REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ELC APPEAL NO. E023 OF 2024

FRANKLINE NJAVANI MURITHI

……..APPELLANT

VERSUS

CHARITY MUTHONI MURURU

……..RESPONDENT

[Being an appeal from the judgment and decree of Hon. M.A Odhiambo – SRM delivered on 27th September 2024 in CM's Court at Isiolo in ELC Case No. 61 of 2018].

JUDGMENT

1. The subject appeal arises out of the Judgment of the learned trial magistrate [*Hon. M.A Odhiambo – SRM*] dated 27th September 2024; and the consequential decree and wherein the learned trial magistrate found and held that the appellant [*who was the plaintiff in the subordinate court*] had failed to prove his case to the requisite standard. To this end, the learned trial magistrate proceeded to and dismissed the appellant's suit with costs to the respondent.

2. It is the said Judgment and the consequential decree which has aggrieved the appellant and thereby precipitated the filing of the instant appeal.

3. The Memorandum of appeal dated 24th October 2024; highlights the following grounds:

   (i) That the trial court erred in law and fact by failing to find that the appellant is the legal bona-fide owner of plot No. 393 Kambi ya Juu, was in continuance occupation, quite user, possession

and had developed his parcel of land for over 23 years, from the time when he acquired it in the year 1994 up to year 2017 when the respondent trespassed forcefully and unlawfully evicted the appellant from his plot and merged it with her plot No. 398A Kambi ya Juu.

(ii) That the trial court erred in law and fact by failing to find that physical planners report dated 19th June 2023 was based on spatial data taken during the planning, exercise that was conducted by the county government of Isiolo, lands department in the year 2019 at time when already the respondent had encroached on the appellant parcel of land No. 393 Kambi ya juu and forcefully evicted him and the suit initiated against the respondent.

(iii) That the trial court erred in law and fact by failing to consider the physical planner testimony whom testified as DW 2 wherein on cross-examination he admitted that his report lacked the input and/or consideration of the appellant documents, as it only captures the details of the respondent parcel of land.

(iv) That the trial court erred in law and fact by failing to consider the county surveyor's report dated 4th September 2019 wherein in his conclusion the surveyor noted that both plot No. 393/Kambi ya juu belonging to the appellant and plot No. 398A/Kambi ya Juu belonging to the respondent existed on the ground and on their records.

(v) That the trial court erred in law and fact by making a determination that the appellant did not provide a surveyor's report to substantiate his claim whereas there was a report on record filed by the county surveyor dated 4th September 2019,

filed pursuant to a scene visit conducted by the Honorable court and the county surveyor.

(vi) *That the trial court erred in law and fact by failing to consider in making the determination the three witness testimonies of the witnesses presented by the appellant most notably the witness testimony of PW 3; Anna Muthoni herein the vendor who sold the subject suit land to the appellant and was his neighbour.*

(vii) *That the trial court erred in law by failing to find that failure by the respondent to pay the allotment and registration fee for her alleged plot No. 398A/Kambi ya Juu within 30 days as provided for, the said plot was forfeited back to the defunct council of Isiolo for reallocation.*

(viii) *That the trial court erred in law by failing to make a determination that the appellant had proved his claim to the required standard, that is on a balance of probabilities.*

(ix) *That the trial court so misdirected on matters of law and fact as to occasion a miscarriage of justice against the appellant.*

(x) *That in light of the foregoing, the trial court failed to do justice before the case at hand.*

4. The subject appeal came up for directions on 29th July 2025; and whereupon learned counsel for the appellant intimated to the court that same had filed and served the record of appeal. Furthermore, learned counsel posited that the record of appeal contained all the requisite documents and thus the appeal was ready for hearing. In this regard, counsel sought for directions in line with the provisions of order 42 rule 13 in Civil Procedure Rules 2010.

