REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCA NO. E030 OF 2024

WILSON NDUBI MATIRI …….1ST APPELLANT

JANET NDURU NKONGE [suing as legal representative of JOSEPH NKONGE MATIRI – DECEASED] ……..2ND APPELLANT

VERSUS

JOHNSON KABURU MATIRI ……..RESPONDENT

[Being an appeal from the judgment of Hon. T.A Sitati – SPM in Githongo E&L Case No. 70 of 2018 delivered on 28th March 2024].

JUDGMENT

1. The Appellants herein had approached the subordinate court *vide* amended Plaint dated **1st December 2021;** and wherein the Appellants sought various reliefs. In particular, the appellants had sought *inter alia* a declaration that the respondent herein and Murithi Matiri [now deceased]; and who is not a party in the subject appeal, held the suit properties on trust for them.
2. For coherence, the suit properties included L.R No's Abothuguchi/Githongo/750, 762 and 186, respectively.

3. The suit in the subordinate court was heard and disposed of *vide* Judgment delivered on 28th March 2024 and wherein the Learned Senior Principal Magistrate [*herein after referred to as the trial court*] found and held that the Appellants had failed to prove their claim of trust in respect of L.R No's. Abothuguchi/Githong0/762 and 186 , respectively.

4. To this end, the appellants' suit was dismissed. On the contrary, the trial court found and held that the respondent herein holds the title in respect of Abothuguchi/Githongo/750 on trust for himself and his siblings, *namely;* the surviving children of Matiri Mwitia, deceased.

5. It is the said Judgment and the resultant decree which has aggrieved the appellants herein and thus provoked the subject appeal. The memorandum of appeal dated 29th April 2024 has highlighted various grounds of appeal.
6. The grounds are reproduced as hereunder:
    (i) *That the honourable trial magistrate erred in law and fact in relying on speculation and hearsay to hold that the respondent did not hold land parcels No's. Abothuguchi/Githongo/186 and Abothuguchi/Githongo/762 and their respective subdivisions in trust for himself and the appellants and which has greatly prejudiced the appellants.*
    (ii) *That the honourable trial magistrate erred in law and fact in his overreliance on the law of succession act instead of the relevant law to which the ELC act and the Land Registration Act 2012.*
    (iii) *That the honourable trial magistrate erred in law and fact in allowing the respondent's counterclaim without giving any reasons for the same.*
    (iv) *That the honourable trial magistrate erred in law and fact in basing his decision on parcel No's Abothuguchi/Githongo/186 and Abothuguchi/Githongo/762 on irrelevant and remote matters and which has caused the appellants great prejudice.*

(v) *That the honourable trial magistrate erred in law and fact in rendering a decision that was/is biased and/or against the weight of evidence.*

7. The subject appeal came up for directions on 8th October 2025; whereupon the 1st appellant intimated to the court that same has since filed and lodged the record of appeal on behalf of both appellants. Furthermore, the first Appellant also contended that the record of appeal was complete and thereafter the appellant[s] sought directions pertaining to the hearing and disposal of the appeal. Moreover, the appellants intimated that same shall be inclined to file written submissions.

8. Though the respondent was duly served and the requisite affidavit of service was placed on record, the learned counsel for the respondent failed to attend court. The court nevertheless reviewed the record of appeal and confirmed that same was complete. To this end, the court ventured forward and issued the requisite directions in line with the provisions of **Order 42 Rule 13 of the Civil Procedure Rules 2010**. In particular, the court directed that the appeal be canvassed and disposed of by way of written submissions. Furthermore, the court also circumscribed the timelines for the filing and exchange of written submissions.

9. The Appellants filed written submissions dated 24th October 2025; and wherein the appellants have highlighted six [6] issues for consideration and determination by the court. Firstly, the appellants have submitted that the learned trial magistrate misapprehended the gist and crux of the appellants' case and thereafter proceeded to invoke the provisions of the law of succession Act, Chapter 160, Law of Kenya, which the appellants contend were irrelevant and inapplicable. In particular, it was submitted that the dispute before the trial court concerned a claim based on

customary trust and not on inheritance or succession of the estate of M'Ithinyai Mwitia [deceased].

