

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT OF KENYA AT**  
**SIAYA**  
**ELC LAND APPEAL NO. E032 OF 2024**

**STEPHEN ONYANGO AWUOR.....**  
**APPELLANT**

**-VERSUS-**

**YUANIAH ONYANGO ODUOR.....1<sup>ST</sup>**  
**RESPONDENT**

**LAND REGISTRAR SIAYA.....2<sup>ND</sup>**  
**RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup>**  
**RESPONDENT**

**THE INCHARGE CARTOGRAPHY SIAYA.....4<sup>TH</sup>**  
**RESPONDENT**

**JUDGEMENT**

**BACKGROUND**

1. The Appellant Stephen Onyango Awuor was the defendant in Siaya MCELC No. E035 of 2022 where he was sued together with the Land Registrar Siaya and the Cartographer by Yuaniah Onyango Oduor vide an amended plaint dated 13/06/2022.
2. In the above suit the plaintiff claimed her land LR No. East Gem/Anyiko/1253 measuring 0.30Ha and the appellants land LR No. East Gem/Anyiko/1262 measuring 0.19Ha have been wrongly mapped/captured in the area map of East Gem Diagram No.12 despite each party physically

occupying their lands as demarcated. She termed this as an error made by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. That despite rectification having been undertaken pursuant to a court order for the rectification issued in 2021 the map was later reverted to same errors.

3. But why sue the 1<sup>st</sup> defendant if this was an error? She averred that the appellant intends to take advantage of the error to occupy the plaintiffs parcel being the larger one and which had a forest of trees he intended to harvest. That he has maliciously trespassed therein to unjustly enrich himself.
4. In his judgement delivered on 24<sup>th</sup> September 2024 Hon.Limo B. Benjamin Principal Magistrate found the plaintiff had proved her case on a balance of probabilities and allowed the prayers sought in the amended plaint.
5. Aggrieved the appellant filed this appeal in person vide Memorandum of Appeal dated 7/10/2025 on the following grounds;-

***1) The Honourable Magistrate erred in both law and facts by finding that the Plaintiff proved her case on a balance of probabilities.***

***2) The Honourable Magistrate erred in both law and facts by finding that the Plaintiff was the legal owner of the suit land parcel.***

***3) The Honourable Magistrate erred in both law and facts by allowing the plaintiff's case***

*without applying the applicable legal provisions and principles.*

**4) The Honourable Magistrate erred in both law and facts by finding that the appellant fail to establish whether my pleadings were properly pleaded on the claim of illegality and fraud to the required standards.**

**5) The Honourable Magistrate erred both in law and in fact by misdirecting himself in the interpretation of law and facts in the instant case and thus arriving at a wrong, erroneous and unjust conclusion.**

**6) The decision in its entirety is against the law, irredeemable travesty of justice and a misapprehension of the law.**

6. On the basis of the above grounds the appellant prays that;-

**1) THAT the entire judgment of the subordinate court/Trial Court delivered on 24th September, 2024 be set aside/Dismissed.**

**2) THAT the plaintiff's land being LR No. EAST GEM/ANYIKO/1253 be retained as depicted in Preliminary Index Diagram (PID) of the first edition Map.**

**3) THAT the defendant's land being LR No. EAST GEM/ANYIKO/1262 be retained as depicted in the Preliminary Index Map (PID) of the first edition Map.**

#### **4) Costs of the appeal.**

### **SUBMISSIONS**

7. That upon certifying the appeal ready for hearing, the court issued directions that the same be heard by way of written submissions.

