceding paragraph, it is imperative to underscore that what is before me is a first appeal. In this regard, it suffices to highlight that this court is vested with the jurisdiction to undertake exhaustive scrutiny, appraisal, review, and evaluation of the entire evidence that was tendered before the trial court and thereafter to determine whether the factual findings and conclusions by the trial court accord with the evidence or otherwise.

22. In addition, it is instructive to observe that this court is at liberty to form and arrive at an independent conclusion. Moreover, the court is also at liberty to depart from the findings and conclusions of the trial court. Nevertheless, it is paramount to highlight that even though this court is at liberty to arrive at an independent conclusion, the liberty is however, circumscribed by certain factors. Simply put, the liberty is not at large and can only be deployed where it is shown that the trial court acted on no evidence; the findings are perverse to the evidence on record; the findings are premised on misapprehension of the evidence on record; or where it is demonstrably shown that there is an error of principle which vitiates the conclusions arrived at by the court.

23. The jurisdictional remit of the first appellate court has been considered in various decisions. Recently, the parameters underpinning the scope of the first appellate court's jurisdiction were expounded 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)*** where the Court of Appeal held as hereunder;

“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.”

24. With the foregoing in mind, I am now well disposed to revert to the issues and to interrogate same. I shall commence with the first issue, *namely*; whether the Appellant has established and proved the plea of customary trust or otherwise.

25. The Appellant herein approached the subordinate court contending that the suit property or part thereof belonged to Javan M’Mutiga [now deceased] who was the father of the Appellant and the Respondent respectively. Moreover, the Appellant posited that even though part of the suit property belonged to their deceased father, same is now registered in the name of the Respondent.

26. Additionally, the Appellant contended that the suit property constitutes family land and thus the Respondent is holding same [suit property] on trust for herself and for the Plaintiff herein. In any event, it was posited that the registration of the suit property and in particular, the part that belonged to their deceased father gives rise to trust. To this end, the appellant invited the court to find and hold that same is therefore entitled to a declaration of customary trust.

27. It is also important to highlight that the Appellant proceeded to and particularized trust; and particularized breach or [sic] what was touted to be breach of trust.

28. Importantly, the Appellant’s claim that a portion of the suit property is held on trust for her stems from the contention and belief that a portion of

what constitutes the suit property belonged to their deceased father. In this regard, the Appellant tendered evidence and posited that their deceased father bought a portion measuring one acre and which portion was added to half acre purchased by the Respondent, culminating into what is now the suit property. It is the said one-acre portion which the appellant claims to be entitled to 70 points of an acre.

29. To the extent that the Appellant contended that the suit property forms and or constitutes family land, it was incumbent upon the Appellant to tender and place before the court evidence to show that the suit property previously belonged to their deceased father before same was transferred to and registered in the name of the Respondent.
30. Suffice it to posit that it behooved the Appellant to tender evidence that it is Javan M'Mutiga who bought [sic] the suit property or any portion thereof from Mutethia Society Limited. Furthermore, it also behooved the Appellant to tender and place before the court evidence of any transfer instrument as well as a copy of the green card [if any].
31. Despite the obligation on the shoulders of the Appellant to tender and prove her claim that the suit property or a portion thereof was family land, same [Appellant] failed to tender any credible evidence. Instructively, proof and or demonstration that the suit property was/constituted family land is a key ingredient on the pathway to demonstrating customary trust.

32. The Supreme Court of Kenya in the case of ***Kiebia v M'lintari & another*** (***Petition 10 of 2015***) [***2018***] ***KESC 22 (KLR)*** (***5 October 2018***) (***Judgment***), held as hereunder;

*“52. Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee 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.”*

33. The need to tender credible evidence to prove a claim based on trust, whether it be resulting trust, implied trust, or customary trust, was also highlighted by the Court of Appeal in the case of **Kazungu Fondo Shutu & another v Japhet Noti Charo & Another [2021] KECA 592 (KLR)**, where the court stated as hereunder;

“28. The concept of trust must however, be proved. This Court in the case of Mumo v Makau [2002] 1EA.170, held that “trust is a question of fact to be proved by evidence....” See also Kanyi Muthiora v Maritha Nyokabi Muthiora, Nairobi Court of Appeal No. 19 of 1982.

29. *In Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR, this Court dealt with the issue of trust at length. The Court made reference to Twalib Hatayan Twalib Hatayan & Anor v Said Saggar Ahmed Al-Heidy & Others [2015] eKLR and re-stated the law on trusts as follows: -*

“According to the Black’s Law Dictionary, 9th Edition; a trust is defined as

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the Trustee Act, "... the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property..."

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories: constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrongdoing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ...

This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p. 175). Therefore, unlike constructive trusts where unknown intentions may be left unexplored, with resulting trusts, courts

will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another is immaterial (see Snell's Equity at p. 177) (supra)."

31. As earlier stated, the existence of a trust is a question of evidence. In the Juletabi case (supra), the court held that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because:

"The law never implies, the Court never presumes a trust, but [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

34. Before concluding on this issue, it is pertinent to underscore that whereas courts are at liberty to construe and decree trust where appropriate, however, it is imperative to observe that the existence of trust must only be construed in cases of absolute necessity and subject to credible evidence being tendered. The presumption of trust must be made with the sole purpose of giving effect to the intention of the parties; and not to confer unjust enrichment on the Claimant. [See *Peter Ndungu Njenga vs Sophia Watiri Ndungu [1998] KECA 150 (KLR); Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others [2015] KECA 713 (KLR)*]

35. Flowing from the foregoing, my answer to issue number one is to the effect that the Appellant neither tendered nor produced plausible evidence

to establish that the suit property or any portion thereof constituted family land. Absent proof that the suit property was family land, the plea of customary land falls flat.