10. Additionally, it was submitted that by invoking and overly relying on the provisions of the law of succession act while disregarding the provisions of the Land Registration Act and the Land Act, the learned trial magistrate failed to properly evaluate the appellant's case. In this regard, it has been submitted that the Judgment arrived at by the learned trial magistrate was therefore contrary to the evidence on record.

11. Secondly, the Appellants submitted that the suit properties, *namely;* Abothuguchi/Githong0/762 and 186, previously belonged to and were registered in the name of M'Ithinyai Mwitia, now deceased and who was a brother of Matiri Mwitia. Furthermore, it was submitted that M'Ithinyai Mwitia was not blessed with any child and thus his properties were to devolve to and in favour of the close family members.
12. In this regard, it was contended that the closest family member to whom the properties ought to have devolved was Matiri Mwitia [now deceased] and by extension the children of Matiri Mwitia, including the appellants herein.
13. Moreover, the appellants have contended that following the death of M'Ithinyai Mwitia, the appellants herein took care of the widow of M'Ithinyai Mwitia and thus vindicating the appellants' legitimate expectation that same would benefit from the suit properties, on the basis of customary trust. For good measure, it was submitted that the learned trial magistrate failed to take into consideration the evidence that the appellants took in and cared for the widow of M'Ithinyai Mwitia during her lifetime.

14. Thirdly, the appellants have contended that the respondent herein was registered as the proprietor/owner of the named properties to hold on trust for the appellants as the respondent was [sic] way older than them.

15. Though the submission by the appellants in terms of paragraph 15 of the written submissions is not clear, what is discernible is to the effect that the appellants are contending that the named properties were registered in the name of the respondent to hold same in trust for the appellants because the respondent had a family. Moreover, it was contended that the respondent was to benefit from the named properties; grow his family; and thereafter sub-divide the named properties to the appellants. Furthermore, it has been contended that the respondent understood the nature of the transaction[s] in so far as the respondent was way older than the appellants.

16. The next issue that has been raised by the appellants is to the effect that the learned trial magistrate failed to appreciate the import and tenor of the provisions of section 28 (b) of the Land Registration Act, 2012; which essentially highlights customary rights. Furthermore, it has been submitted that customary trust constitutes an overriding interest and thus does not require to be registered on the title.

17. In addition, it has been submitted that the learned trial magistrate misapprehended the nature of the claim by the appellants. Additionally, it has been submitted that the learned trial magistrate failed to appreciate the ingredients that were highlighted and captured in the decision in the case of ***Isaac Inanga Kiebia vs Isaya Theuri M'Lintari & another (2018) KESC 22.***

18. The next issue that has been raised by the appellants relates to the contention that the learned trial magistrate ignored and disregarded un-

contested facts and evidence and thereafter proceeded to base his Judgment on hearsay. To this end, it has been submitted that the learned trial magistrate failed to appreciate and take into account the import and the provisions of sections 107 and 108 of the Evidence Act, Chapter 80, Laws of Kenya. Moreover, it was submitted that the learned trial magistrate also contravened the provisions of section 63 of the Evidence Act which prohibits reliance on hearsay evidence.

19. The last issue that has been canvassed by the Appellants touches on and concerns the breach/violation of the provisions of Article 50 of the Constitution 2010. To this end, it has been submitted that the learned trial magistrate disregarded the facts and the evidence tendered and thereafter misapplied the law on the evidence.
20. In particular, it has been submitted that a Judgment which disregards evidence on record or misapplies the law offends the constitutional guarantee envisaged *vide* article 50 of the Constitution, 2010. Moreover, it has been submitted that the impugned Judgment was also arrived at in a manner that demonstrates bias on the part of the learned trial magistrate.