### **Appellants Submissions**

8. The appellants submissions are dated 25/03/2025 and identified three issues for determination which are summarised as follows;-

### **Whether the trial court disregarded the fact that the matter is res judicata.**

9. Referring to the provisions of Section 7 of the Civil Procedure Act is submitted that the trial court did not address the issue as to whether the suit is res judicata despite the same having been raised by the appellant in their lower court submissions. A clear evidence that the trial court did not consider the appellants submissions in the lower court.
10. It is urged that the trial court should have dismissed the suit at the onset without going to its merits because the same is res judicata. It is contended that the 1<sup>st</sup> respondents' pleadings, attached an order issued in **ELC MISC NO E017 OF 2021** where the court granted the same orders the Plaintiff is seeking in the present suit over the same parcel numbers being parcel numbers

**EAST GEM/ANYIKO/1253** and **1262**. The court is referred to the case of **Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others, [2017] eKLR**), where the Court of Appeal set the criteria to be satisfied for a suit to be rendered res judicata.

**Whether there was a mistrial of this matter leading to a miss-courage of justice.**

11. Referring to the definition of a mistrial in the Black's Law Dictionary 9<sup>th</sup> Edition as; **"a trial that the judge brings to an end, without determination on merit, because of procedural error of serious misconduct occurring during the proceedings."**
12. It is submitted that there was a mistrial in the lower court because during the hearing of this matter on 9 July 2024, the matter was scheduled for hearing of the plaintiff's case and both the appellant and the 1<sup>st</sup> respondent's advocate was present and the Appellant was present in person. The matter was then given time allocation at 12; 30 p.m. After the matter was given time allocation, the appellant stepped out to wait for the allocated time then come back to court, when the Appellant came back at 12;10 p.m., the appellant found the matter already proceeded and the plaintiff and defense case closed.
13. That the court proceeding with the matter before the allocated time of 12;30 pm clearly amounted to a miscarriage of justice. The court should have proceeded with the matter at the allocated time and not earlier than

that. Further, the least the court should have taken the plaintiffs in the trial court and then take another date for the appellants case to be heard. Failure to observe time by the court denied the appellant the opportunity to be heard hence leading to a miscarriage of justice.

**Whether the 1<sup>st</sup> Respondent proved a case of transfer by way of exchange to the required standard**

14. It is contended that the trial court in its judgement only relied on the surveyor's recommendation to arrive at its judgement and did not consider any other factor. Rehashing the findings in the said report the appellant asserts that from the map, the two parcel numbers are located where they are as a result of an adjudication and the aerial map (1<sup>st</sup> edition) filed in this court as defense exhibit-1 is a confirmation of the same. That it is therefore not possible for the 1<sup>st</sup> respondent to challenge the said map at this stage yet the same was prepared as it is during adjudication.
15. That the 1<sup>st</sup> respondent in her pleadings have not demonstrated that there was an error made by the 2<sup>nd</sup> and 4<sup>th</sup> Defendant, the mere fact that the 1<sup>st</sup> respondent is using the wrong parcel does not mean the parcel is erroneously located on the part it occupies on the map.
16. It is further submitted that as part of due diligence, the 1<sup>st</sup> respondent ought to have gone to the ground and

confirmed the land she was buying and also check on the map the exact location of her parcel which she failed to do and cannot start blaming the 2<sup>nd</sup> and 3<sup>rd</sup> respondents for her own mistake.

17. Referring to the provisions of section 24 and 26 of the Land Registration Act 2012 it is contended that the 1<sup>st</sup> respondent is seeking to have the appellants title deed through the back door. The orders being sought by the 1<sup>st</sup> respondent has the legal effect of change of ownership of the appellants parcel.
18. Referring to the provisions of section 79 (2) of the Land Registration Act on the registrars' powers of rectification of a register and section 80 on rectification by the court it is submitted that rectification upon a re-survey can only be done by consent of the land proprietor or the same can be done if it is found that the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission. That the provisions do not envision rectification that does affect the rights/interest of registered property.
19. It is asserted the rectification proposed by the surveyor does not conform with Section 79. That the changes it proposes clearly confers the entire parcel to another party. Secondly, the procedure provided for in this Act was not followed by the lands office before they arrived at the said decision. That therefore the trial court erred in fact

and in law in relying on the recommendations of the survey report in arriving at the judgement.

