

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ELC APPEAL NOE012 OF 2025

ALAN MACHARIAPPELLANT

VERSUS

ADOW OSMAN JEHOW
.....RESPONDENT

[Being an appeal from the decree and judgment of Hon. M.A Odhiambo – SRM delivered on 21.3.2025 in Isiolo CMC ELC case No. 5 of 2019].

JUDGMENT

1. The subject appeal arises from the Judgment of the learned trial magistrate [Hon. M.A Odhiambo – SRM] dated **21st March 2025**; and the consequential decree arising therefrom wherein the learned trial magistrate found and held that the respondent herein [*who was the plaintiff in the subordinate court*] had proved his claim as pertains to the suit property. To this end, the learned trial magistrate entered judgment in favour of the respondent and decreed *inter alia* that the appellant vacate[s] the suit property and, in default same be evicted therefrom.
2. It is the said Judgment and the consequential decree which has aggrieved the appellant and thus provoked the subject appeal.
3. The Memorandum of appeal dated 28th March 2025; has highlighted the following grounds:
 - (i) *That the learned trial magistrate erred both in law and fact by finding and holding that the respondent proved his claim, yet the*

sale agreement produced in evidence refers to a letter of allotment dated 15.7.1999 but the letter of allotment produced and admitted in evidence is dated 13.7.1995.

- (ii) That the learned trial magistrate erred both in law and fact in failing to find and hold that the letter of allotment relied on by the respondent to prove ownership of the alleged plot by the purported seller does not refer to the parcel of land pleaded in the plaint or any other land parcel or plot number.*
- (iii) That the learned trial magistrate erred both in law and fact by holding that the respondent acquired the subject land in 2016 through a legitimate transfer, yet no documents of transfer or ownership by him was/were produced in evidence in the primary suit.*
- (iv) That the learned trial magistrate erred both in law and fact in failing to find and hold that the documents produced by the respondent in evidence in the primary case differ and contradict each other materially in terms of the alleged plot number.*
- (v) That the learned trial magistrate erred both in law and fact in failing to find and hold that the documents relied on by the respondent in evidence in the primary case differ and contradict each other glaringly regarding the name of the alleged seller.*
- (vi) That the learned trial magistrate erred both in law and fact by relying on the affidavit allegedly sworn on 24.1.2013, yet it was only marked for identification and was never produced as an exhibit after the respondent failed to avail the maker of the same in court for cross examination on the contents thereof, despite being accorded an opportunity to avail him on two different dates/occasions.*

- (vii) *That the learned trial magistrate erred both in law and fact in failing to find and hold that the said agreement relied on by the respondent does not disclose the size of his claimed parcel of land.*
- (viii) *That the learned trial magistrate erred both in law and fact in failing to find and hold that the documents relied on and produced by the respondent lacked a plot or land registration number which is distinct and different from a part development plan (P.D.P) number relied on by the respondent.*
- (ix) *That the learned trial magistrate erred both in law and fact by failing to find and hold that the respondents claim could not succeed without expert [land registrar's or surveyor's or physical planner's] evidence/report pointing out existence and exact location or site on the ground of the respondents alleged parcel of land or plot, in view of the appellants produced and admitted documentary evidence of his ownership, occupation and development of his plot No. Mwangaza/76 measuring 0.180 ha under part development plan (P.D.P) No. ISL/117/97/132.*
- (x) *That the learned trial magistrate erred both in law and fact in failing to find and hold that the appellant's evidence on his prolonged occupation, ownership, registration and development of his plot No. Mwangaza/776 under P.D.P No. ISL/117/97/132 was not challenged whatsoever.*
- (xi) *That the learned trial magistrate erred both in law and fact in entering judgment against all the sued defendants yet the 1st defendant died and the claim against him was either withdrawn or abated.*
- (xii) *That the learned trial magistrate erred both in law and fact by determining the primary matter before the determination of Isiolo ELC Petition No. E008 of 2021 (Formerly Meru ELC Petition No.*

1 of 2019), yet she had earlier kept it on hold pending delivery of judgment in that petition which affected the subject matter in the primary suit.

