



REPUBLIC OF KENYA



KENYA LAW
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**Koske v Langat (Environment and Land Appeal E005 of 2021)
[2025] KEELC 5708 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5708 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND APPEAL E005 OF 2021
LA OMOLLO, J
JULY 31, 2025**

BETWEEN

KIBORE ARAP KOSKE APPELLANT

AND

REUBEN KIPROTICH LANGAT RESPONDENT

*(Being an appeal arising from the judgement of Hon. S.K Ngetich
delivered on 8th October, 2021 in Kericho CM ELC Case No. 304 of 2014)*

JUDGMENT

Introduction.

1. By a Memorandum of Appeal dated 8th November, 2021, the Appellant challenges the decision of Hon. S.K Ngetich in Kericho CM ELC Case No. 304 of 2014.

Factual Background.

2. In the Subordinate Court, the Respondent filed a Complaint dated 2nd September, 2014 against one Samuel Rono, the Defendant, seeking the following orders;
 - a. An order compelling the District Surveyor, Kericho District, Kericho County with the assistance of the Officer Commanding Police Station, Sosit to cause the re-opening of the suit access/feeder road Taprotin – Chemumbe dip – Kabianga main road.
 - b. An order for a permanent injunction restraining the Defendant from closing/blocking the suit access/feeder road Taprotin – Chemumbe dip – Kabianga main road.
 - c. Costs of the suit.
 - d. Any other relief.



3. The said Samuel Rono did not file a Statement of Defence.
4. As the matter was pending before the trial Court, the Appellant filed the application dated 14th October, 2014 seeking to be joined to the suit as an Interested Party.
5. On 22nd October, 2014 the said application was allowed and the Appellant was joined to the suit as an Interested Party.
6. One Taplelei Chepkemioi Bartembwa filed the application dated 7th September, 2015 seeking to be joined to the suit as the 2nd Interested Party.
7. On 4th December, 2015 the application was by consent allowed.
8. The Appellant filed a Statement of Defence dated 3rd October, 2019 where he denied the averments in the Plaintiff and sought that the Respondent's suit be dismissed with costs.
9. The Learned Trial Magistrate delivered his judgement on 8th October, 2021 and allowed the Respondent's claim as against the Defendant one Samuel Rono as follows;
 - “ 1. The District Surveyor, Kericho with the assistance of the OCS, Sosiot Police Station to cause the re-opening of the access road serving parcels Nos. 1761, 3548, 1082 and 1083 up to 9 meters in width as per the Registry Index Map.
 2. An order for permanent injunction restraining the Defendant from closing/ blocking the access road serving parcels Nos. 1761, 3548, 1082 and 1083.
 3. The Defendant to bear the costs of the suit.”
10. The Appellant being aggrieved by the said judgment approached this Court by way of appeal.
11. The Appeal was admitted for hearing on 24th July, 2024. The Court issued directions that the appeal be heard by way of written submissions.
12. The Appeal was mentioned severally to confirm filing of submissions and on 11th February, 2025 it was reserved for judgement.

The Appeal.

13. The grounds of appeal are as follows;
 - a. That the Learned Trial Magistrate erred both in law and fact by declaring that the access road had encroached parcel of land known as Kericho/Kabianga/3548 belonging to the Appellant.
 - b. That the Learned Trial Magistrate erred both in law and fact by declaring that the access road mentioned serves parcel Nos. 1761, 3548, 1082, and 1083, yet it only serves parcel No.1083, who purchased it from a different seller who ought to have created an access road. (sic) The parcel of land known as Kericho/Kabianga/1082 has a different access road.
 - c. That the Learned Magistrate fell in (sic) error by assuming without the benefit of submission by counsel that the wrong description of the access road could not have occasioned a miscarriage of justice. The Plaintiff had pleaded for a wrong road known as Taprotin – Chemumbe dip – Kabianga. The wrong description was used to create an illusion that the Defendant had encroached into (sic) a public road.