5. With the concurrence of learned counsel for the respondents, 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 by way of written submissions to be filed and exchanged within the circumscribed timelines.
6. The appellant filed written submissions dated 20th September 2025; and wherein same has highlighted and canvassed three [3] key issues for consideration and determination by the court. Firstly, learned counsel for the appellant has submitted that the appellant tendered and produced before the trial court assorted documentary evidence demonstrating ownership of plot No. 393 Kambi ya Juu. To this end, learned counsel has referenced the various exhibits, *namely*; exhibit P1 – P12 and thereafter contended that the learned trial magistrate failed to appraise the said documentary evidence. To this end, it has been contended that the judgment of the learned trial magistrate is contrary to the weight of the evidence on record.

7. Secondly, learned counsel for the appellant has submitted that the learned trial magistrate erred in law in adopting; taking into account; and considering the evidence of the county physical planner [DW 2] yet it was apparent that the said witness visited the disputed ground long after the respondent had evicted the appellant. Moreover, it was contended that the learned trial magistrate also failed to appreciate that the county physical planner visited the *locus in quo*, albeit in the absence of the parties and hence his report ought not to have been given due weight by the trial court.

8. On the other hand, it has been submitted that the learned trial magistrate failed to consider and internalize the report dated 11th November 2021, which was filed by the county surveyor and which report, it is contended, confirmed the existence of the two plots. In particular, it has been submitted that the report by the county surveyor confirmed the existence of the plot belonging to the appellant, as well as the plot belonging to the respondent.

9. Thirdly, learned counsel for the appellant has contended that the learned trial magistrate erred in fact and in law in finding and holding that the appellant had failed to adduce a surveyor's report before the court in an endeavor to prove encroachment. However, it has been submitted that the learned trial magistrate misapprehended the import of the report filed by the county surveyor and dated 10th November 2021. Furthermore, it was contended that the said report was duly filed and thus forms part of the record of the court.

10. Flowing from the foregoing, learned counsel for the appellant has submitted that the judgment of the learned trial magistrate is wrought with grave errors and mis directions. Consequently, the court has been invited to allow the appeal, set aside the impugned judgment and thereafter enter Judgment in favour of the appellant in terms of the Plaint dated 15th May 2017.

11. The respondent filed written submissions dated 10th October 2025; and wherein learned counsel for the respondent has raised and highlighted three [3] key issues. Firstly, learned for the respondent has submitted that the subject appeal was filed out of time, albeit without leave of the court.

To this end, it has been submitted that the appeal beforehand is therefore premature, misconceived and legally untenable. Moreover, it has been submitted that where an appeal is filed out of time without leave, then the court is stripped of the requisite jurisdiction to entertain and adjudicate upon the appeal.

12. For coherence, learned counsel for the appellant has submitted that though the memorandum of appeal is dated 24th October 2024, the appeal itself was not filed until 28th October 2024. In this regard, learned counsel has referenced the court tracking system and pinpointed [referenced] the invoice that was generated by the court at the instance of the appellant. Additionally, learned counsel has also referenced the receipt, *namely*; receipt No. RA – 0245801 dated 28th October 2024.

13. In the premises, it has been submitted that the appeal beforehand does not lie in so far as same was filed/lodged outside time without leave of the court.

14. To buttress the foregoing submissions, learned counsel for the respondent has cited and referenced the decision of Supreme Court in the case of ***Nick Salat vs IEBC & 7 others (2014) KESC 12,*** wherein the apex court expounded on the legal implications of an appeal [notice of appeal] filed out of time.

15. Learned counsel for the respondent has also submitted that the appellant failed to tender and produce before the subordinate court any evidence to prove ownership of the suit plot. In particular, it was contended that the

burden of proof laid on the shoulders of the appellant and hence it behooved the appellant to tender plausible evidence. Nevertheless, it was submitted that the appellant failed to produce any letter of allotment or evidence of ownership of the suit plot. Moreover, it was submitted that the part development plan, which was tendered by the appellant, was neither signed nor approved. To this end, it was contended that the impugned part development plan was incomplete and thus invalid.

16. Additionally, it was submitted that though the appellant had contended that the respondent had encroached onto the suit property, the appellant did not produce any expert report to confirm such encroachment. Furthermore, it was submitted that the witnesses who were called by the appellant were not able to demonstrate encroachment or otherwise.

