REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL E020 OF 2025

SILAS M'RINYIRU M'MBUI……..…..……1ST APPELLANT

MBAJO EDWARD……2ND APPELLANT

ZAVARIO MWITI NKANATA……..……..3RD APPELLANT

ESTHER NJOKI KIMATHI…….……4TH APPELLANT

VS

FREDRICK GITONGA RINYIRU……RESPONDENT

[An appeal from the judgement of Hon S.K.Ngetich (SPM) delivered on 12.3. 2025 in Nkubu PMELC Case No E035 of 2022]

JUDGMENT

---

1. The subject matter brings to mind the holding of the Court of Appeal in the case of ***William Koross v. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR***, where the court stated thus:

> ***"The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add***

to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

2. The instant matter pits the son [Fredrick Gitonga Rinyiru] who is the respondent as against his father [Silas M'Rinyiru M'Mbui]. The respondent filed the suit namely; Nkubu ELC E035 of 2022 and wherein same contended that the 1st appellant herein holds LR No Abogeta/L-Kiungone/ 809 and the resultant sub-division[s] thereof in trust for himself[Respondent] and all his other children. The respondent proceeded to and supplied the particulars of trust and also highlighted particulars of breach of trust as against the 1st appellant herein as well as the rest of the appellants. For good measure, the 2nd 3rd and 4th appellants are purchasers who bought their respective portions from the 1st appellant.

3. Following the filing of the suit, the 1st appellant and the rest of the appellants duly entered appearance and thereafter filed statement of defence in which the 1st appellant contended that the suit property lawfully belongs to him. Furthermore, the 1st appellant also contended that he is the one who gathered the suit property and thus the suit property is not family land. In addition, the 1st appellant disputed the contention that the suit property was being held on trust for the respondent and the rest of his siblings, *namely*; the other children of the 1st appellant.

4. The suit in the subordinate was heard and disposed of *vide* Judgment delivered on 12.3.2022 and wherein the learned trial magistrate[Hon S.K Ngetich-SPM] found and held that the respondent had proved/established his case to the requisite standard. To this end, the trial court proceeded to and entered judgment in favor of the respondent, inter alia declaring that the suit property was held on trust for the respondent and the respondent's

siblings. In addition, the learned magistrate also decreed cancellation of the various sub-divisions arising from the suit property.

5. It is the said judgement and the consequential decree which has aggrieved the appellants herein and thus provoking the subject appeal. The subject appeal is premised in various grounds which have been highlighted at the foot of the memorandum of appeal dated 1.4.2025.

6. The grounds at the foot of the Memorandum of appeal are reproduced as here under-

    a) *That the honorable magistrate erred in law and in fact by finding that the respondent proved all the elements of customary trust*
    b) *That the honorable magistrate erred in law by considering extraneous issues not borne in the pleadings and evidence and more particularly on whether the name in the 1st registration of the suit land was that of the 1st appellant of that of his father hence arriving at a wrongful finding by presuming that it was not clear whose name it was*
    c) *That the honorable magistrate erred in law and fact by holding that the 1st appellant was not the 1st registered owner of the suit land, despite the evidence to the contrary, hence arriving at the wrong finding*
    d) *The honorable magistrate erred in law and In fact by finding that the 1st appellant's subdivision and selling of the suit land to 2nd , 3rd and 4th appellants was done in breach of the customary trust in favor of the plaintiffs*

e) *That the honorable magistrate erred in law and fact by disregarding the 1st appellants evidence that he gathered the suit land before the 1st registration.*

f) *That the learned magistrate erred in law and fact by failing to take both judicial and record notice that both the High Court and court of appeal had earlier held that the 1st appellant did not hold the suit land in customary trust in another case involving the respondent's brother against the 1st defendant, hence arriving at the wrong finding.*

g) *That the learned magistrate erred in law and fact by failing to analyse, consider and/or distinguish the appellant's written submissions and other authorities thereof and more particularly the issue of res judicata.*

h) *The honorable magistrate erred in law and fact by failing to recognize the 1st appellant's beneficial interest in the suit land by holding that his interest was merely that of a registered owner holding the suit trust for the plaintiff*

i) *That the learned magistrate erred in law and fact by finding that the 2nd , 3rd and 4th appellants were not innocent purchasers for value of the suit from the 1st appellant*

j) *The honorable magistrate erred in law and in fact by allowing the respondents' claim.*

7. The subject appeal came up for directions on the 6.10.2025, wherein the advocate for the appellants intimated to the court that same have filed and served the record of appeal. Furthermore, learned counsel for the appellant stated that the record of appeal was complete and thereafter same sought directions as pertains to the hearing and disposal of the appeal.

