



Nyariki & another (Suing as the Administrators of the Estate of Henry Nyariki Okara) v Sani & 4 others (Environment and Land Appeal E013 of 2024) [2026] KEELC 457 (KLR) (4 February 2026) (Judgment)

Neutral citation: [2026] KEELC 457 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E013 OF 2024
DO OHUNGO, J
FEBRUARY 4, 2026**

BETWEEN

**AGNES MORAA NYARIKI 1ST APPELLANT
FELISTAS NYARIKI 2ND APPELLANT
SUING AS THE ADMINISTRATORS OF THE ESTATE OF HENRY NYARIKI
OKARA**

AND

**BILLAH KEMUNTO SANI 1ST RESPONDENT
THE COUNTY LAND REGISTRAR, NYAMIRA COUNTY . 2ND RESPONDENT
THE AREA CHIEF, NYANSIONGO LOCATION 3RD RESPONDENT
THE DEPUTY COUNTY LAND REGISTRAR, NYAMIRA
COUNTY 4TH RESPONDENT
ELIJAH SANI 5TH RESPONDENT**

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Keroka (C. Ombija, Senior Resident Magistrate) delivered on 20th November 2024 in Keroka MCELC No. E001 of 2023)

JUDGMENT

1. The background of this appeal is that Henry Nyariki Okara moved the Subordinate Court through Plaintiff dated 12th January 2023. He later passed away on 3rd May 2023, and the Appellants herein, who obtained letters of administration Ad Litem in respect of his estate, replaced the original Plaintiff with Amended Plaintiff amended on 12th February 2024.



2. The Appellants averred in the Amended Plaint that Henry Nyariki Okara (deceased) was the registered owner of land registration number Gesima Settlement Scheme/93 (the ‘Suit Property’) and that there didn’t exist any boundary dispute between them and the First Respondent who was the registered owner of land reference number Gesima Settlement Scheme/98 since both parcels were separate and distinct with the boundaries clearly demarcated.
3. They averred that the Respondents had been persistently issuing summons to the Appellants with an intention of an illegal process and that they feared that the Respondents and/or their agents would materialize the threats and invade the suit property thus denying them quiet enjoyment.
4. The Appellants prayed for judgment against the Respondents for the following orders:
 - a. Declaration that the plaintiff is the sole owner of Gesima Settlement Scheme/93 and that there is no road of access through his land parcel Gesima Settlement Scheme/93 through to the land parcel Gesima Settlement Scheme/98 or any other land.
 - b. Orders permanently prohibiting/restraining the Defendants, their agents, employees, servants, accomplices and/or any other person from interfering with the Plaintiff’s Henry Nyariki Okara quiet possession of the property known as Gesima Settlement Scheme/93 and not to interfere with the said parcel in any manner whatsoever.
 - c. General damages for trespass into the land parcel Gesima Settlement Scheme/93.
 - d. Costs of the suit.
 - e. Interest on d above.
5. In response, the First and Fifth Respondents filed their statement of defence and counter claim dated 10th November 2023. They admitted that there was no boundary dispute between the Appellants and the First Respondent and that the suit property and parcel number Gesima Settlement Scheme/98 were separate and distinct. They denied the Appellants’ allegations as to issuance of summons and invasion and averred that they were neighbours who had peacefully co-existed without any boundary issues until the deceased appropriated and closed an access road which was adjacent to parcel number Gesima Settlement Scheme/98 with the result that they became landlocked.
6. The First and Fifth Respondents further averred that the above action necessitated the process leading to the re-opening of the subject access road. That as result of subsequent closure of the access road, they suffered loss.
7. Consequently, the First and Fifth Respondents prayed that the Appellants’ suit be dismissed with costs and that judgment be entered in their favour for:
 - a. A declaration that the disputed area is a public access road and that the Plaintiffs have no private rights over the disputed subject matter.
 - b. An order of permanent injunction restraining the Plaintiffs by themselves, agents, servants and/or anybody claiming under them from damaging, cultivating, blocking and/or allocating to themselves the disputed access road.
 - c. An order of eviction against the plaintiffs, their family, assignee, agent or anyone claiming ownership and /or entitlement of the disputed parcel of land that makes up the access road.
 - d. An order compelling the plaintiffs to reconstruct the access road to a murrum status at their own costs.