### **The Respondents Submissions**

20. On the plea that the suit is res judicata it is submitted that the appellant herein was not a party to the said application by way of miscellaneous case ELCMISC/E017/2021 as the same was between the 1st respondent herein as the then applicant, the In-Charge Siaya Cartography Department, Siaya Land's Registrar and the Siaya County Surveyor as the then respondents, for implementation of the lower trial court's judgment issued on 24th September, 2024, by the Hon. Limo B. Benjamin (PM). Thus, the order sought was merely facilitative and meant to implement the judgement of the court.
21. Reference is made to the case of **Omar t/a Sabrin Shop v Highrise Commodities Ltd (Civil Appeal E291 of 2023) [2024] KEHC 6177 (KLR)** (27 May 2024) (Ruling).
22. It is emphasised that parties herein litigated over MCELC/E035/2022 in which a judgment was delivered in it on 24th September, 2024. Reliance is placed on the case of Attorney **General & another ET vs (2012) eKLR** where it was held that parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit which is described as a cosmetic uplift.

23. Rehashing the plaintiffs claim as pleaded it is asserted the plaintiffs application by way of Notice of Motion dated 13th June, 2022, both the plaintiff and appellant's (then 1<sup>st</sup> defendant's) advocates consented to prayer no. 3 of the said application. The prayer is revisited elsewhere in this judgement. That the consent was duly signed by the parties advocates filed in court on 18th August, 2022 and duly served upon the appellant's (then 1<sup>st</sup> defendant's) advocates, the firm of Rakewa Otieno & Co. Advocates.
24. It is also submitted that the consent was adopted as an order of the court whereby the 1<sup>st</sup> respondent herein engaged Opiyo & Associates Licensed Land Surveyors, being private land surveyors who on 21st February, 2023 visited the 1<sup>st</sup> respondent's (then plaintiff's) and appellant's (then 1<sup>st</sup> defendant's) land and upon assessing the said lands gave a recommendation that, "the court to compel the Siaya District Surveyor to redraw the Registry Index Map (RIM) Sheet 11 of East Gem Anyiko registration section to depict AI-A2-A3-A4 as parcel 1253 and B1-B2-B3-B4 as parcel 1262."
25. That subsequently, on 4<sup>th</sup> April, 2023 the County Surveyor one Mr. Harrison Adongo alongside the District Land Registrar visited the disputed lands and upon assessing the same gave a recommendation that, "1. Both plaintiff and 1<sup>st</sup> defendant should do transfer by exchange to reflect what is on the ground." and "2. A re-survey be done on parcel no. 1262 to reflect ground truth."

26. That indeed the appellant herein was present during the exercise which gave a recommendation to swap the parties' land parcel numbers on the land registry and map, and not the physical lands as was on the ground. It should be noted that the appellant herein never objected to the experts' reports dated 4<sup>th</sup> April 2023 and 21st February, 2023 of the exercise done on the land parcels.
27. The court was invited to note that despite service of court documents, the appellant never defended his suit. That equity calls to those seeking its aid to come before it with clean hands and also do equity as was held in **John Njue Nyaga v Nicholas Njiru Nyaga & Another (2013) eKLR**, the Court of Appeal sitting at Nyeri observed as follows: "It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings. The applicant has not done so and is underserving of the orders he seeks."

### **ANALYSIS AND DETERMINATION**

28. Upon considering the appeal, the pleadings, the evidence on record, the judgments of the courts below, the grounds of appeal, and the rival submissions of the parties, the issues that arise for consideration is whether the appeal has merit.
29. Section 78 of the Civil Procedure Act outlines the duties of the court sitting on appeal;-

“Subject to such conditions and limitations as may be prescribed, an appellate court shall have power;

1. (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require the evidence to be taken;

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

30. I will also be guided by the case of **Selle Vs. Associated Motor Boat Co. (EA.123)** where the court stated thus; -

‘.....Briefly put 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.’