- d. That the Learned Magistrate erred in law and fact by declaring that the Interested Party, now the Appellant, encroached the access road yet he was not allowed to bring in evidence and witnesses. In actual fact, the access road reopened (sic) encroached the parcel of land known as Kericho/Kabianga/3548 belonging to the Appellant.
 - e. That the Learned Magistrate erred in law and fact by failing to appreciate that the access road might not have existed. The Defendant never filed any defence. The Defendant never availed witnesses, to the disadvantage of the Appellant. The Appellant was only an Interested Party who could not file any defence.
 - f. That the Learned Magistrate erred in law and fact by failing to recognize that there was an existing road which used to serve the parcels of land known as Kericho/Kabianga/1082 and 1083. The same is being contested in Kericho High Court ELC case No 47 of 2019.
 - g. That the Learned Magistrate erred in law and fact by failing to order the Land Surveyor to measure the whole parcel of land known as Kericho/Kabianga/3548 and parcel of land known as Kericho/Kabianga/1761 to ascertain the total acreage to determine whether there was an actual encroachment.
 - h. That the learned Magistrate erred in law and fact by relying on the surveyor's report which only touched on the access road and not on the entire parcel of land. The same surveyor never surveyed the entire parcel of land known as Kericho/Kabianga/3548 and Kericho/Kabianga/1761.
14. The Appellant prays for orders that;
- a. The appeal be allowed.
 - b. The judgement of the Learned Magistrate be quashed and reversed (sic).
 - c. The costs of the appeal and the proceedings in the lower Court be awarded to the Appellant.

Issues for Determination.

15. The Appellant filed his submissions on 11th October, 2024 while the Respondent filed his submissions on 10th February, 2025.
16. The Appellant submits on the following issues;
- a. Whether the trial Court erred in finding encroachment onto Kericho/Kabianga/3548. (sic)
 - b. Whether the access road serves the parcels cited by the trial Court.
 - c. Whether the use of the wrong description of the road led to a miscarriage of justice.
 - d. Whether the Appellant was denied a fair hearing by exclusion of evidence and witnesses. (sic)
 - e. Whether the trial Court erred in relying on an incomplete survey.
 - f. Whether the Court erred by failing to consider the non-existence of the access road.
17. On the first issue, the Appellant relies on the judicial decisions of Chemei Investments Limited v The Attorney General & Others [2006] eKLR, Peter Kimani Njuguna v Peter Ngugi Kimani [2019] eKLR and submits that the Learned Trial Magistrate erred in making the finding that the access road encroached on land parcel No. Kericho/Kabianga/3548.



18. It is the Appellant's submissions that the Learned Trial Magistrate relied on an incomplete survey report which only addressed the access road.
19. It is also the Appellant's submissions that the report failed to establish the boundaries of the land in question. He adds that a comprehensive survey that includes the measurement of the two suit parcels should have been ordered.
20. It is further the Appellant's submissions that the failure to order for a full survey undermined the integrity of the survey report which led to the erroneous conclusion that there was encroachment onto land parcel No. 3548 (sic).
21. On the second issue, the Appellant relies on the judicial decision of *Dunlop Pneumatic Tyre Co Ltd vs Selfridge & Co. Ltd* [1915] AC 847 and submits that the trial Court made a finding that the access road in question was used to access land parcel No's 1761, 3548, 1082 and 1083.
22. The Appellant submits that the said finding was erroneous as the road was only used to access land parcel No. 1083.
23. The Appellant also submits that land parcel No. 1083 was sold by the Defendant and that it was the Defendant who was under the obligation to construct an access road for the said parcel of land.
24. On the third issue the Appellant submits that parties are bound by their pleadings. He relies on the judicial decisions of *Galaxy Paints Co. Ltd v Falcon Guards Ltd* [2000] eKLR, *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* [2015]eKLR, *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 Others* [2014]eKLR, *David Sironga Ole Tukai v Francis Arap Muge & 2 Others* [2014] eKLR and submits that the trial Court mistakenly relied (sic) on a road described as "Taprotin Chemumbe Dip-Kabianga".
25. It is the Appellant's submissions that the said description was factually incorrect and it created an illusion of encroachment.
26. It is also the Appellant's submissions that the said issue was not pleaded by the parties and the trial Court ventured beyond the scope of the pleadings by introducing an incorrect description of the road. This Court should therefore intervene and correct that miscarriage of justice.
27. On the fourth issue, the Appellant submits that, in the trial Court he was an Interested Party. He also submits that during the hearing, he sought to call witnesses and adduce evidence, but the Learned Trial Magistrate denied him the opportunity thereby infringing on his right to fair hearing.
28. The Appellant relies on Article 50 of *the Constitution*, the judicial decision of *Koinange & 13 Others vs Koinange* [1986] KLR 23 and submits that he was unfairly denied an opportunity to present crucial evidence. He therefore urges the Court to set aside the judgement of the trial Court on that basis.
29. On the fifth issue, the Appellant submits that the Learned Trial Magistrate failed to consider his argument that the access road may not have existed.
30. It is also the Appellant's submissions that this omission was significant as the existence of the said road was central to the encroachment claim.
31. It is further the Appellant's submissions that the Defendant in the trial Court did not file a defence and neither were witnesses called to verify the existence of the road in question. He was therefore left to challenge the road's existence without proper evidence from the opposing party.
32. The Appellant concludes his submissions by urging the Court to allow his appeal with costs.