4. The instant appeal came up for directions on 30th July 2025; and whereupon learned counsel for the appellant intimated to the court that same had duly filed and served the record of appeal. Furthermore, learned counsel posited that the record of appeal was complete and thus the appeal was ready for hearing. To this end, learned counsel sought directions pertaining to and concerning the hearing of the appeal.
5. With the concurrence of learned counsel for the respondent, 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 canvassed and disposed by way of written submissions. Moreover, the court proceeded to and circumscribed the timelines for the filing and exchange of written submissions.
6. The appellant filed written submissions dated 18th August 2025; and wherein same has highlighted nine [9] key issues for consideration and determination. Firstly, learned counsel for the appellant has submitted that the learned trial magistrate erred in finding and holding that the respondent had proved/established his ownership rights to and in respect of the suit property, yet the documents which were tendered before the trial court were contradictory and thus devoid of probative value. In particular, learned counsel pointed out that the letter of allotment, which was relied upon by the trial court in finding that the respondent was entitled to the suit property, referenced an un-surveyed residential plot – Isiolo; and yet the

suit before the court relates to a property known as un-surveyed residential/ISL/117/95/2.

7. To this end, it was submitted that what was claimed in the pleadings before the court was at variance with the letter of allotment and, by extension, the part development plan before the court.
8. Be that as it may, it was submitted that the learned trial magistrate failed to discern and reconcile the contradictions apparent on the face of the documents. Furthermore, it was submitted that the learned trial magistrate also failed to appreciate that the sale agreement, which was entered into between the respondent and the vendor, also referenced plot No. ISO/117/95/2, which is also contended to be separate and distinct from the letter of allotment; and the suit property underpinning the respondent's claim.
9. In view of the foregoing, it was submitted that the finding and holding by the learned trial magistrate that the respondent had placed before the court a chain of documents to underpin his ownership rights was based on a misapprehension of the documents before the court. Besides, it was posited that the contradictions under reference negated the respondent's claim to the suit property.
10. Secondly, learned counsel for the appellant has also contended that the learned trial magistrate misdirected herself in finding and holding that the respondent had acquired the suit property in the year 2016 through a transfer, yet no transfer document was ever tendered or produced before the court. In the absence of a transfer instrument, it was submitted that the finding by the learned trial magistrate was arrived at or based in a vacuum.

11.Thirdly, learned counsel for the appellant has also submitted that the learned trial magistrate also erred in law in holding that the respondent had lawfully purchased the suit property, yet the identity or true identity of the vendor was neither justified nor authenticated. To this end, it was submitted that the letter of allotment which underpinned the sale transaction between the respondent and the vendor related to one Col. E.M Muhia, and yet the same agreement was between the respondent and Brig. Evans Miringu Muhia. In this regard, it was contended that that the respondent was obligated to call the purported vendor in an endeavor to demonstrate the legality of the sale agreement.

12.Nevertheless, it was submitted that the respondent failed to call the vendor or any member of the vendor's family. Moreover, it was submitted that an affidavit that had attempted to reconcile the discrepancy in the names of the allottee was neither produced nor admitted before the court. For good measure, counsel referenced Plaintiff's PMFI 9, which was not admitted as an exhibit.

13.Fourthly, learned counsel for the appellant has also submitted that the learned trial magistrate committed a grave error in adopting and relying upon a document, *namely*; an affidavit sworn on 24th January 2013, yet the said document had not been admitted as an exhibit. In this regard, it has been posited that the reliance upon and the consideration of the said document constituted a grave misdirection and thus warrants the intervention of this court. In particular, learned counsel has invited the

attention of the court to page 37 of the record of appeal, wherein the attempted production of the named affidavit was objected to.

14. The fifth issue which has been canvassed by learned counsel for the appellant is to the effect that the learned trial magistrate proceeded to and decreed eviction of the appellant from the suit plot, yet the learned trial magistrate failed to discern the acreage/extent of the suit property, if at all. In any event, it was submitted that the respondent himself conceded that same did not know the size of the suit property. Moreover, it was also pointed out that the sale agreement, which was being relied upon by the respondent, was also silent on the question of acreage.

15. The sixth point, which has been taken by learned counsel for the appellant, relates to the fact that the learned trial magistrate failed to appreciate that the letter of allotment, which underpins the respondent's claim did not reference any particular plot. For good measure, it was submitted that the letter of allotment could not be relied upon to stake a claim to and in respect of the suit property.

16. The next issue that has been canvassed by learned counsel for the appellant relates to the failure by the respondent to call any expert witness to confirm and or authenticate the ground location of the suit plot or at all. In particular, it was submitted that the respondents' claim could not have succeeded in the absence of the evidence of either a physical planner or a surveyor.