21. Flowing from the foregoing, the appellants have contended that the appeal beforehand is meritorious and thus same ought to be allowed. In particular, the appellants have invited the court to allow the appeal; set aside the impugned judgment; and to substitute same with an order allowing the claims at the foot of the amended plaint dated 1st December 2021.

22. For good measure, the appellants have invited the court to find and hold that L.R No's Abothuguchi/Githongo/762 and 186, inclusive of the sub-divisions arising therefrom, are held by the respondent on trust for himself [respondent] and the appellants.

23. The respondent herein was duly served with the record of appeal and the mention notice for directions. Additionally, the respondent was equally served with the written submissions filed by the appellant[s] and a mention notice for directions. Nevertheless, the respondent neither attended court during the issuance of directions or on the return date, when the matter was set down to confirm the filing and exchange of written submissions. For good measure, the respondent herein neither participated in the directions nor filed written submissions. In short, the only written submissions on record are the submissions filed by the appellants.

24. I have reviewed the record of appeal, the pleadings filed, the evidence tendered [both oral and documentary] and the written submissions filed on behalf of the appellants and upon consideration, I come to the conclusion that the determination of the subject appeal turns on two [2] key issues, *namely*; whether the subject appeal is competent and legally tenable or otherwise; and whether the appellants indeed proved their claim as pertains to L.R No. Abothuguchi/Gitongo/762 and 186 or otherwise.

25. 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 [findings] 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.

26. 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, or arbitrarily.

27. 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."

28. Back to the issues for consideration. Firstly, it is common ground that the Judgment that underpins the subject appeal was delivered on 28th

March 2924. For coherence, the copy of the judgment which has been availed to the court confirms as much. In addition, it is also important to underscore that the decree on record also reveals that the judgment was rendered on 28th March 2024.

29. Additionally, it is imperative to highlight that the memorandum of appeal lodged by and on behalf of the appellants also confirms that the impugned Judgment was rendered on 28th March 2024. In this regard, there is no dispute that the judgment under reference was delivered on the named date and there is no confusion as pertains to the date of delivery of the Judgment.

30. Suffice it to posit that the appellants herein were at liberty to file/mount the appeal [if at all] within the stipulated timelines. Notably, the timelines for filing an appeal are provided for *vide* Section 79G of the Civil Procedure Act, Cap 21 Laws of Kenya.

31. The provisions of section 79G of the Civil Procedure Act [supra] stipulate thus:

> ***79G. Time for filing appeals from subordinate courts.***
>
> *Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.*

32. In so far as the impugned judgment was delivered on 28th March 2024, and taking into account the provisions of section 79G of the Civil Procedure Act [supra], the appellants herein were obliged to file/lodge the subject appeal within 30 days. The 30 days for purposes of filing/lodging the appeal were to be reckoned excluding the day of delivery of the Judgment, but inclusive of the last day, *namely*; the 30th day. In this regard, it is common ground that the subject appeal ought to have been filed on or before 27th April 2024 and not otherwise.

33. Moreover, if the timeline[s] for filing of the appeal had lapsed, then it behooved the appellants to seek and obtain leave to file the appeal out of time.

34. Be that as it may, it is important to underscore that the memorandum of appeal was dated and filed on 29th April 2024. For good measure, the court tracking system [e-platform] reveals that the subject appeal was paid for on 29th April 2024 at 13.32.57 hours. To my mind, by the time the appeal was being filed, the prescribed/stipulated timeline had lapsed and hence the appeal could not have been filed without the requisite leave.

35. Additionally, I beg to highlight that I have reviewed the entire record of appeal and nowhere do the appellants intimate and or indicate that the subject appeal was filed with leave of the court. The appellants herein cannot file an appeal out of time and thereafter imagine that a court of law will fail to discern such a lapse or omission. Moreover, there is no gainsaying that the filing of an appeal out of time without leave renders the appeal incompetent and a nullity.

