Waqo v Abdi (Suing as the legal representative of the Estate of Siraj Abdi Ali - Deceased)) & another (Land Case Appeal E009 of 2025) [2025] KEELC 6600 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6600 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

LAND CASE APPEAL E009 OF 2025

JO MBOYA, J

SEPTEMBER 18, 2025

BETWEEN

WARSITU GUYOLA WAQO ..... APPELLANT

AND

ALIKUL SIRAJ ABDI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SIRAJ ABDI ALI - DECEASED)) ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF MARSABIT ..... 2ND RESPONDENT

(Being an appeal arising from the Judgment and decree issued on 12/2/2025 by the Hon. W. K. Cheruiyot, Principal Magistrate in MELC No. E010 of 2023- Principal Magistrate's Court at Moyal)

JUDGMENT

1. The 1st Respondent [who was the Plaintiff in the subordinate court] approached the court vide Plaint dated the 3rd July 2023 and wherein same sought various reliefs. The reliefs that were sought by the 1st Respondent are as hereunder;

    a. A declaration that firm No. 994 belongs to the estate of Siraj Abdi Ali and that the occupation by [sic] 2nd Defendant is illegal.

    b. A permanent injunction restraining the 2nd Defendant, its agents, servants and all and any persons claiming through or in the name of the 2nd Defendant from proceeding to lease, occupy, alter, alienate and/or transfer of firm No. 994.

    c. General damages.

    d. Costs of the suit.

e. Interest on [c] and [d]

f. Any other or further relief that this honourable court may deem fit and necessary to grant.

2. The 1st Defendant [now the Appellant] duly entered appearance and filed a statement of defence dated the 16th February 2024 and wherein same denied the claims by the 1st Respondent. In particular, the Appellant herein contended that the suit property which is being claimed by the 1st Respondent constitutes plot Number 1209 and not farm 994.

3. Furthermore, the Appellant contended that the 1st Appellant's claim to the disputed property was being made after a duration of more than 28 years. To this end, the Appellant posited that the 1st Respondent's suit was statute-barred. Instructively, the Appellant invoked and referenced Section 7 of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.

4. The 2nd Respondent [who was the 2nd Defendant] neither entered an appearance nor filed any statement of defence. Furthermore, the 2nd Respondent did not participate in the proceedings before the subordinate court.

5. The suit in the subordinate court was heard and disposed of vide judgment delivered on the 12th February 2025; and wherein the learned trial magistrate [Hon W. M K Cheruiyot, Principal Magistrate] found and held that the Appellant had proved his claim as pertains to farm no. 994. To this end, the learned trial magistrate proceeded to and entered judgment in favour of the 1st Respondent and thus declared the occupation of the suit property by [sic] the 1st Defendant to be illegal.

6. However, it is instructive to recall that the plaint by the 1st Respondent adverted to occupation by the 2nd Defendant and not the 1st Defendant.

7. It is the said Judgment and the consequential decree which aggrieved the Appellant and thus precipitated the subject appeal. The Appellant has filed the memorandum of appeal dated the 5th March 2025; and wherein same has highlighted the following grounds;

i. The Honorable Magistrate erred in law and fact in holding that the 1"respondent owned the suit land whereas evidence adduced did not support this finding.

ii. The Honorable Magistrate erred in law and in fact in finding that a note allegedly recorded by a County Executive Committee member in charge of Energy and Urban Development, "hereafter referred to as the CEC" was proof of ownership.

iii. The Honorable Magistrate erred in law and fact in replying and making a determination that a note allegedly recorded by the CEC was proof of ownership of the suit land.

iv. The Honorable Magistrate misapplied the facts and the law by finding that a note allegedly recorded by the CEC could form a basis of ownership on the suit land whereas the 1st respondent did not adduce any evidence or records showing his deceased father ever owned the suit land.

v. The Honorable Magistrate misconstrued the evidence of the existence of the note by the CEC to support the finding that it was a proof of allocation and ownership dating back to 1973, yet no evidence to demonstrate such an acquisition was in existence.

vi. The Honorable Magistrate erred in law and in fact in failing to consider what would be the source of records of the suit land detailing ownership which were never availed in evidence by the 1s respondent.

vii. The Honorable Magistrate misdirected himself by making a finding that the suit as commenced was not statute-barred, whereas disregarding the evidence adduced by the parties on the duration of the open and continuous usage of the suit land by the appellant, thereby extinguishing any claim made by the 1st respondent.