8. 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 by way of written submissions to be filed and exchanged by the parties. Moreover, the court also circumscribed the timelines for filing written submissions.

9. The appellant filed a written submission dated 12.11.2025 and wherein the appellant has raised and highlighted four [4] key issues for consideration. Firstly, learned counsel for the appellants has submitted that the learned trial magistrate erred in fact and in law in finding and holding the respondent herein had adduced sufficient evidence to demonstrate that the suit property was family land before its registration in favor of the 1st appellant. It was contended that the totality of the evidence on record including the green card showed that the 1st appellant was the 1st registered owner of the suit property and hence the suit property was never family land to warrant a finding of trust.

10. Furthermore, learned counsel for the appellant has submitted that the learned magistrate overlooked and disregarded critical evidence tendered by and on behalf of the 1st appellant and thus the finding of customary trust was arrived at in vacuum.

11. To buttress the forgoing submissions, learned counsel for the appellant has cited and referenced the holding of the Supreme Court in the case of ***Isaac Kiebia vs Isaiyah M'Lintari & others 2018 KESC 2022*** wherein the Supreme Court highlighted the elements [ingredients] that must be proved before a find of a customary trust can be arrived at.

12. Secondly, learned counsel for the appellant has submitted that the learned trial magistrate failed to appreciate that the 2nd, 3rd and 4th respondents were indeed bona-fide purchasers for value without notice of any defect in the title of their predecessor. In addition, it was submitted that the learned trial magistrate disregarded the evidence that was tendered by the 2nd to 4th Appellants and in particular, the sale agreement which demonstrated lawful purchase and acquisition.

13. It was the further submissions by learned counsel for the appellants that the respondent herein failed to tender or adduce any evidence to controvert the testimony of the 2nd to 4th respondents that same were bonafide purchasers. Moreover, it has been submitted that the 2nd to 4th respondents were neither privy to nor knowledgeable of the existence of a customary trust. In this regard, it was contended that the issue of customary trust cannot therefore be deployed to defeat the rights and interest[s] of the 2nd to 4th appellants.

14. Thirdly, learned counsel for the appellants has submitted that the learned trial magistrate erred in law in failing to find and hold that the suit beforehand was barred/ prohibited by the doctrine of res judicata. It was contended that a brother of the respondent, *namely*; Jackson Mwiti M'Rinyiru, had raised and canvassed the issue of customary trust as against the 1st appellant [Father]; and that the claim based on customary trust was heard and disposed of.

15. Moreover, learned counsel for the appellants has submitted that the dispute between Jackson Mwiti Rinyiru was escalated to the court of appeal *vide* Nyeri court of appeal civil appeal No 50 of 2020: Jackson Mwiti Rinyiru vs Silas M'Rinyiru Mbui. In addition, it was submitted that the Court of

Appeal returned a finding that the 1st appellant herein [who was the respondent in the appeal] does not hold the suit property on trust.

16. Learned counsel for the appellants further submitted that the claim by Jackson Mwiti Rinyiru, which was escalated up to the court of appeal, was in respect of a claim on customary trust on behalf of the said Jackson Mwiti Rinyiru and all the other children of the Silas M'Rinyiru Mbui [the respondent] before the Court of Appeal.

17. In view of the decision of the court of appeal between Jackson Mwiti Rinyiru and the 1st appellant herein, learned for the appellants, has submitted that the suit before the subordinate court, which was filed by the respondent herein on his behalf and on behalf of the other children of the 1st appellant, is barred by the doctrine of *res judicata*.

18. The next issue which has been raised by learned counsel for the appellants, touches on and concerns the disguised attempt by the respondent herein to deprive the 1st appellant of his right to and in respect of the suit property. In particular, it has been contended that the 1st appellant accrued a proprietary right in accordance with the provisions of Article 40 of the Constitution and that his [First Appellant's] rights ought to be recognized and protected.

19. Flowing from the foregoing submissions, learned counsel for the appellants has contended that the appeal before hand is meritorious. To this end, learned counsel for the appellants has implored court to set aside the judgment and the consequential decree and thereafter to dismiss the respondents' suit with costs.