36. In the case of **Nicholas Kiptoo Korir Arap salat vs IEBC & 7 others, Civil application No. 16 of 2014 {2014] eKLR**, the Supreme Court [the apex court] dealt with a similar situation where an appeal was filed out of time without leave.

37. For coherence, the court stated as hereunder:

> *No appeal can be filed out of time without leave of the court. Such a filling renders the 'document' so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court. It is unfortunate that Petition No 10 of 2014 has been accorded a reference number in this court's registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No 10 of 2014 having been filed out of time and without leave (an order of this court extending time), is expunged from the court's record.*

38. The legal implication[s] attendant to an appeal filed out of time were also adverted to and underscored by the Court of Appeal 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 proceeded to and observed that an appeal filed out of time and without leave is void and invalid.

39. For coherence, the court stated as hereunder;

> *The appellant failed to take advantage of the latitude accorded under section 16A(2). This means that the appeal before the ELC*

was incompetent. The learned Judge could not, in the circumstances, arrogate to herself jurisdiction to hear an appeal that never was. We cannot, therefore fault her for downing her tools for want of jurisdiction and for consequently dismissing the appeal before her.

40. Finally, it is instructive to observe that the jurisdiction of the court only arises where an appeal or better still a competent appeal has been filed in accordance with the prescription of the law. Where an appeal is filed outside the prescribed timelines, the court is divested of the requisite jurisdiction. In this regard, a court of law cannot purport to entertain and adjudicate upon an appeal filed out of time without leave.
41. In the absence of jurisdiction, a court of law is commanded and obliged to down its tools. For good measure, jurisdiction is everything. In this regard, a court without jurisdiction cannot entertain proceedings and adjudicate upon a matter wherein same is divested of jurisdiction.

42. In the case of ***Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service (Civil Appeal 244 of 2010) [2019] KECA 767 (KLR) (Civ) (10 May 2019) (Judgment),*** the Court of Appeal revisited the significance of jurisdiction and the legal implications attendant to same.

43. The court ventured forward and stated thus;

It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?

2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself

that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.

44. In view of the foregoing observation, it is my finding and holding that the subject appeal [which was filed out of time] and without leave of the court is void and invalid. Same courts striking out.

45. Having come to the conclusion highlighted in the preceding paragraph[s], it would have been apposite to terminate the Judgment at this juncture. However, I am alive to the fact that I may [I repeat, may] be wrong in the computation of time. In this regard, it suffices to venture forward and to consider the merits of the appeal. To this end, I propose to address the 2nd issue, namely; whether the appellants proved their claim as pertains to the two named properties or otherwise.

46. It is the appellants who had approached the subordinate court, contending that the various properties alluded to at the foot of the amended Plaint dated 1st December 2021 were held on trust. In this regard, there is no gainsaying that the appellants were chargeable with the obligation of placing before the trial court plausible and cogent evidence to demonstrate the plea of customary trust. Simply put, the burden of proof lay on the shoulders of the appellants in terms of the provisions of

sections 107, 108 & 109 of the Evidence Act, Chapter 80, Laws of Kenya.

47. The question that does come to the fore is whether the Appellants indeed discharged the burden of proof or otherwise? To start with, the appellants acknowledge that L.R No's. Abothuguchi/Githongo/762 and 186 [now subdivided], belonged to and were registered in the name of M'Ithinyai Mwitia and not Matiri Mwitia [now deceased], the latter who was the father to the appellants and the respondent.
48. Furthermore, evidence abound that the suit properties were transferred to and registered in the name of the respondent herein pursuant to court proceedings arising from civil case No. 102 of 1976 – Meru. For good measure, the proceedings and order emanating from the same case were tendered and produced before the court as exhibit D1 on behalf of the respondent.