36. Furthermore, there is no gainsaying that the burden of proving of customary trust rested on the Appellant. To this end, the Appellant bore both the evidential and legal burden. Unfortunately, the Appellant fell short of the statutory requirement[s]. [see *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] KECA 642 (KLR); *James Muniu Mucheru v National Bank of Kenya Limited* [2019] KECA 1058 (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)].
37. Turning to the second issue, it is imperative to underscore that the Respondent herein also filed a Counterclaim and wherein same contended that she is the lawful proprietor of the suit property. Moreover, the Respondent posited that the suit property herein arose from the subdivision of the original parcel of land, namely, LR. NO. KIRIMARA/KITHITHINA BLOCK 1/192.
38. Additionally, the Respondent tendered evidence to demonstrate that the original parcel of land was bought/purchased jointly with one Nahshon M’Nabea Taranga and thereafter a certificate of title was issued in their common names. Furthermore, the Respondent averred that subsequently, the original parcel of land was sub-divided into two portions and Nahshon M’Nabea Taranga became the registered proprietor of L.R No. LR. NO. KIRIMARA/KITHITHINA BLOCK 1/210, while the suit property was transferred to the Respondent.

39. For good measure, the position by the Respondent is vindicated by the documentary evidenced tendered and produced before the court including a copy of the Green Card in respect of the original parcel of land showing Nahshon M’Nabea Taranga and Respondent as the first registered owners; the mutation form culminating into the subdivision of the original parcel of land; and a copy of the certificate of title in the name of the Respondent.
40. To the extent that the Respondent herein is the lawful and registered proprietor of the suit property, same is by law entitled to exclusive occupation, possession, and use. In any event, any third party, the Appellant not excepted, can only enter upon and remain in occupation of the suit property with the consent/ permission of the Respondent. Absent consent or permission of the Respondent, the activities of the third party would constitute actionable trespass. [See *Moya Drift Farm Ltd. vs. Theuri (1973) EA 114*; *Mohanson Kenya Limited vs Registrar of Titles (2017) eKLR*; and *Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment)*].
41. Having found and held that the Respondent herein is the lawful and legitimate proprietor of the suit property, there is no gainsaying that the Respondent is entitled to partake of and benefit from the statutory privileges; rights; and interest[s] attendant to ownership of the suit property [See *sections 24 and 25 of the Land Registration Act 2012*].

42. Before concluding the issue, it is instructive to take cognizance of the holding in the case of *Waas Enterprises Limited v City Council of Nairobi & another* [2014] KEELC 605 (KLR) where the court held and stated as hereunder:

“As a registered proprietor, the plaintiff is entitled to enjoy all proprietary rights to the exclusion of all others. This includes the right to exclusive possession of the suit land. The rights of a proprietor of land are set out in **Sections 24 and 25 of the Land Registration Act** which provide as follows: -

“24. Subject to this Act—

(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

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—

1. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
2. 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.”

It therefore follows from the above that only the plaintiff is entitled to enjoy proprietary rights over the suit land. The 2nd defendant had no right to the suit land. She must therefore vacate the suit land and hand over possession to the plaintiff.”

43. My answer to issue number two is threefold. Firstly, the respondent herein has tendered plausible evidence pertaining to ownership of the suit property. In this regard, there is no gainsaying that the Respondent is truly the legitimate and registered owner of the suit property.

44. Secondly, by virtue of being the registered owner of the suit property, the Respondent is entitled to exclusive possession and use. To this end, no third party can enter upon and or remain on the suit property without the permission; authority; or consent of the Respondent.

45. Thirdly, the Appellant has no lawful rights to and in respect of the suit property. In this regard, the actions by and on behalf of the Appellant constitute actionable trespass.

46. In view of the foregoing, it is apparent that the learned trial magistrate reached and arrived at the correct conclusion. In the premises and having considered the principles in the case of *Mwanasokoni vs Kenya Bus*

Services Limited (1985) eKLR; and *Jabane versus Olenja [1986] eKLR*; respectively, I hereby affirm the decision by the learned trial magistrate.

FINAL DISPOSITION

47. Having analyzed and considered the two [2] thematic issues that were highlighted in the body of the Judgment, I conclude that the appeal beforehand is *devoid* of merit[s]. In this respect, the appeal court's dismissal.

48. In the upshot, the final orders of the court are as hereunder;

- i. The Appeal be and is hereby dismissed.**
- ii. The Judgement dated 5th October 2023 and the consequential decree and are hereby affirmed.**
- iii. The Appellant shall proceed to vacate the suit property within 60 days from the date hereof; and in default, same shall be evicted in accordance with the decree of the subordinate court.**
- iv. Costs of the appeal be and are hereby awarded to the Respondent.**

49. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF SEPTEMBER 2025

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

In the presence of:

Hussein – Court Assistant

Ms. Mugo Holding Brief for Mr. Kiogora Ariithi for the Appellant

Mr. Moses Kamau Holding Brief for Mr. Mutembei Chabari for the Respondent