viii. The Honorable Magistrate erred in questioning the manner the registration of the suit land was being undertaken by the appellant whereas this had never been the issue rather the preceding acquisition by way of a gift formed the basis of the ownership claim of the suit land.

ix. The Honorable Magistrate misapplied the law on the burden of proof in that the 1" respondent failed to adduce any document of ownership of the suit land or even any records of ownership held by the 2nd respondent.

x. The Honorable Magistrate misapprehended the law and facts as tendered in evidence on ownership, occupation and usage of the suit land thereby making an erroneous finding on the ownership and or usage.

xi. The Honorable Magistrate erred in failing to satisfy himself that the evidential burden of existence of records showing the suit land was in the name of the 1st respondent's deceased father had been discharged despite issuance of an order of production of the register.

xii. The Honorable Magistrate erred in law and in fact in failing to establish whether the principle of the root of title satisfactorily proved that the suit land belonged to the 1" respondent's deceased father.

xiii. The Honorable Magistrate erred in law and fact in holding that the failure todate the gifting agreement made it incapable of being relied upon discounting the evidence adduced on the manner and when the appellant acquired the suit land.

xiv. The Honorable Magistrate erred in law in failing to consider that the ls respondent by not taking any action and not knowing the location of the suit land this was not an indication that he was unaware it even existed and it constituted property of his deceased father.

xv. The Honorable Magistrate erred in law and fact in failing to analyze, test the veracity and interrogate the evidence adduced by the parties in their witness testimonies during the hearing.

xvi. The Honorable Magistrate erred in failing to critically analyze the evidence adduced through the witness testimonies, whereas failing to draw any necessary inferences and or conclusion.

xvii. The Honorable Magistrate misapprehended the 1st respondent's cause of action as against the evidence adduced, whereby no party even pleaded that there had been occupation of the suit land by the appellant.

xviii. The Honorable Magistrate erred in law while awarding costs yet the evidence adduced did not prove the 1" respondent's case on a balance of probabilities

8. The Appeal came up for directions on the 3rd June 2025; whereupon the advocates for the parties covenanted to canvass and dispose of the appeal by way of written submission. To this end, the court proceeded to and issued directions circumscribing the timelines for the filing and exchange of the written submissions.

9. The Appellant filed written submissions dated the 10th July 2025; and wherein same has highlighted six [6] issues for consideration by the court. The issues highlighted by the Appellant are namely; whether

the note by the county executive committee member for land and urban development [CEC] could constitute evidence of ownership of the suit plot; whether the trial court could rely on the note from the CEC as proof of ownership of the suit plot in the absence of the register and/or land records; whether the suit was/is time barred; whether the court properly evaluated the evidence on ownership, occupation and usage of the suit; the credibility and reliability of the Appellant gifting agreement; and whether the 1st Respondent had proved his case on a balance of probabilities.

10. Though the Appellant has distilled six [6] issues for consideration, the issues in my view are repetitive and cross-cutting. Be that as it may, I beg to state that only three issues do arise and same are namely, whether the 1st Respondent established and proved his claim pertaining to ownership of farm No. 994 or otherwise; whether the 1st Respondent's suit was statute barred or otherwise; and whether the Appellant established his ownership to plot No. 1209 on the basis of the gifting agreement or otherwise.

11. Regarding the first issue, namely, whether the 1st Respondent established his claim to ownership of farm No. 994, learned counsel for the Appellant has submitted that it was incumbent upon the 1st Respondent to tender and produce before the court plausible and credible evidence showing ownership of the suit property. To this end, counsel posited that the 1st Respondent ought to have tendered and produced before the court a copy of the register from the Ministry of Agriculture and from the County Government of Marsabit demonstrating that the suit property belonged to and was registered in the name of Siraj Abdi Ali [deceased].

12. Additionally, it was submitted that though the 1st Respondent has contended that the suit property was allocated to his father [Siraj Abdi Ali] in 1973, the 1st Respondent did not tender and/or produce any evidence to demonstrate such allotment or at all.

13. Furthermore, learned counsel for the Appellant has submitted that the only document which the 1st Respondent tendered to show ownership of the suit property was a note said to have been signed by the county executive committee member for lands and urban development. However, it was submitted that the note under reference by and of itself cannot demonstrate/prove ownership of land.