**Whether the suit herein is res judicata**

31. The appellant has asserted that the suit is res judicata and the trial court should not have proceeded with the hearing. My perusal of the trial court proceedings bears no record of this plea as having been raised. However being cognisant of the fact that this goes to the root of jurisdiction of the court and that jurisdiction is everything

without which a court cannot adjudicate over a dispute I must make a determination on the same - see **Owners of Motor Vessel Lilian S Vs. Caltex Oil(Kenya) Ltd (1989)**

32. Both the appellant and the respondent have referred to and rightly so the provisions of Section 7 of the Civil Procedure Act which read;-

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

33. The **Black’s law Dictionary 10<sup>th</sup> Edition** defines “**res judicata**” thus;

**“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”**

34. The Supreme Court in a decision rendered on 6<sup>th</sup> August, 2021 in **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR** stated as follows:

**[86]** *We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:*

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action

35. The Court of Appeal in **Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others, (supra)** spells out the factors to be considered as follows;

***For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;***

**a) The suit or issue was directly and substantially in issue in the former suit.**

**b) That former suit was between the same parties or parties under whom they or any of them claim.**

**c) Those parties were litigating under the same title.**

**d) The issue was heard and finally determined in the former suit.**

**e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.**

36. The appellant identifies the former suit as ELC MISC NO E017 OF 2021 where the 1<sup>st</sup> respondent plaintiff is said to have obtained the same orders sought in the present suit. My review of the trial court file shows that when the plaintiff filed the present suit she also filed a Notice of Motion application 13/06/2022. One of the grounds upon which the application was premised, is that she had on 13/09/2021 obtained exparte orders to direct the Incharge, Cartography department to amend the Map of East Gem to repositioning the two properties as demarcated on the ground. That upon hearing the orders were granted.

37. The grounds also state that while the same orders were implemented, the map was reverted back with the same errors thus necessitating this suit against all defendants with the 'inclusion of the 1<sup>st</sup> defendant who is in the process of wanting to grab the plaintiff land.
38. Arising from the above firstly it is clear the orders in ELC MISC NO E017 OF 2021 were obtained without the involvement of the other parties and it was also not heard on merits. Infact it is clear to me the 1<sup>st</sup> defendant was being joined for the first time through the present proceedings as he was not in the former proceedings. This is confirmed by the Order. The parties in the said matter are Yuniah Adhiambo Oduor (the plaintiff in the present proceedings) Vs. In charge Cartography Department Siaya, Land Registrar Siaya and County Government Siaya.
39. In view of the foregoing the present suit does not involve the same parties with the former suit and the former suit was not heard on its merits and therefore was not finally determined. It is the finding that the present suit is not res judicata.
40. The court has been invited to find that there was a mistrial. It is urged that the case proceeded in the absence of the appellant who was present in court when the matter was called out for time allocation for hearing and was allocated 12.30pm. That he stepped out and

coming back at 12.30pm he found that the same had proceeded in his absence before the allocated time.

41. I resorted to the record of the proceeding (page 9/7/2024). The record shows the 1<sup>st</sup> defendant was present in person where he informed the court he was ready to proceed. The court then gave an allocation of 12.30pm. The record shows that at 12.30pm the court noted that the matter was to proceed for hearing in the absence of the defence. I had no evidence before me that the court resumed at any other time before 12.30pm.
42. The record further reveals that Mr. Ochanyo applied to have the defence case closed as per the return of service. The court obliged and closed both the plaintiffs and defence cases and fixed the matter for mention on submissions 23/7/2024.
43. The record of appeal further reveals at page 72-77 that on 5/8/2024 the 1<sup>st</sup> defendant filed a Notice to Act in Person dated 3/6/2024. It is not clear why the Notice dated 3/6/2024 was being filed on 5<sup>th</sup> August. Be that as it may the 1<sup>st</sup> defendant also filed closing submissions on 5/08/2024 of even date.
44. It seems to me the 1<sup>st</sup> defendant had no issues/qualms with the hearing that proceeded as he is seen filing his final closing submissions. I say so because if he was in court on the date of the hearing and indeed went back to court and found out that the hearing had been concluded he still had an opportunity to apply to the court to set

aside the proceedings. He did not but proceeded to file his closing submissions. He then raises the issue on appeal. This cannot prevail for the reason that what is before me is not an application to set aside a judgement. It is neither an appeal against the ruling in any such application that was dismissed. It is an appeal against a judgement.