20. The respondent filed written submissions dated 19.11.2025 and wherein same had highlighted and canvassed four [4] key issues for consideration and determination by the court. The issues raised by/on behalf of the respondent are: whether the trial court erred in law and in fact in finding that the 1st appellant held the suit land in customary trust for the respondent; whether the 2nd 3rd and 4th appellants were innocent purchasers for value without notice; whether the trial court failed to consider relevant judicial precedents, submission and authorities including the applicability or res judicata; and whether the 1st appellants rights were violated.

21. Regarding the First issue, learned counsel for the respondent has submitted that the learned trial magistrate fully appraised and evaluated the evidence on record and thereafter came to the correct conclusion that the suit property was family land.

22. In particular, it was submitted that the evidence on record showed that the suit property emanated from LR Abogeta/L-Kiungone/204, which was registered in the name of the 1st appellant's Father. Additionally, it was submitted that there is evidence that the respondent herein is a son of the 1st appellant and thus a legitimate beneficiary of the suit property. Moreover, learned counsel contended that the respondent and other family members had long occupied and used the suit property.

23. Based on the foregoing, learned counsel for the respondent has submitted that the finding and holding that the 1st appellant held the suit property on trust for the respondent and his siblings was correct and well-grounded.

24. In support of the foregoing submissions, learned counsel for the respondent has cited and referred to the decision in ***Mbui Mukangu vs Mutwiri Mbui***

Court of Appeal Civil Appeal 281 of 2000 & Kabiri vs Githinji and another 2024 KEELC 637, respectively.

25. Next is the issue as to whether 2nd 3rd and the appellants were innocent purchasers for value without notice. It has been submitted that though the 2nd to 4th appellants have contended that same are innocent purchasers, the said appellants are said to have failed to carry out or undertake due diligence over the suit property. In particular, it has been submitted that had the said appellants carried out due diligence same would have found/ established that the suit property was under extended occupation by the respondent and his other siblings.

26. Additionally, it was submitted that the named appellants also failed to tender and adduce before the court copies of the sale agreement or evidence of payments of the purchase price. In this regard, it was posited that the named appellants did not meet/ satisfy the requisite threshold to warrant a declaration of being bonafide purchaser[s] for value.

27. Moreover, it was submitted that the plea of customary trust cannot be defeated by a bonafide purchaser. Pertinently, learned counsel submitted that customary trust is an overriding interest and thus binds purchasers irrespective of registration.

28. Turning to the third issue, learned counsel for the respondent has submitted that the plea of res judicata does not apply to or affect the subject suit. It was contended that the respondent herein was never a party in the previous litigation/ proceedings, which were essentially between Jackson Mwiti Rinyiri and Silas M'Rinyiru Mbui[The 1st appellant] herein.

29. In so far as the respondent herein was not a party to the previous suit including the appeal before the Court of Appeal, it has been submitted that the doctrine of res Judicata cannot now be deployed to defeat the respondent's claim. For good measure, counsel posited that there has never been any previous suit between the 1st appellant and the respondent herein or at all.

30. Lastly, learned counsel for the respondent has submitted that the 1st appellant's right to own property was neither breached or infringed upon. On the contrary, it has been submitted that the decision beforehand was reached and arrived at in accordance with the due process of the law. Furthermore, learned counsel has submitted that the provisions of article 40 of the Constitution which have been invoked by the 1st appellant, do not protect unlawful and illegal acquisition[s].

31. In addition, learned counsel has submitted that a trustee who holds land on trust cannot invoke and rely on provisions of article 40 of the Constitution, 2010; in an endeavor to defeat existing trust or at all.

32. In the premises, learned counsel for the respondent has contended that the Judgment of the trial magistrate is well-reasoned, sound and well-grounded. In this regard, counsel has invited the court to dismiss the appeal and to affirm the judgment of the trial court.

33. I have reviewed the record of appeal; the evidence tendered and the submissions filed by the parties. The issues that arise/crystallize for determination in respect of the subject appeal are namely: whether the respondents' suit before the subordinate court was barred by the doctrine of res judicata; whether the impugned judgement constitutes a violation of the

doctrine of judgement in rem or otherwise; whether the respondent established the claim based on customary trust or otherwise.

34. Before addressing the thematic issues, which have been highlighted in the preceding paragraph it is imperative to highlight that what is before me is a first appeal. Being a first appeal, this court is enjoined to undertake exhaustive scrutiny, review, evaluation and analysis of the entirety of the evidence that was tendered before the court of 1st instance [Lower court] and thereafter to discern whether the conclusion/finding[s] arrived at by the lower court accord with the evidence or otherwise.