14. Premised on the foregoing, learned counsel for the Appellant has submitted that the 1st Respondent failed to prove ownership of the suit property. In any event, it was submitted that the learned trial magistrate failed to appreciate and/or interrogate the documentation tendered by the 1st Respondent and thus arrived at an erroneous conclusion.

15. To buttress the foregoing submissions, learned counsel for the Appellant has cited and referenced the decision in the case of Caroline Awinja Ochieng & Another vs Jane Ann Mbithi Gitau & 2 Others [2015]eKLR and Mbuthi vs Ousman & Another [2024]KEELC 387, wherein the court highlighted the manner in which ownership of an unregistered land is to be proven.

16. Turning to the second issue, learned counsel for the Appellant has submitted that the 1st Respondent averred that the suit property was allocated unto his [1st Respondent's father] in 1973. Furthermore, it has been contended that the 1st Respondent's father stayed on the suit property up to and including 1977, when same vacated the suit property on the basis of tribal clashes.

17. Moreover, it has been submitted that the 1st Respondent contended that his father [now deceased] returned to the suit property in the year 1996. However, it has been contended that the 1st Respondent's father is said to have died in the year 2007.

18. Be that as it may, learned counsel for the Appellant has submitted that the Appellant herein did not take any steps or at all towards recovery of the suit property [if at all] until the year 2022, when same

lodged the complaint with the county council of Marsabit; and thereafter filed the instant suit. To this end, it has been posited that by the time the 1st Respondent was filing the instant suit in an endeavour to claim ownership of the suit property, a duration in excess of 12 years had lapsed.

19. Flowing from the foregoing, learned counsel for the Appellant has submitted that the 1st Respondent's suit which was filed on the 5th July 2023 was statute-barred. In this regard, it has been submitted that the learned trial magistrate ought to have dismissed the suit.

20. Next is the issue as to whether the Appellant proved and demonstrated ownership of plot number 1209. Learned counsel for the Appellant has submitted that the Appellant tendered and produced before the trial court assorted documents including a copy of the gift agreement which was executed by Boko Wache Acho and wherein the Appellant was gifted the land located along Old Moyale Road. Furthermore, learned counsel also submitted that the Appellant also tendered before the court the application for registration of unregistered plot and which application was duly approved by the County Government of Marsabit.

21. Additionally, learned counsel for the Appellant has also submitted that other than the documents which clearly demonstrated that the disputed plot [plot 1209] belongs to the Appellant, the Appellant also called Witnesses [evidence] who confirmed that it is the Appellant who has been occupying the said land on the basis of cultivation over time.

22. Based on the foregoing, learned counsel for the Appellant has submitted that the learned trial magistrate misconceived and misapprehended the totality of the evidence on record and thus arrived at an erroneous conclusion. In this regard, learned counsel for the Appellant has invited the court to subject the totality of the evidence on record to fresh scrutiny; and to find that the 1st Respondent did not prove his case to the requisite standard.

23. The Respondent filed written submissions dated the 24th July 2025; and wherein same has highlighted three [3] issues for consideration by the court. The issues highlighted by the 1st Respondent are namely; whether the 1st Respondent's evidence before the trial court was sufficient to prove ownership of the suit property; whether the 1st Respondent's suit was time barred; and whether the Appellant's documents were sufficient to support his claim on the suit property or otherwise.

24. Regarding the first issue, learned counsel for the 1st Respondent has submitted that the 1st Respondent tendered and produced before the court a note which was written by the county executive committee member for lands -Marsabit County; and wherein same indicated that farm number 994 was in the name of Siraj Abdi Ali [now deceased]. In addition, it has been submitted that after the CEC – Lands wrote the note, same handed over the note to the 1st Respondent.

25. Nevertheless, it was submitted that subsequently, the CEC- Lands sought to revoke the note and denied having written same. To this end, learned counsel has submitted that the 1st Respondent was constrained to and indeed lodged a complaint with the Directorate of Criminal Investigations [DCI] with a view to having the handwriting on the note to be subjected to forensic document examination.

26. Furthermore, learned counsel submitted that the note which had been written by the CEC – Lands Marsabit County was thereafter submitted to a forensic document examiner who examined same and prepared a report. To this end, the report was tendered and produced before the court by PW4, namely; Chief Inspector Gilbert Tunoi.