17. Turning to the eighth issue, learned counsel for the appellant has submitted that the learned trial magistrate erred in law in proceeding to enter judgment against all the defendants, including the 1st defendant, yet the case against the 1st defendant had been withdrawn. To this end, learned counsel has referenced page 49 of the record of appeal and, in particular, paragraph 18 of the Judgment.

18. Finally, learned counsel for the appellant submitted that the learned trial magistrate erred in law in proceeding to and delivering judgment in respect of the suit before her, yet same was made aware of the existence of a petition touching on and concerning various plots, including the suit property. In this regard, counsel referenced Isiolo ELC Petition E008 of 2021, which was contended to touch on and concern the same land in question.

19. According to learned counsel for the appellant, the learned trial magistrate ought not to have proceeded with and delivered the judgment under reference yet same had been notified of the existence of the said petition *vide* the amended statement of defence that was filed by the appellants and the rest of the defendants in the subordinate court. Instructively, learned counsel for the appellant has referenced page 100 of the record of appeal.

20. Flowing from the foregoing submissions, learned counsel for the appellant has therefore invited the court to find and hold that the appeal beforehand is meritorious. To this end, the court has been implored to allow the appeal, set aside the judgment and in lieu thereof dismiss the respondents suit with costs to the appellant.

21. Though the respondent was privy to and knowledgeable of the directions pertaining to the filing of written submissions, same failed to file and serve written submissions. Moreover, it is instructive to highlight that the respondents sought and obtained further indulgence but did not file any submissions.

22. On 15th October 2025, this court made an order closing the window for the filing of written submissions. For good measure, the court directed that the respondent was deemed to have forfeited the right to file and serve written submissions.

23. I have reviewed the record of appeal; the pleadings; and evidence tendered on behalf of the parties and upon consideration of the written submissions filed by the appellant, I come to the conclusion that two [2] issues crystallize for consideration and determination. The issues that do crystallize are *namely*; whether the respondent proved his claim as pertains to ownership of plot number un-surveyed residential/ISL/117/95/2 [the suit plot] or otherwise; and whether the judgment of the learned trial magistrate is fraught with errors of principles and mis-directions or otherwise.

24. What is before me is a first appeal. By virtue of being a first appeal, this court is vested with the mandate and authority to subject the entire evidence to fresh and exhaustive scrutiny and evaluation in an endeavor to discern whether the conclusions arrived at by the learned trial magistrate accord with the evidence. Moreover, the court is also seized of jurisdiction to arrive at an independent conclusion and where appropriate, to depart from the findings; and conclusions of the trial court.

25. 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.

26. The jurisdictional remit of the 1st 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.”

27. I now revert to the issues for consideration. I shall address the issues sequentially, starting with whether the respondent proved/established his claim as pertains to ownership of the suit property or otherwise.

28. It is worthy to recall and reiterate that the respondent approached the subordinate court contending that same is the lawful owner/proprietor of the suit property. Furthermore, the respondent posited that despite being the owner of the suit property, the appellant and three other parties who had been sued as defendants in the subordinate court had trespassed onto and or encroached upon the suit property and thereby deprived the respondent of his entitlement thereto.

29. Additionally, it was the contention by the respondent that same had bought/purchased the suit property from the previous allottee, *namely*; Evans Miringu Muhia. To this end, the respondent referenced a sale agreement dated 5th May 2016.

30. Having approached the subordinate court and made the foregoing assertions, it was incumbent upon the respondent to place before the trial court plausible, cogent and credible evidence to demonstrate that same was indeed the lawful owner of the suit property. The question that does arise is whether the totality of the evidence that was tendered by the respondent was sufficient to establish the respondent's claim to and in respect of the suit property.

31. To start with, it is not lost on me that what the respondent was purporting to buy was [sic] a letter of allotment which had been issued to and in favour of one Col. E.M Muhia. Furthermore, the letter of allotment under reference related to un-surveyed residential plot – Isiolo. Moreover, the letter of allotment is said to have been issued on 13th July 1995.

32. Be that as it may, it is imperative to highlight that the copy of the letter of allotment which was tendered and produced before the court was a single-page document *devoid* of the signature page. In this regard, it was/is not possible to authenticate whether the said letter of allotment, which underpins the respondent's claim to the suit property, was duly signed or whether same was authentic. I am aware that the respondents contended that the documents which same had been produced before the court were authentic. However, it is one thing to make the assertion and another thing to prove the assertion.