17. Finally, learned counsel for the respondent has submitted that, unlike the appellant, the respondent herein tendered and produced evidence confirming ownership of plot No. 398A Kambi ya Juu. In addition, it has been submitted that the county physical planner [DW 2] also authenticated that the ground occupied by the respondent corresponded with the part development plan obtaining at the department of physical planning.

18. As a result of the foregoing, learned counsel for the respondent has therefore submitted that the appellant did not prove his case to the requisite standard. In this regard, it has been posited that the judgment of the learned trial magistrate and the consequential decree are well grounded and thus same ought to be affirmed.

19. I have reviewed the record of appeal; the pleadings; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the subject appeal turns on two key issues, *namely*; whether the subject appeal was filed timeously and in accordance with the provisions of section 79G of the Civil Procedure Act or otherwise; and whether the appellant established his claim pertaining to the suit property or otherwise.

20. 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 or the trial court.

21. 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.

22. 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."

23. It is common ground that the judgment being appealed against was delivered on 27th September 2024. In this regard, it was incumbent upon the appellant to mount/file the appeal, [if at all] within the statutory timelines. For good measure, the appeal under reference ought to have been filed within 30 days from the date of delivery of the judgment.

24. Given that the judgment and the consequential decree were rendered on 27th September 2024, the subject appeal ought to have been filed on or before 27th October 2024. Suffice it to state that the computation of time

for purposes of filing the appeal is reckoned exclusive of the date of delivery of the judgment but inclusive of the last date. To this end, the computation would thus exclude 27th September 2024, but include the last date, *namely*; the 30th day.

25. Arithmetically, the appellant herein had three days in September 2024. Thereafter, the appellant was to partake of a further 27 days in the month of October 2024. The 27 days in October surely lapsed on 27th October 2024. To this end, there is no gainsaying that the last date for filing the appeal was 27th October 2024 and not otherwise.

26. It has been contended that though the memorandum of appeal is dated 24th October 2024, same was only filed/lodged with the court on 28th October 2024. Suffice it to observe that pleadings filed before the court are only deemed as filed upon payments. In this regard, the date when the court fees were paid in respect of the memorandum of appeal becomes critical and paramount.

27. In the case of ***South Nyanza Sugar Company Limited v Samwel Osewe Ochillo P/A Ochillo & Company Advocates [2007] KECA 175 (KLR),*** the court of appeal considered the foregoing position and rendered itself in the following manner;

> ***The contents of the respondent's letter to the Deputy Registrar at Kisii were simply false and we are surprised that a Deputy Registrar acceded to the request and directed that no fee was payable on the filing of the plaint. The Deputy Registrar, however, had no power to exempt the respondent from paying the requisite fee with the result that the plaint was not properly filed***

and that being so, there was no valid plaint upon which the learned Judge of the superior court could proceed to deliver his judgment. The judgment was based on no valid plaint.

Dealing with a similar situation in the Ugandan case of <u>UNTA EXPORTS LTD VS CUSTOMS</u> [1971] EA 648, Goudie, J. stated as follows at page 649 letters E to F:-

"I have no doubt whatsoever that both as a matter of practice and also as a matter of law documents cannot validly be filed in the civil registry until fees have either been paid or provided for by a general deposit from the filing advocate from which authority has been given to deduct court fees ……."

With respect, we agree and would adopt that principle as being aptly applicable to the issue we are dealing with.

28. Though learned counsel for the respondent brought out the date when the court fees was paid by the appellant and even ventured forward to highlight the details of the receipt relied upon for payments, learned counsel for the appellant remained mute. Same neither denied nor confirmed the fact that the appeal was paid for on 28th October 2024.

29. To my mind, the subject appeal was filed out of time. It is instructive to underscore that where an appeal is filed out of time, such an appeal is rendered a nullity ab initio. Moreover, the court is deprived or stripped of jurisdiction to entertain such an appeal.