35. Furthermore, it is important to underscore that in the course of evaluating the evidence on record, this court is called upon to arrive at and form an independent conclusion. Besides the court is seized of the discretion to depart from factual finding arrived at by the lower court. Nevertheless it must be recalled that even though the court is obligated to arrive at an independent conclusion or depart from the factual conclusion, such depart can only be taken If and only of it is demonstrated that the findings of the lower court were based on no evidence; misapprehension of the evidence on record; perverse to the evidence tendered; or better still where it is demonstrate that the judgment was arrived at in contravention of established principle[s] of the law.

36. The scope and jurisdictional remit of the 1st appellate court while handling an appeal has been expounded in a plethora of decisions. In the case of ***Kenya Urban Roads Authority & another Vs Belgo Holdings Limited [2025]KECA*** the Court of Appeal reviewed various decisions and thereafter stated thus

"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 circumstances 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."

37. Premised on the established principles detailed in terms of the decision [supra] I am now well disposed to revert to the issues and to interrogate same with a view to ascertaining whether the conclusions by the learned magistrate ought to stand or otherwise. I shall address the issues sequentially.

38. The respondent approached the court *vide* the Plaint dated 16.9.2022 and sought various reliefs. The crux of the respondent's case was to the effect that the suit property is held in trust for himself and the family of his father, namely; the 1st appellant. In addition, the respondent ventured forward and contended that the registration of the suit property was undertaken in the name of the 1st appellant and that the said registration is subject to customary trust in so far as the land in question was family land.

39. The respondent thereafter ventured forward and availed the particulars of trust. The particulars pleaded are inter alia;

The 1st defendant [now the 1st appellant] was at all material times a trustee of the plaintiff [now the respondent] and all his other children.

40. From the plaint on record, it is apparent that the respondent's suit was filed on his own behalf and for the benefit of his siblings, namely; the other children of the 1st appellant herein. Suffice it to underscore that one of the other children of the 1st appellant for and on whose behalf the suit is maintained, is Jackson Mwiti Rinyiru.

41. It is common ground that Jackson Mwiti Rinyiru himself had been sued by the 1st appellant herein *vide* Nkubu Civil suit 9 of 2012: and wherein the 1st appellant sought to evict the said Jackson Mwiti from the suit land. Confronted with the suit Jackson Mwiti filed a statement of defence and wherein same contended that the suit property was being held on trust by the 1st appellant on behalf of himself[Jackson Mwiti Rinyiru] and the other children of the 1st appellant.

42. The suit *vide* Nkubu PMCC 9 of 2012 [Supra] was heard and determined, culminating into a judgment wherein the trial court found inter alia that the suit property was not being held by the 1st appellant on trust for the said Jackson Mwiti Rinyiru and his siblings.

43. The said decision aggrieved Jackson Mwiti Rinyiru. In this regard Jackson Mwiti Rinyiru, who is a brother of the current respondent, filed/ lodged an appeal *vide* Meru ELCA 47 of 2019, but erroneously, stated/ referred to as MERU ELCA No. E021 of 2022. For good measure, the said appeal was equally heard and disposed of, culminating into a judgment wherein the decision of the trial court was affirmed. Instructively, the learned judge who heard the appeal found and held that the suit property was not being held on trust.

44. Jackson Mwiti Rinyiru was similarly dissatisfied with the judgment rendered *vide* Meru ELCA 47 of 2019 and thereby filed an appeal before the court of appeal at Nyeri, Namely Nyeri Civil Appeal No 50 of 2020. Notably, the said appeal was equally heard and disposed of *vide* judgment delivered on 21.6.2024.

45. The Court of Appeal found and held that the appeal on behalf of Jackson Mwiti Rinyiru was devoid of merit[s]. The appeal under reference was dismissed and the judgment of the ELC court was affirmed. In the course of the judgement, the Court of Appeal observed as hereunder:

> ***It was common ground that the respondent is the registered owner of the suit land, and that he has raised his family on the said property, including the appellant, who is his son. The burden of proving that the suit land was ancestral land, and that the respondent was registered as a proprietor of the suit land in trust for among others the appellant, lay squarely on the appellant. It was the concurrent finding of fact by the two courts below that the respondent was able to prove, from the ownership documents produced before the trial court, that he gathered the suit land in the 1940s, by purchasing several parcels of land, which he later consolidated and was registered as the owner in 2010.***
>
> ***The appellant did not adduce any evidence before the trial court to establish his claim that the respondent inherited the 22 acres of the suit land from his grandfather. His witness, DW2, told the court that he was not born when the respondent acquired the suit property, and that he only heard that the respondent had inherited the suit land from his father. In the absence of any***

<u>evidence from the appellant to buttress his claim of existence of a customary trust, we find no reason to fault the finding of the concurrent findings of the trial magistrate and the learned appellate Judge made in favour of the respondent.</u> It has not been shown by the appellant that the two courts below considered matters they should not have considered, or failed to consider matters they should have considered.