33. In my humble view, the authenticity of the letter of allotment could only be established or vouched by producing a duly signed/executed letter of allotment, containing the special conditions which ordinarily accompany a letter of allotment.

34. Other than the foregoing, there is no gainsaying that a letter of allotment is merely an offer to the allottee. To this end, it suffices to underscore that the allottee of a letter of allotment is obligated to comply with the terms and conditions thereunder. Notably, compliance with the terms and conditions must be undertaken within the circumscribed timelines. Moreover, there is no gainsaying that where the terms of a letter of allotment are not complied

with timeously, the letter of allotment lapses and becomes extinguished in the eyes of the law. [See the decision in **Joseph Kamau Muhoro vs Attorney General & Another (2021) eKLR.**

35.It was incumbent upon the respondent who was relying on the letter of allotment to place before the court evidence that the allottee [the vendor] who allegedly sold the suit plot unto him had duly complied with the terms of the letter of allotment. Sadly, the respondent neither tendered any letter of acceptance nor the revenue receipt [if any] pertaining to payments of the standard premiums within the statutory 30 days. In the absence of the letter of acceptance and payments in accordance with the terms of the letter of allotment, there is no gainsaying that the letter of allotment died a natural death.

36.Other than the foregoing, there is also the critical aspect that a letter of allotment by and of itself does not confer upon the allottee any legal rights or interests capable of being sold or transferred. Simply put, the bearer of a letter of allotment cannot purport to enter into and execute a sale agreement purporting to sell [sic] the letter of allotment. Suffice it to posit that no interest can be disposed of on the basis of a letter of allotment.

37.In the case of **Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment),** the Supreme Court of Kenya considered the issue and stated thus:

So, can an allotment letter pass a good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions

stipulated therein. In **Dr Joseph NK Arap Ng'ok v Justice Moiwo Ole Keiyua & 4 others** CA 60/1997 [unreported]; and in **Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others** HC Civil Case No **182 of 1992; [2008] eKLR**, the superior courts restated this principle as follows: “It has been held severally that a letter of allotment *per se* is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all” [Emphasis added].

59. The pronouncement in *Gladys Wanjiru and Dr Joseph NK Arap Ng'ok* (*supra*) has been echoed in various Environment and Land Court decisions post the 2010 [Constitution](#), including; **Lilian Wanjeri Njatha v Sabina Wanjiru Kuguru & another, Environment and Land Case No 471 of 2010; [2022] eKLR**; **John Elias Kirimi v Martin Maina Nderitu & 4 others, Environment and Land Suit No 320 of 2011; [2021] eKLR**; and **Kadzoyo Chombo Mwero v Ahmed Muhammed Osman & 11 others, Environment and Land Case No 42 of 2021; [2021] eKLR**, to mention but a few.

60. Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass a valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment

letter. In [Peter Wariire Kanyiri v Chrispus Washumbe & 2 others](#), Environment and Land Court Case No 603 of 2017; [2022] eKLR, Kemei, J held as follows: “[15]. In the case at hand, in the absence of any title registered in the name of the plaintiff, the court is unable to hold that the plaintiff is the registered proprietor of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences” [Emphasis added].

61. While we agree with the general tenor of the learned Judge’s foregoing pronouncement, we remain uncomfortable with his inference that the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact that an allotment letter in and by itself is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing a valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not, therefore, that the allotment letter has not lapsed.

62. Back to the facts of this case, the allotment letter issued to Renton Company Limited was subject to payment of stand premium of Kshs.2,400,000.00, annual rent of Kshs.480,000.00, amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.

38. Despite the foregoing, the respondent's case is premised on the purchase of a letter of allotment. To my mind, the sale agreement which was relied

upon by the respondent as the basis of the acquisition of rights over the suit plot, was executed in vacuum. Moreover, the sale agreement under reference cannot bestow upon the respondent any legal rights capable of being protected under the law.

39. Additionally, it is important to underscore that the property which was allegedly being sold to and in favour of the respondent is different from the suit property alluded to at the foot of the plaint. For good measure the sale agreement referenced un-surveyed plot number ISO/117/95/2, yet the suit before the court relates to plot number un-surveyed residential/ISL/117/95/2.

