

REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA AT KERUGOYA

ELCA NO. 16 OF 2019

**GEOFREY KARIITHI MURAGE 1ST
APPELLANT**

**PETER NJOGU MURAGE 2ND
APPELLANT**

JULIUS NGARE NGURE 3RD APPELLANT

VERSUS

JAMES MWANIKI MWEA RESPONDENT

*[Being an appeal from the judgement of Hon. L. W. Kabaria, SRM, delivered on
23rd August 2019 in Gichugu PMCC NO. 19 OF 2017]*

JUDGEMENT

1. The appellants commenced this appeal through the memorandum of appeal dated 2nd September 2019 raising the following seven (7) grounds:
 - a) *“The learned trial magistrate erred in law and fact in relying on the doctrine of constructive trust and/or proprietary[sic] estoppel which had not been pleaded by the plaintiff in the plaint and the alleged promise/sale of the land by the original owner to the respondent was not established; in respect of the suit land which is now land parcel NGARIAMA/NGIRIAMBU/1461.*
 - b) *The learned trial magistrate erred in law and fact in that after making a finding that the original owner is the one who transferred the land to the 3rd appellant, and the 3rd appellant had no contractual relations whatsoever with the respondent, hence constructive trust cannot be implied as against the 3rd appellant and in favour of the respondent, and considering that the appellants are the ones in occupation of the suit land, nevertheless*

proceeded to give orders of eviction against the appellants from the suit land.

- c) The learned trial magistrate erred in law and fact in giving an order of eviction and permanent injunction against the appellants without any determination as to the proprietary[sic] rights of the respondent in respect of the suit land in the final orders of the court in its judgement.*
- d) The learned trial magistrate erred in law and fact in that whereas she made a correct finding that the transfer of **land parcel number Ngariama/Ngiriambu/1344** which was later subdivided into **parcel numbers Ngariama/Ngiriambu/1460 and 1461**, from the original owner Daniel Nguru to Julius Ngari the 3rd appellant was not fraudulent and therefore was proper and lawful, nevertheless proceeded to make a finding of constructive trust against the same original owner and in favour of the respondent.*
- e) The learned trial magistrate erred in law and fact in making a finding that there was an award from the Land Disputes Tribunal in favour of respondent over the same land, yet that award was overturned by the Land Disputes Appeals Committee otherwise the respondent would have just executed the decree emanating from the award of the Land Disputes Tribunal instead of filing a fresh suit.*
- f) The learned trial magistrate erred in law and fact in basing her findings on alleged occupation of the land by the respondent for a long period of time as reasons for eviction of the appellants, yet the claim was not one of adverse possession.*
- g) The findings were against the pleadings, the evidence adduced in court and the applicable laws.”*

2. The appellants therefore prayers for:
 - a) *“The appeal be allowed.*
 - b) *The judgement of the learned trial magistrate be set aside and be substituted with an order dismissing the respondents suit.*
 - c) *Costs of the suit and appeal to be borne by the respondent.*
 - d) *Any other or further orders that the court may deem fit to grant.”*
3. The learned counsel for the appellants and respondent filed their submissions dated the 23rd June 2025 and 11th August 2025 that the court has considered.
4. From the grounds on the memorandum of appeal and submissions, the following issues arises for the court’s determinations: -
 - a) *Whether the learned trial magistrate erred in law and in facts in relying on the doctrine of constructive trust and/or proprietary estoppel.*
 - b) *Whether the learned trial magistrate erred in law and in facts in ordering eviction and permanent injunction against the appellants.*
 - c) *Whether the learned trial magistrate findings were against the pleadings, the evidence adduced and the applicable laws.*
 - d) *Who pays the costs?*
5. The court has carefully considered the grounds on the memorandum of appeal, record of appeal, submissions by the learned counsel for the parties, superior court decisions cited thereon and come to the following findings: -
 - a) The respondent commenced the suit before the trial court through the plaint dated 21st March 2017, averring inter alia that