46. My reading and understanding of the excerpt from the decision of the court of appeal [Supra] drives me to the conclusion that the court of appeal returned a finding that the suit land was not being held on trust by the respondent, who is the 1st appellant herein. Furthermore, it is apparent that the court of appeal acknowledged that the appeal concerned a claim on behalf of Jackson Mwiti Rinyiru and his siblings. Simply put, the claim that the suit property was held on trust for among others Jackson Mwiti Rinyiru.

47. It is important to highlight that even though the respondent herein was not directly a party to the previous proceedings and the resultant appeal, his interests were being canvassed/ represented by Jackson Mwiti Rinyiru. Moreover, there is no gainsaying that the Respondent's interest[s] are interwoven/ intertwined with those of Jackson Mwiti Rinyiru. In this regard, the decision by inter alia the Court of Appeal binds the current respondent. To this end, I find and hold that the suit before the subordinate court was prohibited by the doctrine of *res judicata.*

48. In the case of ***<u>Godfrey Shimonya Peter & 3 others v Mary Anyango Ameka & another [2018] KECA 356 (KLR)</u>*** the Court of Appeal held that;

"The doctrine of res judicata is provided for under S. 7 of the Civil Procedure Act which provides as follows:

"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.

Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—<u>Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating</u>." (emphasis added)

*……**The appellants' contention is that they were not parties in the previous suit as they were minors. Indeed, the learned Judge found that they could not sue in their own right as they were not of age. That being so it is clear that their interests were being represented by their parents, or other relatives who were parties to the suit. The orders of the Court were not just against Omumia Ingambi, who was claiming the land from his brother Andrea Salamu but against all those claiming through him, meaning all those who were residing on that plot because they were related to Omumia Ingambi one way or another.***

49. The respondent herein may not have been a party just like the appellants in the decision [Supra] were not parties, but for as long as his interest were being propagated by Jackson Mwiti Rinyiru, the respondent cannot now be heard to say that same is not bound by the doctrine of res judicata. To my mind, the contention by learned counsel for the respondent that the doctrine of res judicata does not apply is based on misapprehension of the elements underpinning the doctrine in question.

50. It is imperative to highlight that the judgment in respect of Nkubu PMCC 9 of 2012 and the judgment in Meru ELCA EO21 of 2022 but [which is ELCA 47 of 2019] were all placed before the trial court. In addition, the issue of Res Judicata was also highlighted. Nevertheless, the learned magistrate neither mentioned nor addressed the issue of res judicata nor the impact of the judgments which had been rendered by the previous courts of competent jurisdiction[s].

51. To my mind, the judgment of the learned trial magistrate failed to determine a critical and essential issue of res judicata touching on and concerning the claim of customary trust. On my own, I hold the view that the suit that was filed by the respondent herein and which touched on and concerned a question of customary trust in respect of the suit property was barred by res judicata.

52. In this regard, I find and hold that the respondent was *non-suited.*

53. Turning to the second issue, namely; whether the judgment by the learned trial magistrate contravenes the doctrine of the judgment in rem. To start with the decision in Nkubu PMCC 9 of 2012,;Meru ELCA 47 of 2019; and ultimately the judgment of the court of appeal *vide* Nyeri Civil appeal No 50 of 2020: all impact on the suit property. Moreover, the said judgments spoke to the ownership rights and the interest[s] attendant to the suit property. For coherence, the judgment in question confirmed that the suit property was not being held on trust.

54. The legal import and tenure of judgment under reference is to the effect that the 1st appellant was declared to be the lawful and absolute owner of the suit property. The issue of trust was effectively and effectually determined. Simply put, the question of trust was adjudicated upon and foreclosed.

55. In so far as the judgments under reference touched on and concerned ownership rights in respect of the suit property, same hold sway against the whole world. In this regard, a contrary decision cannot issue in favor of the same parties or a party who was affected by that decision, unless there is an appeal.