33. The Respondent in his submissions, submits on each of the Grounds on the Appellant's Memorandum of Appeal.
34. On ground one, the Respondent submits that the Defendant in the trial Court did not file any Statement of Defence. The Respondent also submits that he (Respondent) was able to prove that it was the Defendant who blocked the access road.
35. The Respondent further submits that the present appeal cannot stand because no defence was filed in the trial Court.
36. It is the Respondent's submissions that the surveyor in his report confirmed the existence of the access road which had been closed. This confirmed his (Respondent's) claim before the trial Court.
37. It is also the Respondent's submissions that the map confirmed that there was a public access road and therefore the Appellant cannot contend that the said access road encroached onto his parcel of land.
38. It is further the Respondent's submissions that on 4th April, 2019, the parties entered into a consent that 6 meters of the access road be in use and that the three meters that were in dispute be litigated upon.
39. The Respondent submits that the said consent was not set aside.
40. The Respondent also submits that the Appellant cannot therefore agree that the road be in use and at the same time complain that the road has encroached onto his parcel of land.
41. The Respondent also submits that the Appellant was granted leave to file a Statement of defence and since he failed to do so, the Learned Trial Magistrate relied on the evidence placed before him.
42. It is the Respondent's submissions that the Appellant's submissions that the surveyor's report was not conclusive is an afterthought.
43. It is also the Respondent's submissions that the said surveyor testified in Court and produced certified copies of the map together with his report. The question of whether or not the report was conclusive was not put to him and therefore it cannot be raised on appeal.
44. It is further the Respondent's submissions that the Appellant encroached onto the access road.
45. With regard to grounds 2, 3 and 4 of the Memorandum of Appeal, the Respondent reiterates that the Appellant was granted an opportunity to participate in the proceedings but he failed to do so.
46. The Respondent also submits that the parties entered into a consent where they agreed that they would use six meters of the access road. This consent confirmed the existence of the access road and therefore grounds 2, 3 and 4 of the Memorandum of Appeal have no merit.
47. It is the Respondent's submissions that issues raised in grounds 2, 3 and 4 of the Memorandum of Appeal were not raised during the hearing before the trial Court and they cannot therefore be raised on appeal.
48. On grounds 5, 6, 7 and 8 of the Memorandum of Appeal, the Respondent submits that the Appellant did not adduce any evidence despite being given an opportunity to do so.
49. The Respondent also submits that the access road in dispute is a public road and therefore the issue of which parcel of land it serves is immaterial.
50. The Respondent further submits that even though he filed the suit before the trial Court in respect of land parcel No. Kericho/Kabianga/1083, he is not a purchaser of the said land as was submitted by the Appellant.



51. The Respondent concludes his submissions by urging the Court to dismiss the appeal with costs.

Analysis and Determination.