he bought 3 acres out of **Ngariama/Ngiriambu/404** from the late Daniel Ngure for **Kshs.18,400**, being a refund to Cyrus Ngure and was placed into possession; that he developed by undertaking various activities to a value of **Kshs.1,339,000**; that Cyrus Nduru died before effecting the transfer to him; that in 2014 the 3rd appellant and others forcefully evicted him from the land and took possession. The respondent sought for orders that he be compensated for the developments done on the land in terms of the Upcountry Valuers Report dated 27th February 2017 or as the court deems fit and for eviction by the appellants from **Ngariama/Ngiriambu/1461**, permanent injunction and costs. The appellants opposed the respondent's claim through their statement of defence dated 7th February 2017 averring among others that the **Kshs.18,400** the appellant gave Daniel Ngure was for the one acre land parcel **Ngariama/Ngiriambu/1327**, that he was placed in possession of and is registered in his name; that Cyrus Nduru has never been the registered owner of **Ngariama/Ngiriambu/404** or 1461; that the appellant's suit is fatally defective as Cyrus Murage Njine, the registered owner of **Ngariama/Ngiriambu/1461**, is deceased, and the suit should be dismissed with costs.

- b) During the hearing, the respondent testified as PW1 and among others told the court that his properties on **Ngariama/Ngiriambu/1461**, measuring 2 acres, that is registered in the name of Cyrus Murage Njine, deceased, was destroyed in 2014 when the appellants chased him out. That he got a valuer who assessed the value of the damages and that he was seeking for compensation of **Kshs.1,339,000** and share of his land after succession. He confirmed that Cyrus had sued him in another suit before the High Court that has been dismissed. That he had filed case No.308 of 1993 for adverse possession at Embu Law Courts that was referred to Kianyaga Land Disputes Tribunal; that the tribunal ruled in his favour and was to get a portion of **Ngariama/Ngiriambu/1460**, but Julius Ngari filed an appeal at Nyeri and he was told not to use the land. In their defence, the 3rd appellant testified as DW1 and told the court that his father,

Daniel Ngure Mwea, had sold one acre of land, being **Ngariama/Ngiriambu/1328**, out of his land, **Ngariama/Ngiriambu/404**, to the respondent; that his father later subdivided the remainder of the land, being **Ngariama/Ngiriambu/1327**, between his three sons [3rd appellant and two others]. That it was after he sold his portion to deceased, Cyrus Murage Njine, who is father to the 1st & 2nd appellants, that the respondent started claiming it was his. The 1st appellant testified as DW2 confirming that he and his brother, the 2nd appellant, had authorized 3rd appellant to plead on their behalf.

That **Ngariama/Ngiriambu/1461**, the suit property, is in the name of their father, Cyrus Murage Njine, who died in 2013, and no succession cause has been filed. That they have been utilizing the land since their father's death in 2013. At the closure of the oral testimonies, the learned counsel for the respondent filed their submissions dated the 29th May 2019 urging inter alia for compensation at **Kshs.1,339,000** and eviction of the appellants from the suit property pending the filing and determination of the succession cause of the estate of the late Cyrus Murage Njine. The learned counsel for the appellants filed their submissions dated 27th June 2018[sic], positing inter alia that the respondent lacked locus in the suit as he is not the registered proprietor, and the suit is in contravention of **Section 82 of the Law of Succession Act chapter 160 of Laws of Kenya**, as none of the appellants is the administrator of the estate of Cyrus Murage Njine, in whose name the land is registered.

- c) This being a first appeal, the court's mandate is as guided by the holding in several superior courts including the case of **Neepu Auto Limited versus Narendra Chananlal Solanki & 3 Others [2014] KECA 383 (KLR)**, where the Court of Appeal held that:

“Being a first appeal we must re-evaluate the evidence and come to our own conclusions, but always bearing in mind we did not hear the witnesses nor observe their

demeanour. We may only interfere with the findings of the trial judge if the judge failed to take into account particular circumstances or based his impression on demeanour of witnesses which was inconsistent with the evidence - see the judgement of this court in Maimuna s/o Patrick Mutoo versus Wilson Njau Nyaki Civil Appeal No. 131 of 1994. In Peters versus Sunday Post Limited, [1958] EA 424 it was held that:

“while an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of the circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to so decide.”

