REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ELC APPEAL NO. 02 OF 2024

ABDI OSMAN HAJI ……..APPELLANT

VERSUS

HOLATE GOTU SELF HELP GROUP ……..…….1ST RESPONDENT

ATLAS TOWERS KENYA LIMITED ……2ND RESPONDENT

MOHAMED NOOR KORME …….…….3RD RESPONDENT

[Being an appeal against the Judgment and decree of Hon. M.S Kimani – PM delivered on 20th December 2023 in Moyale MCELC No. E005 of 2021].

JUDGMENT

1. The Appellant herein [*who was the plaintiff in the subordinate court*] filed the Plaint dated **12th March 2021;** and which Plaint was subsequently amended resting with the amended Plaint dated 3rd August 2021.
2. The amended Plaint highlights the following reliefs:

(a) Declaration that the plaintiff is the sole owner of plot no. 167B.

(b) An order of permanent injunction restraining the 2nd defendant, its servants, agents and or employees from developing on plot No. 167B.

(c) General damages for trespass.

(d) Mesne profits.

(e) Costs

(f) Any other relief which the court may deem fit to grant.

3. The Respondents herein [*who were the defendants in the subordinate court*] duly entered an appearance and filed statement of defence. The 1st & 3rd respondents filed a statement of defence dated 26th January 2022 while the 2nd defendant filed a statement of defence dated 27th October 2021. The respondents variously denied the allegations by and on behalf of the appellants.

4. The suit in the subordinate court was heard and disposed of *vide* judgment delivered on 20th December 2023; and wherein the learned trial magistrate found and held that the appellant had failed to prove his claim to the requisite standard. To this end, the learned trial magistrate [Hon. M.S Kimani – PM] dismissed the appellant's suit, *albeit* with no orders as to costs.

5. It is the said Judgment and the consequential decree which has aggrieved the appellant, leading to the filing of the subject appeal. The memorandum of appeal dated 16th January 2024; has highlighted the following grounds:

    (i) That the learned magistrate erred in law and facts when he failed to consider the evidence adduced by the appellant, illustrating he was the bona-fide legal and registered owner of a piece of land known as plot Number 167B situated in Garboniwis area in Odda location within Moyale sub county.

    (ii) That the learned magistrate erred in law and facts by failing to find in favour of the appellant that all that piece of land

known as plot number 167B situated in Garbonowis area in Odda location within Moyale subcounty.

(iii) *That the learned magistrate erred in law and facts by failing to consider the testimonies of the witnesses presented by the appellant thereof occasioning a miscarriage of justice.*

(iv) *That the learned magistrate erred in law and facts by failing to find that the parcel of land claimed by the respondents was totally different from the subject suit land to with plot number 167B as such, the respondents had no claim whatsoever over the appellant parcel of land plot number 167B.*

(v) *That the learned magistrate erred in law and fact by making a determination that the appellant parcel of land known as plot number 167B was community land.*

(vi) *That the learned magistrate erred in law and facts by failing to consider the applicable principles, authorities and the submissions filed by the appellant.*

(vii) *That the learned magistrate erred in law and facts so misdirected himself on matters of law and fact as to occasion a miscarriage of justice against the appellant.*

(viii) *That in light of the foregoing, the learned magistrate erred in law and facts failed to do justice before him in the case at hand.*

6. The 1st and 3rd respondents herein filed/lodged what is deemed to be [sic] Memorandum of cross appeal. The said cross appeal is dated 7th March 2024.
7. The Memorandum of cross appeal has highlighted the following grounds:

a) *That the learned principal magistrate erred and misdirected himself on the law in purporting to pass judgment on plot number 122 owned by the 1st cross appellant in the absence of there having been a counterclaim over the same or when ownership of the same was not in dispute in the suit or in the absence of any proof that the said plot was located on the same space as plot number 167B.*

b) *That there was no legal basis for the learned principal magistrate to boldly declare plot number 122 community land in the absence of evidence that the same vested in the community and more so granted that the Community Land Act did not become operational until after 2016.*

c) *That it was a misdirection and wrongful exercise of discretion on the part of the learned principal magistrate to deny costs to the cross-appellants on the basis of extraneous factors or due to alleged actions/inactions by the Marsabit County Government or its predecessor county who were non-parties in the suit.*

d) *That the learned principal magistrate erred in law and the facts in basing his judgment on inaccurate expositions and interpretations of the law, presumptions and speculations.*

e) *That the cross-appellants do not support in any way the memorandum of appeal dated 16th January 2024.*