40. To my mind, there is a variance or discrepancy pertaining to the identity of the property that is being claimed by the respondent. However, what is apparent is that the respondent neither bought nor purchased the property that underpins the suit before the court. I say so, because the sale agreement, which was produced referenced a different plot.

41. Without endeavoring to exhaust the contradictions apparent in the evidence of the respondent, it is also important to highlight that the part development plan which was being relied upon by the respondents was never approved nor authenticated. The part development plan was therefore incomplete and invalid in the eyes of the law.

42. Pertinently, a part development plan can only become legal upon its approval, authentication and issuance of a part development number. [See the holding of the supreme court in **Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023]**]

KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023)
(Judgment – paragraphs 104 – 108 thereof).

43. Taking the foregoing observations into account, I am afraid that the respondent did not establish and or prove his claim as pertains to ownership of the suit property. Suffice it to state that the evidence of the respondent was inflicted with several discrepancies and contradictions. The net effect of the contradictions was to negate the respondent's claim.

44. It is instructive to underscore that the learned trial magistrate failed to apprehend the import and tenor of the document[s] that were tendered by the respondents. Had the learned trial magistrate addressed her judicial mind to the contents of the documents and the contradictions thereof, same would not have come to the conclusion that the respondent had tendered documents to underpin an unbroken chain proving acquisition and ownership of the suit plot. In particular, I hold the view that the findings of the trial magistrate in terms of paragraphs 13 & 14 of the Judgment are with respect, erroneous and contrary to the established position of the law.

45. Turning to the second issue, *namely*; whether the judgment of the learned trial magistrate is fraught with errors and mis- directions or otherwise. It is instructive to highlight that the learned trial magistrate failed to take into account the fact that the property adverted to at the foot of the said agreement was different from the one impleaded before the subordinate court. Moreover, there is no gainsaying that the learned trial magistrate did not endeavor to reconcile the discrepancy.

46. Secondly, it is also important to point out that the learned trial magistrate also failed to appreciate that the letter of allotment which same relied upon

as one of the key documents in the chain proving the respondent's claim to land was incomplete. In particular, it escaped the judicial eye of the learned trial magistrate that the signature page was not tendered before the magistrate. Moreover, the part development plan which has also been adverted to at the foot of paragraph 13 of the Judgment was incomplete. The deficiency at the foot of the part development plan also appears to have escaped the legal eye of the trial magistrate.

47. Finally, I also beg to highlight the fact that the learned trial magistrate proceeded to and rendered a judgment in favour of the respondent, yet there was a variance between the pleadings filed [namely the plaint] and the evidence tendered. For good measure, the judgment of the learned trial magistrate offends the provisions of Order 2 Rule 6 of the Civil Procedure Rules, which underpins the doctrine of departure. [See also the decision in **IEBC vs Stephen Mutinda Mule (2014) eKLR; Dakianga Distributors Ltd vs Kenya seed Co. Ltd (2015) eKLR and Presbyterian Foundation vs Kibera Siranga Self Help Nursery school (2023) KECA.**]

48. Flowing from the foregoing and taking into account the established principles in the case of **Mwanasokoni vs Kenya Bus Services (1985) eKLR and Jabane vs Olenja (1986) eKLR**, respectively, I come to the conclusion that the findings of the learned trial magistrate were based on misapprehension of the evidence on record.

FINAL DISPOSITION.

49. For the reasons that have been highlighted in the body of the judgment, it must have become apparent that the appeal beforehand is meritorious. On

the contrary, the judgment of the learned trial magistrate reeks of grave errors and mis-directions and thus same warrants variation.

50. In the end, the final orders that commend themselves to the court are as hereunder;

- (i) **The Appeal be and is hereby allowed.**
- (ii) **The Judgment of the learned trial magistrate dated 21st March 2025 and the consequential decree be and are hereby set aside.**
- (iii) **In lieu thereof, an order be and is hereby made dismissing the Respondents suit *vide* plaint dated 14th February 2019.**
- (iv) **Costs of the appeal be and are hereby awarded to the Appellant.**
- (v) **The Appellant shall also have costs of the proceedings before the subordinate court.**
- (vi) **Furthermore, the security which had hitherto been deposited by the Appellant be and is hereby ordered released to the appellant.**

51. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 30TH DAY OF
OCTOBER 2025**

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

In the presence of:

Hussein/Mukami - Court Assistants

Mr. Carlpeters Mbaabu for the Appellant

Mr. Caleb Mwiti for the Respondent