This above principle was also restated in the case of Selle & Another versus Associated Motor Boat Co. Ltd & Others [1968] EA 123, where the Court of Appeal held:

“This Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of retrial... this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always

bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

- d) That from paragraphs (3) to (5) of the plaint dated the 21st March 2017, the respondent averred that he bought three acres of land out of **land parcel Ngariama/Ngiriambu/404** from Daniel Ngure, his grandfather, for **Kshs.18,400** that was employed in refunding the purchase price paid by one Cyrus Ngure for the same land. That he was placed in possession and he developed to the tune of **Kshs.1,339,000**. At paragraph (6) of the said plaint, the plaintiff averred that Cyrus Nduru died before transferring the land to him, but he continued in possession until 2014, when he was evicted by the appellants. In his prayers, the respondent sought for compensation for the developments erected on the suit land, eviction order of the appellants from **Ngariama/Ngiriambu/1461**, permanent injunction and costs.
- e) I have perused the oral testimonies of the respondent, 3rd and 1st appellants and their written witness statements that are in the Record of Appeal dated 4th June 2025, and the following is apparent:
- i. That the respondent claims to have bought three acres of land out of **Ngariama/Ngiriambu/404 in 1984** from Daniel Ngare, his grandfather and father to 3rd respondent among others at **Kshs.18,400**, that was used to pay off a previous buyer is disputed by the appellants. The appellants' position is that the portion of land the respondent bought for **Kshs.18,400** was one acre in acreage, and was transferred to him. No sale agreement or other supporting documents in support of a sale of three acre portion of land was availed.
 - ii. It is however not disputed that the first subdivision of **Ngariama/Ngiriambu/404**, measuring eleven acres, resulted into parcels **Ngariama/Ngiriambu/1327 & 1328** of

ten and one acres respectively. The date of subdivision was not disclosed.

- iii. It was also not disputed that **Ngariama/Ngiriambu/1328**, measuring one acre, was transferred to the respondent by his grandfather. The date of transfer not disclosed.
- iv. It is also admitted that **Ngariama/Ngiriambu/1327**, measuring ten acres was subsequently subdivided, into three parcels, and registered as follows:
 - One parcel of three acres was transferred to 3rd appellant;
 - One parcel of three acres was transferred to sons of Jackson Ireri, and
 - Four-acre parcel remained in the name of Daniel Ngure.

The dates of subdivision and transfers was not disclosed.

- v. It is not disputed that Daniel Ngure passed on, but the date of his death has not been given.
- vi. In his witness statement, the respondent alleged that the Daniel Ngure fraudulently transferred the four-acre parcel to the 3rd appellant. The 3rd appellant has in his witness statement stated that the land was given to him. The date the said land was transferred to the name of 3rd appellant has not been disclosed by the parties.
- vii. It is not disputed that the 3rd appellant subdivided the four-acre parcel into **Ngariama/Ngiriambu/1460 & 1461**, each measuring two acres, and that he subsequently sold the latter to Cyrus Murage Njine. The date of subdivision, and transfer of **Ngariama/Ngiriambu/1461** has not been given.
- viii. That it is not in dispute that Cyrus Murage Njine, in whose name **Ngariama/Ngiriambu/1461** was and is still registered, is deceased.

f) In her judgement delivered on the 23rd August 2019, the learned trial magistrate identified three issues for determinations. The issues are whether the plaintiff purchased **Ngariama/Ngiriambu/1461** from Daniel Ngure in 1984; whether the plaintiff took possession of the said land and developed it, and finally whether he was entitled to the orders sought. The learned trial magistrate analysed the evidence presented, and starting at the last paragraph at page 6 of the judgement, held as follows:

*“In our case the testimony of the plaintiff that he has been in occupation of the land and has developed it I find corroborated in several respects, first are those valuation reports which confirm development on the land as the plaintiff has claimed, secondly the admissions by the defendants that there have been findings elsewhere that the plaintiff had property specifically trees on this land and lastly the inconsistencies of the defendants in their testimonies: the 3rd defendant’s denial for instance of a pond which has been shown to exist by the assessor, it is noted that the defendants did not challenge these reports as fabricated or inaccurate! I make a finding therefore that the plaintiff has established on a balance of probabilities that he has been in occupation of the parcel now known as **Ngariama/Ngiriambu/1461** and indeed made developments thereon.*

*Now the defendants did concede in evidence that this land was part of a **parcel Ngariama/Ngiriambu/404** belonging to one Daniel Ngure Mwea who the plaintiff told the court put him in occupation of it. In the circumstances then I find that the plaintiff having been out in actual occupation of the suit property by its registered owner at the time acquired equitable rights thereon, that a constructive trust was created in favour of Mr. Mwaniki is enforceable in law.
.....the plaintiff accused the 3rd defendant of fraudulently transferring the land from his father to himself but there is*

no evidence of it. What is common ground is the land originally registered to Daniel Ngure was thereafter registered to the 3rd defendant who then sold it to Cyrus Njiine on the strength of which registration his sons the 1st and 2nd defendants now occupy the land.