52. The issues that arise for determination are as follows;

- a. Whether the Learned Trial Magistrate erred in law and in fact in failing to give the Appellant an opportunity to be heard.
- b. Whether the Learned Trial Magistrate erred in law and in fact in finding that the access road exists.
- c. Whether the Learned Trial Magistrate erred in law and in fact by relying on a survey report that found that the access road encroached on land parcel No. Kericho/Kabianga/3548 and yet the said survey report did not set out the total acreage of land parcel No's Kericho/Kabianga/1761 and 3548.
- d. Whether the Learned Trial Magistrate erred in law and in fact in finding that the access road serves land parcel No's Kericho/Kabianga/1761, 3548, 1082 and 1083 and yet the said road only serves land parcel No. Kericho/Kabianga/1083.
- e. Whether the Learned Trial Magistrate erred in law and in fact in finding that the wrong description of the access road could not have occasioned a miscarriage of justice.
- f. Whether the Learned Trial Magistrate erred in law and in fact in failing to find that there was an existing road that was serving land parcel No's Kericho/Kabianga/1082 and 1083.
- g. Who should bear costs of the appeal.

A. Whether the learned Trial Magistrate erred in law and in fact in failing to give the Appellant an opportunity to be heard.

53. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of *Gitobu Imanyara & 2 others Vs Attorney General* [2016] eKLR. It was held as follows;

“An appeal to this Court from a trial by the High 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 allowances in this respect.”

54. In *Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR the Court held as follows;

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

55. The Appellant contends that the Learned Trial Magistrate did not give him an opportunity to call his witnesses and give evidence.

56. The Respondent submits that the Appellant was given an opportunity to participate in the proceedings but he failed to do so.



57. The Learned Trial Magistrate in his judgement stated as follows;
- “On 5th September, 2019, parties agreed that Interested Parties be allowed to put in responses to the claim, (sic) thereafter parties agree (sic) on issues to be addressed by the Court. Unfortunately, this was not fully complied with as the parties never agreed on issues for determination. The first Interested Party, however filed a defence while the 2nd Interested Party never filed anything.
- When the matter proceeded to hearing only the Plaintiff called witnesses and at the close of the case the Plaintiff and the 1st Interested Party only, (sic) filed submissions.”
58. The Learned Trial Magistrate in his judgement stated that the Appellant, who was the 1st Interested Party in the Trial Court, was granted leave to file a Statement of defence but he did not give any evidence when the matter came up for hearing.
59. A perusal of the proceedings before the trial court shows that on 6th August, 2020 the matter came up for defence hearing. Counsel for the Appellant was present and he informed the trial Court that he had three witnesses. He also stated that he was ready to proceed but in the absence of the Defendant, he did not think it was prudent to proceed.
60. The matter was placed aside and at 9:40 am, the matter was called out again. At this point, counsel for the 2nd Interested Party informed the Trial Court that he had found an authority where the Court held that Interested Parties cannot take part in a matter by giving evidence.
61. The hearing of the suit was adjourned to 1st October, 2020 and Counsel for the 2nd Interested Party ordered to furnish the Trial Court with the said decision.
62. On 1st October, 2020, Counsel for the Appellant was not present when Counsel for the 2nd Interested Party informed the Trial Court that in Francis Kariuki Muruatetu & another vs Republic [2016] eKLR the Court held that Interested Parties only have a peripheral role in proceedings.
63. Counsel for the Respondent confirmed that that was the position in law and since the Defendant was not present in Court, Counsel requested that his (Defendant) case be marked as closed.
64. The Learned Trial Magistrate closed the Defendant’s case and stated that the Court would be conducting a site visit.
65. The matter was mentioned severally before the trial Court issued the following orders on 3rd June, 2021;
- “Having reviewed the evidence on record, and to avoid further delay, the site visit to the scene is done away with. Parties to file their respective submissions. Mention on 23rd June, 2021.”
66. The issue whether or not the Appellant could give evidence was not re-visited, raised and/or addressed again after the Defendant’s case was closed. The only time the question of the Appellant tendering evidence came up, as previously stated, was on 6th August, 2020 when the matter came up for defence hearing and Counsel for the Appellant who was present informed the trial Court that he had three witnesses and although he was ready to proceed, in the absence of the Defendant, he did not think it was prudent to do so.
67. It is this Court’s view that if at all the Appellant was desirous, subsequently, of giving evidence and calling witnesses, he ought to have said as much.