30. Simply put, the appeal beforehand is void and thus invalid.

31. In the case of ***Pentagon Communications Limited v National Land Commission (Civil Appeal E035 of 2022) [2025] KECA 1304 (KLR) (18 July 2025) (Judgment),*** the court stated as hereunder;

> *No appeal should have been filed out of time without leave of the court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. We therefore arrive at the inescapable conclusion that the Environment and Land Court did not have jurisdiction to entertain the appeal before it as it was statute-barred.*

32. On this ground alone, it is my finding and holding that the appeal beforehand is legally untenable. The appeal courts being struck out. [See also the decision of the Supreme Court in ***Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others (2014) KESC 12].***

33. Notwithstanding the foregoing holding and for the sake of completeness, I propose to venture forward and address the 2nd issue.

34. It is imperative to highlight that the suit in the subordinate court was filed by the appellants. To this end, the appellant bore the burden/obligation of placing before the subordinate court plausible; cogent; concrete; and credible evidence to demonstrate ownership of the suit plot. In addition, it was also incumbent upon the appellant to place before the court evidence of trespass/encroachment by the respondent.

35. To start with, though the appellant had contended that same is the sole registered owner of the suit property situated within Isiolo County, the appellant failed to tender and or produce any letter of allotment; any application for allotment of land; any certified minutes of the county council of Isiolo [now defunct]; or any approved part development plan.

Moreover, the appellant also failed to produce any certificate of title or deed of entitlement.

36. In the absence of documents to underpin allotment or ownership of the suit property, one wonders how the appellant would hold himself out as the sole registered owner of the suit property. I beg to remind myself that it is one thing to make an assertion and another thing to prove the assertion. Nevertheless, the assertions by the appellant herein were never proved. Same remained at the level of allegations.

37. Other than the foregoing, the appellant had also contended that same has been in peaceful occupation of the suit plot. However, evidence abound that the appellant had been issued with an enforcement notice dated 16th May 2014 and thereafter same was duly evicted. It is instructive to underscore that the enforcement notice was issued by the county government of Isiolo. Moreover, the enforcement notice under reference was tendered and produced by the appellant himself. [see Exhibit P4].

38. Additionally, the appellant himself and his witnesses confirmed the fact that the appellant was evicted from the suit plot by the county government of Isiolo. Besides, it was confirmed that during the eviction, the area chief was present.

39. Taking into account the totality of the evidence on record, it is apparent that the contention by the appellant at the foot of the plaint was erroneous. Suffice it to state that by the time the appellant was filing the suit in the subordinate court, same [appellant] had long been evicted pursuant to an enforcement notice, whose validity was never impugned/impeached.

40. Furthermore, it is also important to highlight that the appellant also relied on a part development plan in an endeavor to prove ownership of the suit plot. However, it is not lost on me that the part development plan which was tendered and produced before the court was neither signed by the drawer nor approved in accordance with the law. The part development plan under reference was therefore deficient and invalid in the eyes of the law.

41. It is also important to highlight that the appellant only called four witnesses, inclusive of himself. Suffice it to point out that no surveyor was called by the appellant. In addition, no survey report was tendered and produced by/on behalf of the appellant. Absent a survey report, it is difficult, nay impossible to prove trespass/encroachment.

42. Having reviewed the totality of the evidence that was tendered and placed before the subordinate court, it is my finding and holding that the learned trial magistrate came to the correct conclusion. Moreover, I find and hold that the analysis of the evidence by the learned trial magistrate in terms of paragraphs 10 & 11 of the impugned judgment was well-grounded. For good measure, the conclusion that was arrived at by the trial court was inevitable.

43. Flowing from the foregoing, I beg to state that the subject appeal is meritless. In this regard, the appeal courts dismissal.

FINAL DISPOSITION.

44. For the reasons which have been adverted to and highlighted in the body of the Judgment, I find and hold that the appeal before hand was filed out of time and without leave of the court. In this regard, the appeal is premature, misconceived and thus a nullity.

45. In the end, the final orders that commend themselves to the court are as hereunder:

    (i) The Appeal be and is hereby struck out.

    (ii) The Judgment delivered on <u>27th September 2024</u> and the consequential decree be and are hereby <u>affirmed</u>.

    (iii) Costs of the Appeal be and are hereby awarded to the respondent.

46. It is so ordered.

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

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

<u>In the presence of:</u>

C/A Hussein/Mukami

Mr. Kaimenyi for the Respondent.

N/A for the Appellant.