.....once the plaintiff was put in possession of the portion of land by his grandfather its registered owner, a constructive trust was created in his favour. The evidence is that the plaintiff took possession of the portion of land in 1984 while it was still part of the larger **parcel Ngariama/Ngiriambu/404** and developed it, per his evidence when the land was transferred to the 3rd defendant he was still in occupation, when the land was transferred to Cyrus father to the 1st and 2nd defendants, he was still in occupation, indeed he remained in possession upto the year 2014 when he was removed from it. Once he put the plaintiff in occupation the late Mr. Daniel Ngure held the land in trust for the plaintiff herein, he could not therefore have properly transferred it to the 3rd defendant. As stated by the Learned Justices of Appeal in Willy Kimutai supra, the doctrine of constructive trust is equity's intervention to provide relief against unconscionable conduct. The transfer to 3rd defendant was subject to the plaintiff's overriding interest over the suit property, therefore it was not effectual and passed no interest to him. It follows therefore that the subsequent transfer to the 1st and 2nd defendants father was equally ineffectual. Indeed, one cannot pass a better title than that which one has.

What then? The plaintiff has asked the court for three orders the first an order for compensation for the developments on the land, second an order to evict the defendants and an [sic] of permanent injunction pending his registration as proprietor. Now these prayers are puzzling on one hand the plaintiff claims compensation for the developments on the land and the same breath claims the land which has the developments, he cannot have both! In

evidence he told the court he was claiming the value of what was damaged, but that is not apparent in his claim, it is a special damage claim that should have been specifically pleaded.

Considering then the prayers sought I will begin with the 2nd and 3rd: the plaintiff asks the court to issue an order of eviction against the defendants, having found that the plaintiff has an interest overriding any other interest over the land, this order will issue. That for a permanent injunction will issue as well. Having issued the two orders that for compensation for what is on the land cannot issue. I find so.

In the end therefore, the plaintiff's claim succeeds to this extent:

- a. That an order is here issued for the eviction of the 1st and 2nd defendants from parcel of land **No. Ngariama/Ngiriambu/1461.**
 - b. A permanent injunction is here issued restraining the defendants from entering, cultivating, working or in any manner interfering with the plaintiff's occupation and cultivation of the parcel ownership of the land parcel **No. Ngariama/Ngiriambu/1461.**
 - c. The plaintiff will have the costs of this suit."
- g) That as can be seen in (d) above, the respondent did not plead the existence of any connection between Ngariama/Ngiriambu/404, that is in the body of the plaint, and Ngariama/Ngiriambu/1461, that is subject matter of the eviction and injunction prayers. The connection has been disclosed through the evidence adduced. It is also clear from the respondent's pleadings that the person he expected to transfer to him the three acres was not Daniel Ngure, but Cyrus Nduru, who he averred died before he could do so. Surprisingly, there is no averment in the pleadings or any evidence tendered to show that Cyrus Nduru was the registered proprietor

of **Ngariama/Ngiriambu/404**, or **Ngariama/Ngiriambu/1461**, in 1984 or at any other time.

That if, as pleaded, Cyrus Nduru was the one to transfer the three acres of land to the respondent, but died before he could do so, then probably, the respondent's claim should have been one of specific performance against the administrator of the estate of the late Cyrus Nduru. There is no pleadings or evidence tendered to show that the appellants were the legal representatives of the late Cyrus Nduru. The pleadings by the parties, and the evidence tendered is that **Ngariama/Ngiriambu/404** was at all material times registered in the name of Daniel Ngure Mwea. It is therefore baffling that the respondent pleaded that Cyrus Nduru died before he could transfer the three acres he had bought out of **Ngariama/Ngiriambu/404** from Daniel Ngure to him, while it is apparent the late Cyrus Nduru was not the registered owner.

- h) As can be seen from the following extract of the judgment, the learned trial magistrate based her finding of a constructive trust in favour of the respondent on the basis that he had been placed in occupation/possession of the suit property by the registered proprietor:

".....In the circumstances then I find that the plaintiff having been out in actual occupation of the suit property by its registered owner at the time acquired equitable rights thereon, that a constructive trust was created in favour of Mr. Mwaniki is enforceable in law.