68. In the judicial decision of *West Kenya Sugar Company Limited v Okendo (Civil Appeal E056 of 2023)* [2024] KEHC 2844 (KLR) (8 March 2024) (Judgment) the Court held as follows;

“22. Matters not canvassed by the parties and which the trial Court did not get a chance pronounce itself upon are not available for consideration by the Appellate Court.”

69. Taking these into consideration, I find that the assertions by the Appellant that he was denied an opportunity to give evidence before the trial Court are not true. This ground of Appeal fails.

B. Whether the learned trial magistrate erred in law and in fact in finding that the access road exists.

70. The Appellant contends that the Learned Trial Magistrate erred in failing to first consider whether the access road existed before making a finding that the said access road encroached on land parcel No. Kericho/Kabianga/3548.

71. The Appellant submits that the suit before the trial Court was not defended and therefore no witnesses were called to verify the existence of the road.

72. The Respondent submits that evidence was adduced before the trial Court which confirmed the existence of the road and further, the Appellant entered into a consent dated 4th April, 2019 where they agreed that six meters of the road be in use.

73. It is therefore the Respondent’s submissions that by entering into the said consent, the Appellant confirmed the existence of the said access road.

74. The Respondent submits that the surveyor confirmed in his report that the said access road existed which road had been closed and was later re-opened.

75. The Learned Trial Magistrate in his judgement observed as follows;

“The first Interested Party, in his submissions, did not challenge the existence of the road on the map but seems to challenge the way it was curved out as he contended that the Plaintiff’s land number (sic) LR No. Kericho/Kabianga/1083 had no relationship with his land number (sic) LR No. Kericho/Kabianga/3548. He submitted that the road should be claimed from Kericho/Kabianga/1143 which was adjacent land (sic) and from whose owner the Plaintiff had bought his land.

As already indicated, the existence of the road was not contested...”

76. A perusal of the pleadings filed before the trial Court shows that on 3rd October, 2019, the Appellant filed a Statement of Defence.

77. He stated that he was the registered owner of land parcel No. Kericho/Kabianga/3548. He also stated that the alleged area (sic) had never been a public road.

78. He further stated that the road which allegedly passed through his land did not appear on the Registry Index Map.

79. Essentially, the Appellant in his Statement of Defence did not dispute the existence of the access road but stated that it was neither a public road nor did it appear on the Registry Index Map.

80. It is evident that the issue of whether or not the access road existed did not form part of the issues for determination before the trial Court.



81. The Learned Trial Magistrate correctly observed that the existence of the road was not in dispute.
82. The Court of Appeal in the judicial decision of Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto [2018] eKLR held as follows;

“It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v. Ruth Watiri Kibe*, [CA No. 39 of 2015](#) and *Openda v. Ahn* [1983] KLR 165). In this case we have stated that the Appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the Learned Judge, quite properly did not address the issue and, to make the matters worse, the Appellant did not raise the issue in his memorandum of appeal in this Court. The Attorney General is entitled to complain, as he does, that he has been taken by surprise and denied a fair opportunity to respond to the new issue. As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the Appellate Court to consideration of the issues that were canvassed before and decided by the Trial Court. If that were not the case, the Appellate Court would become a Trial Court in disguise and make decisions without the benefit of the input of the Court of first instance. (See *North Staffordshire Railway Co. v. Edge* [1920] AC 254).” [Emphasis Mine]

83. It is my view that the Appellant is precluded from raising the issue of whether or not the access road existed on appeal and yet the said issue, did not form part of the issues for determination before the trial Court.
84. This ground of appeal therefore fails.