27. Arising from the foregoing, learned counsel for the 1st Respondent has submitted that the note which was written by the CEC – land and the documents that were tendered by the 1st Respondent were sufficient to prove and confirm that the 1st Respondent was the owner of the suit plot.

28. In support of the foregoing submissions and in contention that the note which was signed by the CEC constituted [sic] a register, learned counsel for the 1st Respondent referenced the holding in the case of Mkamenyi Farmers Cooperative Society Ltd vs The Ministry of Lands & Physical Planning & 8 Others [2025] KEELC 3025.

29. In respect of the second issue, learned counsel for the 1st Respondent has submitted that the suit by the 1st Respondent was not statute-barred. In this regard, learned counsel has submitted that the submissions that the suit was time-barred are not only misconceived, but same are based on a misapprehension of the provisions of Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

30. Turning to the third issue, learned counsel for the 1st Respondent has submitted that the Appellant herein did not tender and/or produce any credible evidence to support his claim to the suit property. In particular, it was submitted that though the Appellant had contended that the suit property was gifted unto him, the document which was tendered by the Appellant was deficient and thus incapable of underpinning the Appellant's claim.

31. Moreover, it was submitted that the land gifting agreement which the Appellant has relied upon to stake a claim to the suit property was not dated; and hence same does not meet the description of what constitutes a valid agreement in the eyes of the law.

32. Additionally, it was submitted that the Appellant herein did not demonstrate that Mzee Boko Woche [the giftor] previously owned the suit property before same could purport to gift the property to the Appellant.

33. Other than the foregoing, learned counsel for the Respondent has also contended that the application for registration of unregistered land which has also been relied upon by the Appellant is incomplete and thus devoid of probative value. In particular, it has been submitted that the application for registration under reference is lacking in material particulars. For good measure, learned counsel for the 1st Respondent has highlighted the deficiencies at the foot of paragraph 38 of the written submissions.

34. Flowing from the foregoing submissions, learned counsel for the 1st Respondent has therefore submitted that the appeal by the Appellant is bereft merits and thus ought to be dismissed.

35. Having reviewed the record of appeal, the evidence tendered by the parties [both oral and documentary]; and upon consideration of the written submissions, I come to the conclusion that the determination of the subject appeal turns on three [3] key issues, namely; whether the 1st Respondent proved his claim of ownership to and in respect of farm number 994 or otherwise; whether the learned trial magistrate shifted the burden of proof to the Appellant; and whether the 1st Respondent's suit was statute barred or otherwise.

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

37. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to review, re-evaluate and re-analyse the findings and observations of the trial court, this court is, however, called upon to exercise necessary caution and circumspection. In addition, the court is called upon to

defer to the findings of the trial court unless the findings of the trial court are informed by extraneous factors or, better still, are perverse to the evidence on record.

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

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

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

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

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

> " As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters vs- Sunday Post Ltd [1958] EA 424. In its own words: -
>
> "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge

has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ..."

41. With the foregoing in mind, I am now well disposed to revert to the issues and to discern whether the learned trial magistrate correctly evaluated the totality of the evidence on record, applied the relevant legal principles and arrived at the correct conclusion. I shall start with the first issue.

42. Regarding the first issue, it is imperative to recall and reiterate that it is the 1st Respondent who approached the subordinate court vide plaint dated 3rd July 2023, contending that plot number 990 situated within Butie Area belonged to and was registered in the name of Siraj Abdi Ali [deceased]. Furthermore, the 1st Respondent contended that the said plot was lawfully allocated to the deceased by the Ministry of Agriculture in the year 1973. In addition, the 1st Respondent posited that the name of the deceased was duly captured in the register kept by the county government of Marsabit.

43. Having contended that the suit property [farm number 994] was allocated to and thereafter registered in the name of the deceased, it was incumbent upon the 1st Respondent to tender and produce before the trial court evidence of allotment of the suit property to the deceased. Notably, one would have expected the 1st Respondent to tender and produce some document [if any] that was issued by the Ministry of Agriculture allocating the land to the deceased. Sadly, no such document was tendered and/or produced.