.....the plaintiff accused the 3rd defendant of fraudulently transferring the land from his father to himself but there is no evidence of it. What is common ground is the land originally registered to Daniel Ngure was thereafter registered to the 3rd defendant who then sold it to Cyrus Njiine on the strength of which registration his sons the 1st and 2nd defendants now occupy the land.

.....once the plaintiff was put in possession of the portion of land by his grandfather its registered owner, a constructive

*trust was created in his favour. The evidence is that the plaintiff took possession of the portion of land in 1984 while it was still part of the larger parcel **Ngariama/Ngiriambu/404** and developed it, per his evidence when the land was transferred to the 3rd defendant he was still in occupation, when the land was transferred to Cyrus father to the 1st and 2nd defendants, he was still in occupation, indeed he remained in possession upto the year 2014 when he was removed from it. Once he put the plaintiff in occupation the late Mr. Daniel Ngure held the land in trust for the plaintiff herein, he could not therefore have properly transferred it to the 3rd defendant....”*

It should be noted that the same Daniel Ngure, who reportedly placed the respondent in occupation of the suit property, is the same one that the 3rd appellant claims gave him the four acre parcel, which he latter subdivided into **Ngariama/Ngiriambu/1460** & 1461. It is also the same Daniel Ngure, the registered proprietor of **Ngariama/Ngiriambu/404**, that after the first subdivision of the original parcel into **Ngariama/Ngiriambu/1327** & **1328**, transferred the latter, measuring one acre, to the respondent.

- i) It is clear from the pleadings and evidence tendered before the trial court that there was no documentary evidence availed on the alleged sale agreement of 1984, between the respondent and Daniel Ngare over the three acres of land out of **Ngariama/Ngiriambu/404**. That though the appellants attempted to deny that the respondent had been in occupation of **Ngariama/Ngiriambu/1461**, I concur with the finding of the learned trial magistrate in her ruling that the evidence availed confirmed the respondent had been in possession of the said land, had developed it by planting trees, and making a pond by the time he was evicted in 2014. This appeal will succeed or fail on the determination of whether that occupation was evidence of a common intent between the late Daniel Ngure and the respondent to confer title upon the latter.

If indeed it was true that Daniel Ngure had sold the three acres of land out of **Ngariama/Ngariambu/404** to the respondent in 1984, and or intended to transfer the said portion to him to own when he placed him in occupation in 1984, the question that arises is why that portion was not subdivided and transferred to the respondent when the one acre comprised in **Ngariama/Ngiriambu/1328** was subdivided and transferred to him?

- j) From the availed evidence, the respondent knew **Ngariama/Ngiriambu/1461**, suit property, was registered in the name of Cyrus Murage Njine, who had already died by the time he filed this suit, and the father to the 1st and 2nd appellants. The 1st and 2nd appellants were not sued as legal representatives of the estate of Cyrus Murage Njine, and there is no evidence that they have been appointed as such, or any citation proceedings commenced to compel them to take out letters of administration.
- k) Did the learned trial magistrate err in facts and in law in finding that the circumstances of the case amounted to a constructive trust in favour of the respondent? To answer that question, it is important to appreciate what a constructive trust is. The Supreme Court of Kenya in the case of **MNK versus POM; Initiative for Strategic Litigation in Africa (ISLA) (Aminus Curiae) (Petition 9 of 2022) [2023] KESC 2 (KLR) (Family) 27 January 2023** dealt with the question of constructive trust and expressed itself in the following terms:

“78. On our part, on evaluating the evidence, we are convinced that the two parties contributed to the acquisition and development of the suit property which led to their proprietary rights. These proprietary rights arose out of a constructive trust. The Black’s Law Dictionary 9th Edition at pg 1649 defines a constructive trust as “the

right, enforceable solely in equity, to the beneficial enjoyment of property which another holds the legal title.”

Simply put, constructive trust is an equitable remedy imposed by law, regardless of parties' intentions, to prevent a registered owner from acting unconscionably to deny another party a beneficial interest in property. It arises from the common intention as discerned from the agreement, arrangement or understanding by the parties, that was acted upon by the one claiming the beneficial interest. It amounts to an overriding interest and is enforceable against the registered proprietor even if not noted on the register. This helps the courts to deliver equitable justice that focusses on fairness and good conscience.