8. The subject appeal came up for directions on 5th June 2025; whereupon the advocates for the parties confirmed that the record of appeal had been duly filed and served. Moreover, it was confirmed that the record of appeal was complete and thus the appeal was ripe for hearing. To this end, the court proceeded to and issued directions pertaining to the hearing and disposal of the appeal. In particular, the court directed that the appeal

be disposed of by way of written submissions to be filed within circumscribed timelines.

9. The appellant filed written submissions dated 11th July 2025; and wherein same has highlighted two [2] key issues, *namely;* the learned trial magistrate misapprehended and misconstrued the totality of the evidence and thereafter arrived at an erroneous conclusion; and that the decision of the learned trial magistrate is contrary to the weight of the evidence on record.

10. Regarding the first issue, learned counsel for the appellant has submitted that the appellant tendered and produced before the trial court assorted documentary exhibits, demonstrating that same was the lawful and legitimate owner of plot NO. 167B. In particular, learned counsel for the appellant has highlighted exhibits P1 and P2, which are contended to underpin the appellant's ownership rights to the suit property.

11. Additionally, it has been submitted that the learned trial magistrate failed to appreciate that the 2nd respondent entered upon and commenced activities on the suit property without the permission and or consent of the appellant. To this end, it has been posited that the learned trial magistrate did not appreciate that the acts complained of constituted trespass.

12. Furthermore, learned counsel for the appellant has submitted that following the gifting of the suit property to the appellant by one Ture Qalicha [now deceased], the appellant sought to register and indeed

registered the suit property with the County Government of Marsabit. In this regard, it has been submitted that the County Government of Marsabit variously collected rates from the appellant and thus confirming that the appellant was indeed the lawful owner of the plot in question.

13. Be that as it may, it has been submitted that the learned trial magistrate disregarded the entirety of the evidence that was tendered by the appellant and came to the conclusion that the suit property constitutes unregistered community land.

14. Turning to the second issue, learned counsel for the appellant has submitted that the judgment of the learned trial magistrate is contrary to the weight of the evidence tendered and adduced before the trial court. In particular, it has been contended that the judgment contravenes the import and tenure of the evidence of the witnesses called by the appellant. In particular, it has been submitted that the learned trial magistrate did not correctly consider the evidence of PW 2, PW 4 and PW 5, respectively, who were members of the land allocation committee chargeable with allocation of land and resolution of disputes arising from land ownership within the Odda location.

15. Flowing from the foregoing submissions, learned counsel for the appellant has therefore submitted that the entirety of the judgment is wrought with grave errors and mis-directions and thus the same ought to be set aside. To this end, the court has been invited to find that the appeal is meritorious and thus ought to be allowed. In short, learned counsel for the appellant has invited the court to grant the reliefs at the foot of the amended Plaint dated 3rd August 2021.

16. The 1st & 3rd respondents filed written submissions dated 7th August 2025 and wherein same have raised four [4] key issues. Firstly, it has been submitted that the learned trial magistrate correctly found and held that the appellant had not proved/established his claim to the suit property. In any event, it was contended that the appellant did not demonstrate that Ture Qalicha [now Deceased] had any rights to and in respect of the suit property capable of being gifted to the appellant or at all.

17. Secondly, learned counsel for the named respondent has submitted that the plot allocation committee or the local chief did not have the requisite authority to purport to allocate the suit plot to the appellant. In this regard, it has been submitted that the appellant cannot therefore contend that same has a valid and lawful entitlement to the suit property.

18. Thirdly, it has been submitted that the mere payments of rates to the County Government of Marsabit does not by and of itself, constitute a basis to warrant inference of title. In particular, it has been submitted that the fact that the appellant was paying rates to the County Council of Marsabit [now defunct]; and to the county government of Marsabit does not mean that the appellant is the owner of the property.