44. Additionally, the Respondent herein had contended that in his endeavour to gather any documentation confirming ownership of plot number 994 by the deceased, same [1st Respondent] was informed that the various documents which were issued by the Ministry of Agriculture were stored at the county government offices at Marsabit. To this end, the 1st Respondent testified that same proceeded to the offices of the county executive committee member – lands at Marsabit, who is said to have perused a register and thereafter confirmed that farm number 994 was registered in the name of the deceased.

45. Nevertheless, it is not lost on me that even though the 1st Respondent spoke about the existence of a register held by the county government of Marsabit; and which is said to have been perused by the county executive committee member – lands, the 1st Respondent and his legal counsel did not take out summonses to compel the production of [sic] the register.

46. I have seen the submissions by learned counsel for the Respondent and wherein same contends that the 1st Respondent was informed that the register is a private document. However, there is no gainsaying that the register, [if at all same exist] is a public document kept by a public office and/or state organs and thus same is available to any citizen in line with the provisions of Article 35 of *the Constitution*, as read together with the provisions of the *Access to Information Act* 2016.

47. I beg to underscore that it was the duty and obligation of the 1st Respondent to place before the court evidence to demonstrate the various claims that same had pleaded. Unfortunately, the 1st Respondent herein abdicated his statutory obligation.

48. Other than the foregoing, it is also instructive to recall that the 1st Respondent's case essentially rests on the note which is said to have been generated and issued by the CEC – Lands, Marsabit County. To start with, the note which has been hyped does not bear the logo of the county government of Marsabit. In addition, the note does not indicate that farm number 994 belongs to and is registered in the name of the deceased.

49. I have looked at the note and I am afraid that same does not add value; or legal weight to the 1st Respondent's case. Furthermore, I am afraid that the note under reference does not constitute a register

in terms of the provisions of Section 104 of the *Land Registration Act* 2012, either in the manner that was contended by learned counsel for the 1st Respondent of at all.

50. It is instructive to observe that the 1st Respondent herein was obligated to tender and place before the court documents and/or deeds to demonstrate the root of his claim to the suit property. For good measure, the documents and/or deeds would be such that same constitute a consistent chain; pathway towards demonstrating ownership and entitlement to the land.

51. The manner of proving title to or entitlement over an unregistered land was succinctly expounded in the case Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & 2 others [2015] eKLR, where the court [justice J.L Ongutio] stated as hereunder;

> " In determining the above issue, it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or paramount title. A good compilation of the documents or deeds relating to the property and concerning the claimant, as well as any previous owners leading to the tide paramount certainly proves ownership. It is such documents which are basically 'the essential indicia of title to unregistered land': per Nourse LJ in Sen v Headiey [1991] Ch 425 at 437.

52. To my mind, the learned trial magistrate failed to interrogate the documents which were tendered and/or placed before the court by the 1st Respondent. In this regard, the learned magistrate misapprehended the salient features of the 1st Respondent's case and thus arrived at an erroneous conclusion. [See the decision of the Court of Appeal in the case of China Wu Yi Ltd vs Edaman Property Ltd [2021]eKLR.

53. Turning to the second issue, whether the learned trial magistrate shifted the burden of proof to the Appellant contrary to and in contravention of the provisions of 107 and 108 of the *Evidence Act*, it is important to highlight that the burden of proof lies with the claimant. Instructively, the claimant bears both the evidential; and Legal burden of proof at the onset and same is called upon to place before the court evidence to discharge the evidential burden of proof before the said burden can shift to the Respondent.

54. To underscore the foregoing preposition, it suffices to reference the decision of the Supreme Court in the case of Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment), where the Supreme Court stated as hereunder;

> " 49. Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

50. This Court in Raila Odinga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent."

55. From the foregoing, it was incumbent upon the learned trial magistrate to interrogate the evidence tendered by the 1st Respondent and thereafter discern whether same has discharged the evidential burden of proof in the first instance. However, the learned trial magistrate merely made reference to the note that was produced by the 1st Respondent and the subsequent reference of the note to the Directorate of Criminal Investigations, but failed to consider whether the note under reference had any probative value; weight; or otherwise.

56. It is also important to highlight that the mere fact that the note signed by the CEC [but which was subsequently disowned by the CEC], was tendered and admitted as an exhibit did not by and of itself, denote that same was deserving of probative value. For good measure, the learned trial magistrate was still under duty to evaluate the note and to assign weight, [if any] to the note taking into account the law as pertains to proof of ownership of land. [See the decision in the case of Kenneth Mwige Nyaga vs Austin Kiguta [2015] eKLR].

