REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. E029 OF 2025

JEREMIAH MUTARI MUCHIRI ……..……..…..APPELLANT

VERSUS

PAUL KOBIA …….. 1ST RESPONDENT

KATHONI KOBIA ……..2ND RESPONDENT

[Being an appeal from the Judgment and decree at Tigania Principal Magistrates' court by Hon. J. Macharia – SPM delivered on 25th March 2025].

JUDGMENT

1. The Subject appeal arises out of the Judgment of the Learned Senior Principal Magistrate [Hon. J. Macharia – SPM] delivered on **25th March 2025;** and the consequential decree arising therefrom wherein the learned magistrate found and held that the appellant herein had failed to prove his case to the requisite standard. In this regard, the trial court proceeded to and dismissed the Appellant's suit.

2. It is the said Judgment and the consequential decree which has aggrieved the appellant and thus provoking the subject appeal. The memorandum of appeal dated **11th April 2025**; has highlighted various grounds. The grounds are reproduced as hereunder;
    i. *That the learned magistrate erred in both law and fact in not finding that land parcel No. Meru North Athinga/Athanja/7102 is mapped on RIM number Athinga/Athanja/108/4/11 against the*

defendant L.R No. Athinga/Athanja/7675 RIM No. Athinga/Athanja/108/4/1/10.

ii. *That the learned trial magistrate erred in law and in fact in not finding that L.R No. Meru North/Athinga/Athanja/7675 does not border land parcels No's 7301 and 7102.*

iii. *That the learned trial magistrate erred in both law and fact by upholding the defendants/defence and submissions that L.R No. Meru North/Athinga/Athanja/7102 boarders L.R No. 7301 & 7675.*

iv. *That the learned trial magistrate erred in law and fact by not finding that appellant does not use not L.R No. Meru North/Athinga/Athanja/7102 due to defendant trespasses hence arrived at wrong decision.*

v. *That the learned trial magistrate erred in law and in fact in not finding that the surveyor report was clear by stating that L.R No. Athinga/Athanja/7675 appears in separate map sheet therefore, the decision was wrong decision.*

vi. *That the learned trial magistrate erred in law and in fact by inviting extraneous facts which had not been pleaded.*

vii. *That the learned magistrate erred in law and in fact by relying too heavily on the issue of sheet map and ground not tallying therefore arrived in a wrong decision.*

3. The instant appeal came up for directions on **22nd September 2025**; whereupon the parties [the appellant and learned counsel for the respondents] agreed to canvass the appeal by way of written submissions. To this end, the court proceeded to and issued directions as pertains to the filing and exchange of written submissions. Moreover, the court also circumscribed the timelines for the filing of the submissions.

4. The Appellant filed written submissions dated 24th September 2025; and whereupon the appellant has reiterated the grounds at the foot of memorandum of appeal and thereafter highlighted two [2] key issues. Firstly, the appellant has submitted that the learned trial magistrate erred in law in finding that parcel number Meru North/Athinga/Athanja/7675 is mapped on the registry index map No. 108/4/10; whereas L.R No. Meru North/Athinga/Athanja/7102 is mapped on registry industry map No. 108/4/1/11. Furthermore, it was contended that the decision of the learned trial magistrate is erroneous and contrary to the weight of the evidence on record. In addition, it was contended that the appellant's property, namely; suit property, is the one which has been trespassed onto by the respondents.

5. Secondly, the appellant has contended that the finding[s] by the learned trial magistrate is also contrary to the survey report which was tendered before the court. Moreover, the appellant has submitted that same tendered and adduced plausible evidence to demonstrate that the respondents have trespassed onto the suit property and erected a perimeter wall thereon. To this end, the appellant has contended that the acts complained of have exposed same to irreparable loss and damages.

6. Flowing from the foregoing, the appellant has invited the court to find and hold that the judgment of the trial court is erroneous and thus same ought to be set aside. Additionally, the court has been invited to find and hold that the appellant duly proved his case and thus Judgment ought to be entered in terms of the amended Plaint dated **24th October 2017.**

7. The Respondents filed written submissions dated 9th October 2025; and wherein same has canvassed one issue. Learned Counsel for the respondents has submitted that the appellant failed to tender and produce credible evidence to demonstrate that the respondents have trespassed onto the suit property. Moreover, it has been submitted that the burden of proof laid on the appellant and thus the appellant was obligated to prove his case. Nevertheless, it has been contended that the appellant failed to discharge the burden of proof in accordance with the provisions of the Evidence Act.

8. Additionally, it has been submitted that the surveyor's report which was filed before the court, clearly demonstrated that the suit property does not border/share a common boundary with L.R No's Meru North/Athinga/Athanja/7301 and 7675, which belong to the respondents. In this regard, it has been submitted that the surveyor's report did not confirm any act of trespass onto the suit property.

9. Based on the foregoing, learned counsel for the respondents has submitted that the appellant herein has neither established nor proven any error on the part of the learned trial magistrate. In this regard, learned counsel for the respondents has contended that the appeal beforehand is meritless and thus ought to be dismissed.

10. I have reviewed the record of appeal; the pleadings filed; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed by/on behalf of the parties, I come to the conclusion that the determination of the subject appeal turns on one key

issue, *namely;* whether the appellant established and proved his claim before the subordinate court to the requisite standard or otherwise.