19. Finally, learned counsel for the 1st and 3rd respondents has contended that in the course of the judgment, the learned trial magistrate declared that the suit property, including plot No. 122, constitutes unregistered community land. Nevertheless, it has been submitted that the declaration under reference was erroneous and based on the misapprehension of the

law. Moreover, it has been contended that the learned trial magistrate failed to appreciate that the Community Land Act was enacted in the year 2016; and thus same could not apply to the dispute beforehand.

20. Additionally, learned counsel for the 1st and 3rd respondent has also submitted that the learned trial magistrate erred in law in coming to a conclusion pertaining the plot No. 122 belonging to the 1st and 3rd respondent; yet the said plot was not in issue. Further, and in any event, it has been submitted that there was no counterclaim that was filed to warrant a contention that plot No. 122 formed and or fell within the unregistered community land.

21. In view of the foregoing, learned counsel for the 1st & 3rd respondent has invited the court to find and hold that the judgment and Decree of the trial court as far as dismissal of the appellant's suit was concerned, is well grounded. On the other hand, it has been posited that there are aspects of the judgment which reeks of misdirection[s] and thus ought to be varied. In particular, learned counsel for the named respondent has highlighted the aspect touching on the declaration that plot No. 122 is an unregistered community land. Moreover, counsel has also highlighted the question of costs.

22. Having reviewed, the record of appeal, the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed by/on behalf of the parties, I come to the conclusion that the determination of the subject appeal; and [sic] the cross appeal, turns on two key issues, *namely;* whether the cross appeal is competent and

legally tenable or otherwise; and whether the appellant proved his claim to the requisite standard or otherwise.

23. 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.

24. 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.

25. The jurisdictional remit of the first 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."

26. Back to the issues for consideration. The first issue touches on and concerns whether the cross appeal is competent and legally tenable. To start with, it is imperative to underscore that the provisions of section 79G of the Civil Procedure Act, Cap 21 Laws of Kenya stipulate that whosoever is aggrieved by a decree or order is obligated to file an appeal [if at all] within 30 days from the date of delivery of the judgment or ruling underpinning the appeal.

27. For ease of reference, it suffices to reproduce the contents of **Section 79G of the Civil Procedure Act**.

28. Same stipulates as hereunder;

79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

29. The provisions of the law referenced in the preceding paragraph are crystal clear. It is instructive that an appeal from the subordinate court ought to be filed within the stipulated 30-day period, reckoned from the date of delivery of the judgment/ruling. In this regard, it is common ground that if the 1st and 3rd respondents were aggrieved with the judgment of the subordinate court, then same ought to have filed an appeal within the prescribed timelines.

30. Nevertheless, it is evident that the memorandum of [sic] cross appeal was only filed on 7th March 2024 and there is no evidence that leave was ever sought and or obtained prior to the filing of the cross appeal. To my mind, an appeal filed out of time without leave is *null and void.*

31. In the case of ***Pentagon Communications Limited v National Land Commission (Civil Appeal E035 of 2022) [2025] KECA 1304 (KLR) (18 July 2025) (Judgment)*** the Court of Appeal considered the fate of an appeal filed out of time without leave.

32. For coherence, the court stated as hereunder;

The appellant failed to take advantage of the latitude accorded under section 16A(2). This means that the appeal before the ELC was incompetent. The learned Judge could not, in the circumstances, arrogate to herself jurisdiction to hear an appeal that never was. We cannot, therefore fault her for downing her tools for want of jurisdiction and for consequently dismissing the appeal before her.

32.The Supreme Court in County Executive of Kisumu vs. County Government of Kisumu & 8 others (Civil Application 3 of 2016) [2017] KESC 16 (KLR) (Civ) (12 April 2017) stated that, by filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. We are caught up in a similar situation. No appeal should have been filed out of time without leave of the court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. We therefore arrive at the inescapable conclusion that the Environment and Land Court did not have jurisdiction to entertain the appeal before it as it was statute-barred.