45. In view of the foregoing it is my finding that there is no mistrial.
46. The respondent submits that the 1<sup>st</sup> defendant did not file a defence. My perusal of the record does not reveal any defence filed by the 1<sup>st</sup> defendant in the matter. However the firm of Rakewa Otieno & Co. Advocates had been on record until the Notice of Intention to Act in person was filed. I have noted that the submissions also introduces factual issues and evidence that was not produced at the trial court. The defendant cannot purport to give his evidence through the submissions. It has now been established that submissions are not evidence. See the case of **Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & Ano.(2014)KECA 642 KLR.**
47. Further a defence is the substratum or the principal document of the party in opposition. Every other document filed by the defendant is anchored upon the defence. The Supreme Court of Kenya in **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR** held as follows:

“A Replying Affidavit is the principal document wherein a Respondent’s reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence of this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1<sup>st</sup> Respondent on 17<sup>th</sup> August, 2018 are of no effect.”

48. I would apply the same reasoning to the present case and state that without a defence the trial court was right in disregarding the 1<sup>st</sup> defendants/appellant documents. For the avoidance of doubt the 1<sup>st</sup> Defendants Statement (see page 45-46) is not a defence. Also see the case of **Kenneth Nyaga Mwige Vs Austin Kigota & 2 Others (2015) eKLR** on when a document is considered to be an exhibit in law.
49. The above notwithstanding it is trite that even if a suit is not defended the plaintiff must prove its case to the required standard. It does not matter that the defendant has not testified or opposed the suit. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the Evidence Act.
50. The Court of Appeal in the case **Charterhouse Bank Limited (Under Statutory Management vs. Frank N. Kamau (2016) eKLR** had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated thus; -

“We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.”

51. The question that arises therefore is whether the Plaintiff proved her claim to the required standard of proof. Should the conclusions reached by the learned trial judge stand or not.
52. The court has perused the judgement at page 80 -81 of the record of appeal. The plaintiff during the hearing adopted the witness statement dated 13/6/2022 as her evidence in chief and produced the documents in the list of documents dated 13/6/2022 and 4/7/2022. They were admitted by the trial court as Pexhibit No. 1-7. Pexhibit No.

8 was the surveyors report dated 4/4/2023. Her emphasis was on the mapping error as stated in the amended plaint.

53. The trial court in its determination noted there was on record the County Surveyors report dated 4/4/2023 by Harrison Adongo alongside the District Land Registrar. The trial court noting the recommendation of the report that '1. Both plaintiff and 1<sup>st</sup> defendant should do transfer by exchange to reflect what is on the ground.' And '2. A resurvey be done on parcel No.1262 to reflect the ground.' The trial court then made the following finding; -

**'It is the finding of the court that-in the circumstances, it is evident that the lands need re-positioning and the court will not belabor. I find the plaintiff to have proved their case on a balance of probabilities.'**

54. The trial court proceeded to grant prayer a,b and c of the amended plaint.
55. I have reviewed the amended plaint dated 13/6/2022. The plaintiffs concern was that her parcel LR No. East Gem/Anyiko/1253 measuring 0.30Ha and the appellants land LR No. East Gem/Anyiko/1262 measuring 0.19Ha have been wrongly mapped/captured in the area map of East Gem Diagram No.12 despite each party physically occupying their lands as demarcated. This is clearly stated in paragraph 18 and 19. This is supported by prayer (b) of the Plaint which reads; -

An order compelling the incharge of Cartography Department Siaya to amend the map of East GEM, DIAGRAM NO.12 re-positioning the plaintiffs land LR No. East Gem/Anyiko/1253 measuring 0.30Ha and the land LR No. East Gem/Anyiko/1262 measuring 0.19Ha respectively as demarcated on the ground and the District Land Registrar, Siaya to affirm the Plaintiff parcel in the parcel file's green card and upon the Incharge of Survey , Siaya Confirming the aforementioned lands boundaries.