49. Other than the foregoing, it is also imperative to recall that the 2nd Plaintiff, namely; Joseph Nkonge Matiri [now deceased], who had been replaced by the current 2nd appellant conceded that it is the family of M'Ithinyai Mwitia [Deceased] who gave the land to the respondent. For good measure, it is instructive to take cognizance of the evidence of PW 1 while under cross-examination by learned counsel for the respondent herein.
50. Same testified thus;

> ***"Nowhere did M'Ithinyai family inform the 2nd defendant to hold the land in trust for us. i.e Plaintiffs"***

51. On re-examination, PW 1 [Joseph Nkonge Matiri] is on record stating thus;

"M'Tithinyai family gave the land to the 1st defendant. I was an adult then in 1971. I am now 83 years old".

52. What I hear the appellants herein to be confirming is that the two properties, which underpin the subject appeal previously belonged to and were registered to in the name of M'Ithinyai Mwitia now deceased. Furthermore, I hear the appellants to be confirming that the land in question was given to the respondent by the family of M'Ithinyai Mwitia, now deceased. Moreover, there is also a concession that the respondent was not to hold the named properties on trust for the appellants [who were the plaintiffs in the subordinate court].

53. To my mind, the evidence on record does not prove and or establish the claim that the named properties were to be held on trust for the appellants herein. On the contrary, it is my finding and holding that M'Ithinyai Mwitia [now deceased], having been registered as the owner of the named properties, was at liberty to deal with same subject only to known overriding interests.

54. Additionally, it is also not lost on me that the transfer and registration of the named properties in the name of the respondent was underpinned by a judgment/decision of the court issued vide Meru DMCC No. 102 of 1976, which decision has neither been impugned nor set aside. Instructively, the said decision is a decision *in rem* and thus same attached to the two named properties.

55. In my humble, albeit considered view, the decision under reference vested the two named properties in favour of the respondent and nowhere was it indicated that the suit properties were being held on trust for the appellants herein.

56. The import of a decision *in rem* cannot be overstated. Nevertheless, it is imperative to take cognizance of the provisions of Section 44 of the Evidence Act Cap 80, Laws of Kenya.

57. The said provisions [supra] stipulate thus;

> *(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.***

58. Other than the foregoing, it is also important to underscore that before a court of law can return a finding of customary trust, the claimant [in this case, the appellant], must demonstrate that the suit property was previously family land and that the claimant could have been registered as the owner thereon save for intervening circumstance. In this regard, it was incumbent upon the applicant to show/demonstrate inter alia that same could have been registered as the owners of the two named properties.

59. However, there is no gainsaying that the named properties belonged to and were registered in the names of M'Ithinyai Mwitia now deceased and not Matiri Mwitia [now deceased] the latter who was the father of the disputants.

60. Moreover, it is also admitted that the appellants and the respondents were duly registered as owners of other parcels of land that were left unto them by their father. To this end, it is imperative to take cognizance of the evidence of the 2nd plaintiff [PW 1] while giving evidence in chief.

61. Same stated thus;

> ***"The 1st defendant has other land parcels i.e. the ones left to us by our father. The 1st plaintiff and I have another portion which was left to us by our father just as the 1st defendant.***

62. From the foregoing, it is apparent that both Wilson Ndubi Matiri [1st appellant] and Joseph Nkonge Matiri [who was the 2nd plaintiff] and now substituted by the 2nd appellant, were capable of being registered as owners of land at the time of Adjudication and registration; and hence there did not exist any militating or intervening circumstance that could warrant the registration of the two named properties on trust for them.

63. Further, and in any event, I have not come across any evidence to demonstrate that M'Ithinyai Mwitia [now deceased] held the named

properties on behalf of the appellants herein. Suffice it to underscore that if M'Ithinyai Mwitia [now deceased] held the named properties on trust, then the said trust would have passed over to and affected the registration of the suit properties in favour of the respondent. However, in the absence of trust against M'Ithinyai Mwitia, I am afraid that the plea of trust against the respondent was misconceived and legally untenable.

64. In the case of ***Isaac M'Inanga Kiebia vs Isaya Theuri M'Lintari & another (2018) eKLR,*** the Supreme Court of Kenya [*the apex court*] highlighted the various elements/ingredients that must be established in a claim based on customary trust.