33. Other than the fact that the purported memorandum of cross appeal was filed out of time and in contravention of **Section 79G of the Civil Procedure Act** [supra], it is also important to underscore that the Civil Procedure Act and the rules made thereunder do not envisage the filing of what is called a cross appeal.
34. For good measure, the terminology, *namely*; cross appeal, is only underpinned by the provisions of **Rule 95 of the Court of Appeal Rules 2022**.
35. Same stipulates as hereunder;

95. Notice of cross-appeal

(1)A respondent who desires to contend at the hearing of the appeal that the decision of the superior court or any part thereof should be varied or reversed, in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of the contention and nature of the order which he or she proposes to ask the Court to make, or to make in that event, as the case may be.

(2)A notice under sub-rule (1) shall state the names and addresses of the persons intended to be served with copies of the notice and lodged in four copies in the appropriate registry not more than thirty days after service on the respondent of the memorandum of appeal and record of appeal, or not less than thirty days before the hearing of the appeal, whichever is the later.

(3)A notice of cross-appeal shall be substantially in Form G as set out in the First Schedule and signed by or on behalf of the respondent.

36. As concerns the filing of appeals emanating from the subordinate court to the high court, and by extension to the courts of equal status, the manner of filing appeals is regulated by the provisions of Order 42 Rule 1 of the Civil Procedure Rules 2010, which clearly stipulates that an appeal shall be commenced by way of a memorandum of appeal. For good measure, the said provision does not advert to; or reference a cross appeal.

37. The contents of **Order 42 Rule 1 of the Civil Procedure Rules** stipulate thus;

(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

38. The 1st and 3rd respondents were called upon to comply with the established provisions of the law, if same were keen and or desirous to file an appeal. For coherence, the 1st & 3rd respondents cannot adopt and deploy their own mechanism of filing [sic] a cross appeal, which is unknown to the civil procedure act and the Civil Procedure Rules.

39. Before concluding on this issue, it is also important to underscore that an appeal can only lie against the decree or orders of the court. Suffice it to posit that an appellant or respondent cannot seek to appeal against mere observations; remarks or obiter dictum of the Court. The issues being raised by the 1st and 3rd respondents/cross appellants, *namely*; the declaration that the suit property was unregistered community land was not the final orders of the court. On the contrary, the decree of the court was to the effect that the appellant's suit was dismissed.

40. In my humble view, an appeal could only lie against the said decree and not any orbiter dictum. In this regard, I would still have come to the conclusion that the Memorandum of cross-appeal by the 1st and 3rd respondents is misconceived and legally untenable.

41. Turning to the second issue, *namely*; whether the appellant proved his claim to the requisite standard or otherwise. It is appropriate to point out that the appellant is the one who approached the court, contending that same is the lawful owner and proprietor of plot number 167B. Moreover, it is the appellant who had posited that the said plot was gifted unto him by Ture Qalicha [now deceased]. For good measure, the appellant's case was premised on the basis of a gift *inter vivos*.

42. Having approached the court seeking to be declared as the owner of the suit property, it was incumbent upon the appellant to tender and place before the court plausible, concrete, cogent, and credible evidence. Did the appellant place before the trial court evidence to underpin his claim of ownership of the suit property?

43. I have reviewed the totality of the evidence that was placed before the trial court. However, I have been unable to discern any evidence showing that the suit property was duly allocated to Ture Qalicha [now deceased]. It is instructive to underscore that Ture Qalicha [deceased] could only gift, dispose of and or sell what same owned and not otherwise.

44. In this regard, it is imperative to invoke and reference the doctrine of *nemo dat quod nan habet*, which essentially underscores that one cannot transfer rights over what he does not own. [See the holding of the Court of Appeal in ***Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & 2 others [2015] KECA 717 (KLR); M'Kiriara M'Mukanya & another v Gilbert Kabeere M'Mbijiwe [1984] eKLR - Civil Appeal 13 of 1980; Arthi Highway Developers Ltd vs West End Butchery Ltd & others (2015) eKLR,*** respectively.

45. Additionally, it is important to highlight that the appellant's case in the subordinate court was premised on gift *inter vivos*. However, it is not lost on me that what the appellant tendered to underpin his claim was a land sale agreement and not a gift or document underpinning a gift. It is common ground that parties are bound by their pleadings and same cannot seek to propagate a state of affairs which is at variance with the pleadings. [**See Order 2 Rule 6 of the Civil Procedure Rules, 2010**].