57. I am afraid that the learned trial magistrate paid scant attention [if at all] to the documentary evidence that was tendered by the 1st Respondent and did not bother to discern whether the 1st Respondent discharged the evidential burden in the manner required, before calling upon the Appellant to rebut same. Furthermore, it is also evident that the learned trial magistrate does not appear to have appreciated who between the 1st Respondent and the Appellant bore the burden of proof, in the first instance.

58. Without belabouring the point, I beg to underscore that the legal burden of proof as pertains to proving ownership of farm number 994 laid on the 1st Respondent. However, the manner in which the learned trial magistrate dealt with the matter before him demonstrates that same shifted the burden to the Appellant. Such ought not to have been the case. [See the dictum in Daniel Toroitich Arap Moi vs Mwangi Stephen Mureithi & Another [2014]eKLR; and Mucheru vs National Bank of Kenya Ltd [2019]eKLR, respectively.

59. Turning to the issue of limitation, it is important to recall that the 1st Respondent contended that the suit property was allocated to his father [now deceased] in the year 1973. Furthermore, the 1st Respondent posited that the deceased lived on the suit property until 1977/1978 and thereafter vacated the land because of the tribal clashes.

60. It was the further testimony of the Plaintiff that his father returned to the suit property in 1996. However, it was contended that the deceased was never heard off. In any event, the 1st Respondent averred that the deceased died in 2007.

61. Be that as it may, what is important is that the 1st Respondent did not take up any endeavours to recover the land [if at all] until the year 2022. Moreover, it is worth recalling that the instant suit was filed in 2023.

62. On the other hand, evidence abound that the Appellant herein had been using the land in question since 1995. Indeed, the fact that the Appellant has been using the land for a long time was conceded by the witnesses called by the 1st Respondent. [See the evidence of PW3, who confirmed that the Appellant had been tilling the land from the year 1997].

63. To my mind, if the 1st Respondent was convicted that the land which was being tiled and occupied by the Appellant belonged to his [1st Respondent's father] then it behoved the 1st Respondent or the members of the deceased family to take out proceedings for recovery of the property within 12 years. [See Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya].

64. Suffice it to state that by the time the instant suit was being filed in an endeavour to [sic] recover the land in question, the Appellant herein had been on the land for more than 12 years period. In this regard, the suit that was filed was time-barred and thus the 1st Respondent was non-suited. [See Bosire Ogero v Royal Media Services Ltd [2015]eKLR; and Pius Kimaiyo Langat vs Cooperative Bank of Kenya Ltd [2017]eKLR; and Gathoni vs Kenya Cooperative Creameries [1982]KECA, respectively].

65. In my humble view, the learned trial magistrate failed to evaluate the evidence on record and thus arrived at and or reached conclusions that were at variance with the evidence. Furthermore, the learned trial magistrate also misapprehended the laws as pertaining to the limitation of actions. Consequently, and in this regard, the judgment of the learned trial magistrate is wrought with errors of omission and commission.

66. In the premises, and having taken into account the principles espoused in the case of Mwanasokoni v Kenya Bus Services Ltd [1985] KECA 82 (KLR) and Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja [1986] KECA 21 (KLR), I am minded to; and do hereby depart from the conclusions arrived at by the learned trial magistrate.

Final Disposition.

67. Flowing from the foregoing analysis, it must have become crystal clear that the appeal beforehand is merited. In this regard, it suffices to highlight that the judgment; and the consequential decree of the subordinate court is unmaintainable.

68. Consequently, and in the circumstances, the final orders that commend themselves to me are as hereunder;

    i. The Appeal be and is hereby allowed.

    ii. The Judgment of the learned trial magistrate [Hon. W. K Cheruyiot Principal Magistrate]; and the consequential Decree arising therefrom be and are hereby set aside.

    iii. The 1st Respondent's suit vide Plaint dated the 3rd July 2023 be and is hereby dismissed.

    iv. Costs of the appeal be and are hereby awarded to the Appellant.

    v. The Appellant is also awarded the proceedings in the subordinate court.

69. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 18TH DAY OF SEPTEMBER 2025.

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

JUDGE

In the presence of:

C/A Hussein/Mukami

Mr. Wokabi Mathenge for the Appellant

Mr. Owade for the 1st Respondent

N/A for the 2nd Respondent