- l) In the case of **Ngao versus Kitheka (Civil Appeal 152 of 2019) [2024] KECA 21 (KLR) (25 January 2024) (Judgement)** the **Court of Appeal upheld the Environment and Land Court [O. A. Angote J]** decision and confirmed that a constructive trust arises when a party, like a brother, occupies land for decades with the registered owner's consent, suggesting a shared, long-term understanding, preventing the registered owner from initiating eviction. An appeal to the **Supreme Court (Petition No. E006 of 2024)** was struck out for want of jurisdiction.

In the case of **Diasproperty Limited & Another versus Githae & 8 Others (2025) KESC 19 (KLR) (11 April 2025) (Judgement)** the **Supreme Court of Kenya** upheld a preliminary objection on jurisdiction and struck out the appeal. **The Court of Appeal had the Environment and Land Court** decision reaffirming that if a seller receives full payment and places a buyer in possession but fails to transfer title, a constructive trust arises, which cannot be defeated by subsequent fraudulent transfers. And, in the case of **Roche versus Roche & Another [2025] KECA 1637 (KLR) (Civil Appeal 177 of 2019)** the **Court of Appeal** upheld the judgment of the **Environment and Land Court [Ongondo J]** and noted that a trust can be presumed if property was held for the benefit of family members, even if not in possession.

- m) With the above decisions in mind, and looking at the facts pleaded by the respondent and the available evidence, I do not find any materials that could lead to the conclusion that by allowing the respondent to use the alleged three acres out of **Ngariama/Ngiriambu/404**, or any other portion thereof, Daniel Ngure intended him, (respondent), to own it. Put differently, there is no common intent shown that Daniel Ngure intended to transfer ownership of the portion of land he allowed him to occupy to him and failed to do so. The respondent's occupation of the land can only be said to have been with the owner's license or permission, and there is no evidence tendered of a common intention that the registered owner was to give title of the three-acre portion of land to the respondent. No wonder then that the portion was not included to the one-acre parcel, **Ngariama/Ngiriambu/1328**, when it was subdivided from the original parcel, **Ngariama/Ngiriambu/404**, evidently after 1984, and transferred to the respondent.
- n) That after re-evaluating the facts pleaded, evidence and submissions presented as contained in the record of appeal, I have come to the conclusion that the learned trial magistrate erred in fact and in law in finding for the respondent and granting the orders issued on the basis of a constructive trust, as none was established. The appeal therefore has merit.
- o) Though the respondent had tendered evidence of damages to some developments on the suit property, he did not specifically plead it the special damages as required. He has not filed a cross-appeal on the dismissal of the compensation prayer and I need not say any more on it.
- p) On costs, the court in the case of **re Estate of Monica Wanjiru Macharia (Deceased) (Family Appeal 15 of 2023) [2024] KEHC 14780 (KLR)** held that:

“Section 27 of the Act is clear that it lies in the discretion of the court to award costs in a suit. This discretion must be exercised judiciously.”

In the case of ***Morgan Air Cargo versus Everest Enterprises Limited [2014] eKLR***, the court set out the factors that ought to be considered when determining the costs to include the conduct of the parties; the subject of litigation; the circumstances which led to the institution of the proceedings; the events which eventually led to their determination; the stage in which they are terminated; the relationship between the parties; and the need to promote reconciliation amongst the disputing parties pursuant to **Article 159(2) of the Constitution**. Having given due considerations to the foregoing factors as discerned from the facts in the appeal, the suit it emanated from and the previous reported litigations, the court find it fair and just to award the appellants costs in this appeal and the trial court.

6. In view of the foregoing conclusions on the various issues that arose for determinations, the court finds and orders as follows:
- a) ***The appeal has merit and is allowed in its entirety.***
 - b) ***That the judgement of the learned trial magistrate delivered on 23rd August 2019 is set aside, and substituted with an order dismissing the respondent's suit.***
 - c) ***Costs of this appeal and suit before the trial court is awarded to the appellants.***

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 4TH DAY OF FEBRUARY 2026.

S. M. Kibunja

ELC JUDGE

In the presence of:

Appellants – Mr. Maina Kagio

Respondent – M/s Naliaka for Kiama

Kinyua - Court Assistant

**S. M. Kibunja
ELC JUDGE**

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