46. The next aspect that merits consideration was the contradictory evidence that was tendered by the witnesses called by the appellant. To start with PW 2 testified that the suit plot, which is claimed by the appellant, measures 4 acres in terms of the area. On the other hand, the appellant's testimony was to the effect that the suit property measured 150 ft by 150 ft. This contradiction negates the appellant's claim.

47. Furthermore, the appellant also called PW 3 [Jaldesa Waqo Jarso]. Same indeed disowned the witness statement which he had adopted. The testimony of PW 3 brings into question the bona-fides of the appellant's claim. Moreover, there is the evidence of PW 4, whose testimony was to the effect that same did not attest the execution of the sale agreement dated 8th February 2014.

48. On the contrary, the said witness said that the document under reference was only taken to him and he signed without having been privy to the execution thereof. In addition, the same witness also posited that it is the appellant who informed him about the gift.

49. To my mind, it is the appellant who made the assertions. In this regard, the appellant bore the burden of proving ownership or entitlement to the suit property. Sadly, the appellant failed to discharge the burden of proof.
50. In the case of ***Mucheru vs National Bank of Kenya Ltd (2019),*** the Court of Appeal discussed the burden of proof.
51. For coherence, the court stated as hereunder:

> *17. On matters evidence,* ***Madan, JA*** *(as he then was) in* ***CMC Aviation Ltd v. Crusair Ltd (No1) [1987] KLR 103*** *stated:* ***?"Proof is the foundation of evidence. As stated in the definition of "evidence' insection 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven...."***
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> *18. The Evidence Act is clear enough upon whom the burden of proof lies.* ***Section 107*** *provides as follows:*
>
> ***"1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***2. When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person."***
> ***Section 109*** *of the same* ***Act*** *further provides:*
> ***"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 law that the proof of that fact lie on any particular person."

19. In ***Karugi & Another v Kabiya & 3 Others*** ***[1987] KLR 347****, this Court held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.*

52. In my humble view, the appellant failed to prove his claim to the requisite standard. In this regard, the learned trial magistrate was right in finding and holding that the appellant's case was not proven. In addition, the learned trial magistrate was right in dismissing the appellant's case.

53. Be that as it may, there is a perplexing aspect of the judgment of the learned trial magistrate, which cannot be left without mention. The dispute, which was before the trial court, essentially turned on whether the appellant was the owner of plot 167B. However, the learned trial magistrate in the course of his/her judgment went on an a frolic of his/her own. For good measure, the trajectory that was taken by the learned trial magistrate, including the determination of whether the suit property was community land or otherwise, was outside the scope of the pleadings.

54. Notably, it is apposite for courts of law to confine their decisions to the issues captured at the foot of the pleadings and canvassed during the trial. [See the dictum 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; Galaxy Paints Limited versus Falcon Guards Limited [2000] eklr].

55. Finally, the learned trial magistrate also made comical and adverse comments against the County Government of Marsabit, yet the said county government was not a party. The contents of paragraph 44 of the impugned judgment are clearly misdirected. Same ought not to have been made without affording the County Government of Marsabit an opportunity to be heard in the usual manner. [See the decision in the case of ***County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] KECA 397 (KLR)*** – paragraphs 71 – 74 thereof].

FINAL DISPOSITION.

56. Flowing from the foregoing analysis, it must have become apparent that both the appeal and [sic] the cross appeal are bereft of merits. To this end, same courts dismissal.

57. In the upshot, and for the reason[s] alluded to; the final orders that commend themselves to the court are as hereunder;

(i) The Appeal be and is hereby dismissed.

(ii) The Judgment and the consequential decree of the trial court dated and delivered on 20th December 2023, be and is hereby affirmed, save to the extent of the correction highlighted in the body of the Judgment.

(iii) For coherence, the appellants suit stands dismissed.

(iv) The cross appeal vide Memorandum of cross appeal dated 7th March 2024; be and is hereby struck out.

(v) Each party shall bear own costs of the appeal.

(vi) Each party shall also bear own costs of the cross appeal.

58.It is so ordered.

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

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

In the presence of:

Hussein – Court Assistant

Mr. Abdullahi for the Appellants

Mr. Mwirigi Mbaya for the 1st & 3rd Respondents/Cross Appellants

No appearance for the 2nd Respondent.