C. Whether the Learned Trial Magistrate erred in law and in fact by relying on a survey report that found that the access road encroached on land parcel no. Kericho/Kabianga/3548 and yet the said survey report did not set out the total acreage of land parcel no’s Kericho/Kabianga/1761 and 3548.

85. The Appellant submits that the Learned Trial Magistrate erred by relying on the filed survey report in making a finding that the access road encroached on land parcel No. Kericho/Kabianga/3548.
86. The Appellant submits that the survey report only addressed the access road without considering the total acreages of land parcel No’s Kericho/Kabianga/3548 and 1761.
87. It is the Appellant’s submissions that the Court ought to have ordered for a more comprehensive survey.
88. The Respondent submits that the map confirmed that the access road was a public road and therefore the Appellant cannot contend that the said road encroached on land parcel No. Kericho/Kabianga/3548.
89. A perusal of the proceedings of the trial Court shows that on 31st May, 2018 the trial Court issued the following order;

“The District Surveyor to visit the ground and confirm the status of the disputed road and assist parties where possible to come up with an amicable solution...”



90. The Learned Trial Magistrate in his judgement held as follows;

“On 3rd May 2018,(sic) the Court ordered the District Surveyor to visit the ground and confirm the status of the disputed road and assist parties where possible to come up with an amicable solution. The surveyor’s report dated 4th March, 2019, filed on 21st March, 2019 made the following findings;

“The said road of access acts as a service road for parcels 1761, 3548, 1082 and 1083

...

The access road encroaches the tea plantation and the house of parcel no. 3548 as shown on the figure which is not drawn to scale. (the figure was attached).

...

Recommendations

If the road is mapped as 6 meters, it will cause minimum destructions and will also serve its purpose while maintaining it at 9 m wide will cause destruction of properties.”

On 4th April, 2019, the Court made an order upon the surveyor’s report being tabled and with the consent of parties that 6 meters which was not disputed be opened up as the parties litigate over the remaining 3 meters...

I consider that the main issue that arose in this case for determination was the location of the disputed road in (sic) the map and whether the same should be opened. There was no pleading challenging the relevant maps or seeking their amendment.

The District Surveyor according to the report dated 4th March, 2019 was able to locate the road on the ground and established that it had been encroached by parcel number 3548 where there was a tea plantation and a house. According to the surveyor, if the road was to be opened to its 9 meters as per the map, it would lead to destruction of property and recommended that the road be reduced to 6 meters. Although that may be a good recommendation, the question of reducing and/or redrawing the disputed road was not the subject of litigation. I am therefore satisfied that the Plaintiff has proven the existence of the road of access and its width as 9 meters and there is no reason why the same cannot be opened up...”

91. It is evident that the Learned Trial Magistrate in his judgement relied on the Surveyor’s report dated 4th March, 2019. In the report, the surveyor found that the access road had been encroached by land parcel No. 3548. (sic)
92. This Court has established that the Appellant did not challenge the findings of the report before the trial Court.
93. It is apparent that the orders of the Trial Court limited the scope of the surveyor’s visit to confirming the status of the disputed road.



94. As mentioned in preceding paragraphs, the Appellant contends that the Court ought to have ordered the surveyor to conduct a comprehensive survey and set out the total acreage of land parcel No's Kericho/Kabianga/1761 and 3548.
95. A further perusal of the trial Court's proceedings shows that an order that a comprehensive survey of the two parcels be done, was not sought.
96. There is no doubt that this is yet another new issue that the Appellant is raising on appeal. As was held in Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto (supra) cited under issue (a), parties are precluded from raising new issues on appeal.
97. This ground of appeal also fails.

D. Whether the learned trial magistrate erred in law and in fact in finding that the access road serves land parcel no's Kericho/Kabianga/1761, 3548, 1082 and 1083 and yet the said road only serves land parcel no. Kericho/Kabianga/1083.