65. For coherence, the Court stated thus;

> *Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:*
>
> ***1. The land in question was before registration, family, clan or group land***
>
> ***2. The claimant belongs to such family, clan, or group***
>
> ***3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.***

4. <u>The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.</u>

5. The claim is directed against the registered proprietor who is a member of the family, clan or group.

66. Guided by the holding in the decision [supra], I am afraid that the Appellants herein have neither established nor proved their claim based on the customary trust. On the contrary, I find and hold that the transfer and registration of the named properties in favour of the respondents was underpinned by a lawful decision of the court which clearly vested ownership rights in the respondent without any intimation of trust.

67. Though the learned trial magistrate spent a substantial chunk of his time reviewing and analyzing the provisions of the law of Succession Act, Chapter 160, laws of Kenya; and decisions attendant thereto [which were irrelevant], I come to the conclusion that the findings of the trial court and essentially, as pertains to the plea of customary trust is solid, well grounded and legally tenable.

68. For good measure, I come to the same conclusion that the appellants did not establish any customary trust in respect of L.R No's Abothuguchi/Githongo/762 and 186, respectively.

69. Before concluding on the appeal, there is one incidental issue that merits mention and a short discussion. The issue touches on and concerns the legality of the orders of the court that were made against Murithi Matiri, now deceased, and who was the 2nd defendant in the subordinate court. Instructively, the 2nd defendant is reported to have died on or about the 16th June 2022. [**See proceedings of court dated 25th July 2022].**

70. It is also common ground that despite the death of the named 2nd defendant, no substitution was undertaken on his behalf. This much is apparent from the proceedings and directions issued on 1st December 2023. Notably, by the time the proceedings of 1st December 2023 were being taken, the statutory 12 months prescribed *vide* the provisions of **order 24 of the Civil Procedure Rules, 2010;** had lapsed/extinguished.

71. In my humble view, the suit as against the 2nd defendant abated upon the lapse of 12 months from the date of his death. Henceforth, no proceedings could be maintained and or prosecuted as against the deceased 2nd defendant. Similarly, there is no gainsaying that no orders could issue as against the 2nd defendant in respect of whom the suit had abated. [See the holding of the Court of Appeal in the case of ***Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others [2015] eKLR - Civil Appeal 16 of 2015.***

72. Flowing from the foregoing, I am afraid that the proceedings that were undertaken by the trial court and the consequential orders that were made long after the suit against the 2nd defendant had abated are a nullity. However, there being no appeal [cross appeal] on this aspect of the matter, I beg to say no more.

73. *In a nutshell*, it is my finding and holding that even on the basis of merits, the appellants herein have neither established nor proved any basis to warrant the interference with the decision of the trial court pertaining to and concerning L.R No's Abothuguchi/Githongo/762 and 186. [now subdivided.] .

74. In short, the appeal is bereft of merits.

FINAL DISPOSITION.

75. Having analyzed the two thematic issues, which were highlighted in the body of the Judgment, it must have become evident that the subject appeal was filed/lodged outside the prescribed timeline. In this regard, there is no gainsaying that the appeal is premature, misconceived, still born and thus invalid.

76. In the upshot, and for the reasons alluded to; the final orders that commend themselves to the court are as hereunder;

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

(ii) The Judgment and the consequential decree of the subordinate court [*save for the aspect touching on abatement of suit*] be and is hereby affirmed.

(iii) For the avoidance of doubt, L.R No's Abothuguchi/Githongo/762 and 186 [now subdivided] are not held in trust for the Appellants.

(iv) No orders as to costs.

77. It is so ordered**.**

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF NOVEMBER 2025

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

JUDGE

In the presence of:

Court Assistant Hussein

Wilson Ndubi Matiri – 1st Appellant in person.

Janet Nduru Nkonge – 2nd Appellant in person.

No appearance for the Respondent