56. The import and tenure of a judgment in rem is highlighted by the provisions of section 44 of the Evidence Act chapter 80 Laws of Kenya. The provisions of Section 44 [supra] stipulates thus:

> **Judgments *in rem*.**
>
> *(1)A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.*
>
> *(2)Such judgment, order or decree is conclusive proof—*
>
> *(a)that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;*
>
> *(b)that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;*

*(c)that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease**;***

(d) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

57. To my mind, the decision by the learned trial magistrate which was issued on the face of the previous decisions touching on and concerning the same suit property amounts to an infringement of the doctrine of Judgment in rem. Additionally, the impugned judgement also appears to have set aside and superseded inter alia the decision of the Environment and land court; and worse still, the decision of the Court of Appeal which touched on the same suit property.

58. The determination of the two legal issues herein before would suffice to dispose of this appeal. However, and for the sake of completeness, I shall venture forward and address the third issue, albeit in brief.

59. The respondent had contended that the suit land arose from LR 204 which, according to the respondent, belonged to and was registered in the name of his grandfather, namely; Mbui Kainyiru. Because the land was said to have been registered in the name of Mbui Kaninyiru [now deceased], the respondent posited that the land ancestral/family land.

60. Additionally, the respondent contended that same was born on the suit land and that he has remained in occupation thereof to date. To this end, the respondent anchored his claim on the basis of occupation and possession.

61. However, during cross-examination by learned counsel for the appellant, the respondent is on record stating thus

> **" I stated that parcel No 809 came from 204. I live in Yururu. The land in Issue is in Kiungune. Yururu and Kiungune are different places. It is not true to say that I am not in occupation.**

62. From the respondent's own testimony, it becomes apparent that the respondent does not reside on the suit land. Moreover, evidence abound that LR No Abogeta/L-Kiungone/204 was registered in the name of Rinyiru Mbui on 28.12.1966. Thereafter, there was a correction of name and entry No 2 reflects Silas M'Rinyiru M'Mbui who is the appellant herein. [See the green card which was tendered and produced as DEXB 1 at page 154 of the record of appeal.

63. In so far as the original parcel of land was registered in the name of the 1st appellant and coupled with finding[s] by the court of appeal *vide* Nyeri Civil appeal No 50 of 2020; I come to the conclusion that the suit property is not being held on trust.

64. In the premises my answer to issue three, which in any event is inconsequential is to the effect that the respondent did not prove the plea of customary trust. In this regard, the findings and conclusion by the learned

trial magistrate was based on misapprehension of the evidence tendered; and which formed part of the record of the Court.

65. Flowing from the forgoing, and taking into account the established principle[s] in the case of ***Peters vs Sunday post Limited 1958 EA and Mwanasokoni vs Kenya Bus Service Limited 1985eKLR*** respectively, I come to the conclusion that the judgement, and of the decision of learned trial magistrate warrants [courts] being set aside.

66. Regarding costs; it is important to underscore that the dispute beforehand essentially involved father and son. The 2nd 3rd and 4th appellant have only been roped in by virtue of being purchasers. The general rule as pertains to disputes involving family members is to the effect that each ought to shoulder own cost; unless the circumstances surrounding the dispute bespeak vindictiveness or cynical conduct.

67. Moreover, it is not lost on me that costs are at the discretion of the court. Nevertheless, in making a decision as to award or not to award cost, the court is called upon to provide good reason one way or the other.[See **Rai & 3 others v Rai & 4 others [2013] KESC 20]**

68. Be as it may, and in respect of the instant matter, the order that commends itself to me is to the effect that each party shall bear own cost of the appeal.

Final disposition:

69. For the reasons which I have highlighted in the body of the judgment, it must have become apparent that the appeal beforehand is meritorious. In this regard the appeal ought to be allowed.

70. In the upshot, the final orders that commend themselves to the court are as here under-:

(a) The Appeal be and is hereby <u>allowed.</u>

(b) The Judgement of the trial court dated 12.3.2025; and the consequential decree be and are hereby set aside in its entirety.

(c) <u>In lieu thereof</u>, an order be and is hereby made dismissing the Respondent's suit *vide* Plaint dated 16.9.2022.

(d) Each Party shall bear own cost of the appeal as well as cost of the proceedings of the subordinate court.

71. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF NOVEMBER 2025

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

JUDGE

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

Hussein -Court Assistant

Mr. Miriti for the Appellants.

Miss Bett holding brief for Mr. Kiogora Arithi for the Respondent