56. The report dated 4/04/2023 is available at page 39 of the record of appeal. It is signed by the County Survey Office Siaya and signed by Harrison Adongo. I note that it was prepared pursuant to 'Court Order ELC No. 035 of 2022 issued on 22<sup>nd</sup> September 2022.' From the record this order was made by consent of the parties and adopted by the court and is at page 25 of the record of appeal. It reads; -

“ THAT the District County Surveyor, Siaya, the in - Charge Cartography Department alongside the District Land Registrar, Siaya in the presence of the Area Chief and the OCS of Yala Police do visit the Applicant's and the 1st Respondent's lands known as LR. NO. East Gem/Anyiko/1253 and LR. NO. East Gem/Anyiko/1262 to determine and affirm their acreages on the ground and as per the issued title deeds on 7<sup>th</sup> July 1993 and 23<sup>rd</sup> July, 2020 respectively and positioning of the lands whereupon

the 2nd, 3rd and 4th Defendants do file before the Honourable Court their comprehensive reports of the exercise and both plaintiff and 1st defendant are at liberty to bring their own private surveyors alongside their counsels, if need be.”

57. I note that both the plaintiff and 1<sup>st</sup> defendant were present and their witnesses. The Land Registrar was present and his surveyor. The PID used for East Gem Anyiko Diagram No.12 was used to carry out a comprehensive survey for both parcels. The following findings were made;-

1. After thorough measurements, it was found out that the acreage of Parcel No. East Gem/Anyiko/1262 on the ground was 0.45Ha and the one occupied, it is the plaintiff Mrs. Yuniah Adhiambo Oduor who planted eucalyptus trees in the whole parcel

2. The acreage of parcel East Gem/Anyiko/1253 on the ground was 0.30Ha and the one occupied, it is the 1<sup>st</sup> defendant, Mr. Stephen Onyango Awuor, in that his mother was the one cultivating the land.

58. The recommendations of the report are already captured in the excerpt of the judgement hereinabove. Based on the consent the exercise was also agreed to determine and establish the acreage. Parties had agreed to also avail their private surveyors. The 1<sup>st</sup> defendant did not but participated in the exercise. I have seen no objection to the said report on the record or a report by the defendant

to counter this report. I see no reasons to fault the trial court for adopting the said survey report dated 4/4/2023.

59. My understanding of the report is that the survey confirmed the concerns raised by the plaintiff that indeed there was an error that required to be rectified. Indeed counsel for the appellant confirms the recommendation is to swap the parties' land parcel numbers on the land registry and map, and not the physical lands as was on the ground. This is my understanding as well.
60. The registrar only made a recommendation which was adopted by the court. The concerns raised by the Appellant that the provisions of section 79 of the Land Registration Act were not followed cannot therefore hold water. The rectification is by the order of the court as per the judgement.
61. I think I have said enough to demonstrate I see no reason to overturn the judgement of the trial court delivered on 24<sup>th</sup> September 2024.
62. The upshot of the foregoing is that the appeal is lacking in merit and is hereby dismissed.
63. To harness good neighbourliness each party shall bear their own costs of this appeal.

Orders accordingly

**Delivered and Dated at Siaya This 23<sup>rd</sup> Day of  
October 2025**

**HON. LADY JUSTICE A.E. DENA  
JUDGE**

**23/10/2025**

**Judgement delivered virtually through Microsoft  
teams Video Conferencing Platform in the presence  
of:**

Mr. Stephen Onyango Awuor Appellant present in person

Mr. Ochanyo for the 1<sup>st</sup> Respondent

No appearance for the rest of the parties

Court Assistant: Elisha Mboya