11. 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 of the trial court.

12. 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.

13. 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 judgment. 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."

14. Back to the issue for consideration. It is imperative to recall and reiterate that the appellant herein approached the subordinate court contending that the respondents herein had encroached upon or trespassed onto the suit property and constructed a wall on a portion thereof. Moreover, the appellant contended that the respondents were purporting that the portion fenced off by the wall belonged to same.

15. Having approached the honourable court contending that the respondents had trespassed upon the suit property, it was incumbent upon the appellant to tender and place before the trial court plausible; concrete; and cogent evidence to establish his claim. Suffice it to underscore that the appellant herein was obliged to place before the court evidence to show offensive entry onto the suit property, which interferes with his [appellants] possessory rights to and in respect of the suit property.

16. Instructively, the appellant herein was obligated to tender and produce before the trial court inter alia a surveyor's report denoting the extent of the suit property and the encroachment [if any] that has been made thereon. However, it is not lost on me that the appellant did not tender or produce any surveyor's report. Notably, the appellant only tendered two documents before the trial court, namely; a copy of the certificate of official search in respect of the suit property and copy of grant of letters of administration ad litem.

17. Be that as it may, the learned trial magistrate found and held that same could not proceed and craft the judgment without a surveyor's report. To this end, the learned trial magistrate made an order directing that the suit property be visited by a surveyor and thereafter, a report be filed. Suffice it to state that the disputed ground was indeed visited by a surveyor and a report was ultimately filed with the court. [See the proceedings of 19th March 2024].

18. The surveyor's report under reference forms part of the record of appeal and same showed that the suit property does not border/share a boundary with L.R No's Meru North/Athinga/Athanja/7301 and 7675, respectively. For ease of reference, it is imperative to reproduce the salient features of the said report.

19. Same are reproduced as hereunder;

"Two parcels were picked; parcel A with an acreage of 0.16 ha [0.40 acres] and parcel B with the acreage of 0.22 ha [0.55 acres]. Parcel A is utilized by the 1st defendant with title No. Meru North/Athinga/Athanja/7675 while parcel B is utilized by the 2nd defendant with title no. Meru North/Athinga/Athanja/7301.

20. From the observations by the surveyor, it is apparent that the suit property does not sit within the same locality with the parcels of land owned by the respondents. Moreover, it is instructive to point out that no encroachment was discerned or reported onto the suit property.

21. The appellant herein filed written submissions and same challenged the surveyor's report. According to the appellant, the surveyor's report filed before the Court was incomplete and thus same ought not to have been acted upon by the court.

22. There is no gainsaying that the appellant did not procure or tender any survey report to demonstrate the encroachment onto the suit property. Notably, it was the obligation of the appellant to tender and place before the trial court evidence to demonstrate the trespass. In so far as the appellant failed to tender such evidence, there is no way that the learned trial magistrate could have returned a finding in favour of the appellant.

23. What constitutes trespass was highlighted by the Court of Appeal in the case of ***Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment)*** where the court stated as hereunder;

Trespass, as stated by this Court in the case of Charles Ogejo Ochieng v Geoffrey Okumu [1995] KECA 169 (KLR), is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. As for the ingredients of trespass, the Court in William Kamunge Gakui v Eustace Gitonga Gakui (Civil Appeal 16 of 2013) [2014] KECA 39 (KLR) stated that trespass is a violation of the right to possession, and that a plaintiff must prove that he has the right to immediate and exclusive possession of the land. Justice Chemutut did not name Mr. Doshi as a defendant in the suit.

24. Flowing from the foregoing, I find and hold that the appellant failed to prove his case. In this regard, I come to the inevitable [inescapable] conclusion as the learned trial magistrate. Simply put, the appellant failed to prove his case and the suit was properly dismissed.

25. In the case of ***Dr. Samson Gwer & 5 others vs Kemri (2020) eKLR***, the Supreme Court addressed the issue of burden of proof and stated thus;

Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

50. This Court in Raila Odinga & others v. Independent Electoral & Boundaries Commission & others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:…a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden…."

51.In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

26. *In a nutshell*, and having subjected the evidence to fresh and exhaustive scrutiny in line with the principles espoused in ***Peters vs Sunday Post Ltd (1958) E.A; and Mwanasokoni vs Kenya Bus Services Ltd (1985) eKLR***, I find that the subject appeal is meritless.

FINAL DISPOSITION.

27. For the reasons that have been alluded to in the body of the Judgment, it is my finding and holding that the appeal is bereft of merit[s] and thus same courts dismissal.

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

(i) The Appeal be and is hereby <u>dismissed.</u>

(ii) The Judgment of the Subordinate court delivered on <u>25th March 2025</u>; and the consequential decree arising therefrom be and is hereby affirmed.

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

(iv) The Costs in terms of clause [iii] above shall be agreed upon; and in default same to be taxed in the conventional manner.

29. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 6TH DAY OF NOVEMBER 2025.

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

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

Hussein – Court Assistant

Mr. Ayub K. Anampiu for the Respondents

Jeremiah Mutari Muchiri, Appellant in person