98. The Appellant contends that the Learned Trial Magistrate erred in making a finding that the access road served land parcel No's Kericho/Kabianga/1761, 3548, 1082 and 1083.
99. It is the Appellant's contention that the said road only serves land parcel No. Kericho/Kabianga/1083.
100. The Respondent did not address this issue in his submissions.
101. The Learned Trial Magistrate in his Judgement observed as follows;

“...Apparently, the access road in question joins the said road but can best be described as the access road serving parcels Nos. 1761, 3548, 1082 and 1083.”
102. The said finding is based on the Surveyor's report that was dated 4th March, 2019 and filed in Court on 21st March, 2019. The report was prepared by Janet Kandie (surveyor) and checked by Isaack Kibet the District Surveyor.
103. The relevant excerpt of the surveyor's report is as follows;

“Emerging issues on the groundThe Plaintiff claims he is the owner of parcel number 1083.The said road of access acts as a service road for parcels 1761, 3548, 1082 & 1083...”
104. As afore stated the Surveyor's report informed the observations and/or findings of the Learned Trial Magistrate. This report was not challenged by the Appellant.
105. This ground of appeal fails.

E. Whether the Learned Trial Magistrate erred in law and in fact in finding that the wrong description of the access road could not have occasioned a miscarriage of justice.

106. The Appellant submits that the Learned Trial Magistrate erred in finding that no miscarriage of justice was occasioned by the Respondent wrongly describing the access road and yet the said description was used to create an illusion that there was encroachment.
107. The Respondent did not address this issue in his submissions.



108. The Learned Trial Magistrate in his judgement observed as follows;

“The Plaintiff might not have been accurate in describing the road as Taprotin-Chemumbe dip – Kabianga main road. Apparently, the access road in question joins the said road but can be best described as the access road serving parcels Nos. 1761, 3548, 1082 and 1083. However, this misdescription could not have occasioned any miscarriage of justice as all the parties understood where the dispute was.”

109. As observed by the Learned Trial Magistrate, the road described by the Respondent as Taprotin-Chemumbe dip – Kabianga main road was the same road in dispute between the parties.

110. Neither of the parties disputed the said description of the access road.

111. It is my view that the Appellant’s contention that the erroneous description of the access road created an illusion of encroachment is unsubstantiated. In any event, a survey of the access road was done and a report filed in Court.

112. The finding of the Learned Trial Magistrate was not based on the manner in which the road was described but was informed by a report filed in Court after a visit by the surveyor.

113. I find that the misdescription of the access road was immaterial in the determination of the dispute before the Trial Court. Consequently, this ground of Appeal also fails.

F. Whether the learned trial magistrate erred in law and in fact in failing to find that there was an existing road that was serving land parcel No’s Kericho/Kabianga/1082 and 1083.

114. The Appellant at ground (f) of his Memorandum of Appeal states that the Learned Trial Magistrate erred in failing to find that there was an existing road that was serving land parcel No’s Kericho/Kabianga/1082 and 1083.

115. Neither of the parties addressed this issue in their submissions.

116. In *Khetshi Dharamshi & Company Ltd v Obuyumbi* (Appeal 10 of 2023) [2023] KEELRC 2664 (KLR) (30 October 2023) (Judgment) the Court held as follows;

“4. To answer the 1st issue, the Court returns (sic) that the appellant has made no submissions on the issue of want of jurisdiction by the trial Court per Grounds 1 and 2 of appeal and as submitted for the Respondent, the Appellant is deemed to have abandoned the two grounds. The Court returns that the two grounds stand abandoned accordingly.”

117. In the judicial decision of *Kamonde v Mulonzya & another* (As Administrators of the Estate of Paul Vinzi - Deceased) (Civil Case E213 of 2022) [2024] KEHC 5648 (KLR) (9 May 2024) (Judgment) the Court held as follows;

“There was no submission on other grounds of Appeal hence they are deemed abandoned.”

118. Similarly, in the present Appeal, the Appellant did not submit on ground (f). I shall deem it as having been abandoned.



G. Who should bear costs of the appeal.

119. The general rule is that costs shall follow the event in accordance with the Provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

120. In the result, I find that this appeal lacks merit. It is hereby dismissed with costs.

121. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 31ST DAY OF JULY, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Langat for the Appellant - Absent

Mr. Miruka for the Respondent.

Mr. Makori – Court Assistant