- e. General and special damages.
 - f. Costs and interest of the suit.
8. The Second to Fourth Respondents filed statement of defence dated 27th March 2024. They denied the Appellants' allegations and averred that any summonses issued were so issued in furtherance of their statutory duties. They further averred that the Appellants' cause of action was a boundary dispute and that they would seek its striking out.
9. Upon hearing the matter, the Subordinate Court (C. Ombija, Senior Resident Magistrate) delivered judgment on 20th November 2024 in the following terms:
1. There exists a public road between parcel Gesima Settlement/93 and Gesima Settlement/52 leading to Parcel no. 98 and the same should be opened within 60 working days of the judgment of this court.
 2. The opening of the said public road is squarely the mandate of the National Lands Commission and /or the County Roads under the County Government which exercise should take place upon determination of the clear boundaries between parcel no. 93 and parcel n. 52 and the actual size of the road as established by a qualified Land Surveyor.
 3. The exercise (2) above be conducted in the presence of all the parties and/or with their representatives or both and MUST be documented.
 4. Any party to this suit is therefore by themselves, agents, servants and/or anybody claiming under them is restrained permanently from damaging, cultivating, blocking and/or allocating themselves the public access road as will be determined in exercise (2) above.
 5. Having found out that the disputed area is a public road, there are no orders as regards to general damages nor special damages.
 6. Each party is also directed to bear their own costs of the suit.
 7. The path as was established during the visit at the locus quo be maintained until exercise No. 2 is concluded.
10. Dissatisfied with the outcome, the Appellants filed this appeal through Memorandum of Appeal dated 3rd December 2024 wherein they listed the following grounds of appeal:
1. The Honourable Magistrate erred in law and fact in ignoring the evidence of the parties in particular the plaintiffs' and their witnesses that there is no road access running through land parcel Gesima Settlement Scheme/93.
 2. The Honourable Magistrate erred in law and fact in holding that the disputed area was a public road whilst agreeing that the public road is not clearly demarcated and established on the ground despite being in the RIM MAP.
 3. The Honourable Magistrate erred in law and fact in ignoring the original map DRG. No. TPA/77/168 of 22nd December 1964 and arrived at a wrong decision that there is a road access based on the RIM MAP which is contradictory to the earlier map known to the plaintiffs and which had been used to point out their land and boundaries.
 4. The Honourable Magistrate erred in law and fact in ignoring the issues for determination raised by the plaintiffs and other parties and came up with only one ground regarding the efficacy of the RIM MAP thereby arriving at an erroneous decision.



5. The Honourable Magistrate erred in law and fact in failing to find that the defendants had jointly ignored the court orders of 13th January 2023 and trespassed into the plaintiffs' land parcel Gesima Settlement Scheme No. 93 hence the need to compensate the plaintiffs by way of general damages.
 6. The Honourable Magistrate erred in law and fact in failing to make a finding whether the County Land Registrar and County Land Surveyor sued as 2nd and 4th defendants had the mandate to enter the disputed land parcel no. 93 to open the road of access and whether their actions amounted to trespass to private property.
 7. The Honourable Magistrate erred in law and fact in failing to award the plaintiff the damages for trespass into the land parcel no. Gesima Settlement scheme 93 on the part of the defendant.
11. Based on those grounds, the Appellants prayed that the appeal be allowed, that the judgment of the Subordinate Court be set aside and be replaced with judgment in their favour as they had sought.
 12. The First and Fifth Respondents were also dissatisfied with the judgment. They filed Memorandum of Cross Appeal dated 18th December 2024 wherein they listed the following grounds in support of the cross appeal:
 1. That the Learned magistrate erred in fact and law in its finding that the disputed area was a public road thereby declined to award general damages, yet the cross appellants had filed a Counterclaim dated the 22nd day of February 2024 at the trial court that was particularized and that was never defended by the Appellants herein.
 2. That the Learned Magistrate erred in finding that despite the court establishing that the Appellant had illegally taken possession of a public road thereby causing other persons including the cross Appellant's damages and loss, the court did not find the Appellants liable to pay any incidental costs.
 3. That the Learned magistrate in his discretion by failing to award the cross appellants' costs of the suit yet the same court had made express orders against the Appellants.
 13. Both the appeal and cross appeal were canvassed through written submissions. The Appellants filed submissions dated 26th September 2025 and submitted that the First and Fifth Respondents did not adduce any evidence to demonstrate that a public road existed between the suit property and parcel number Gesima Settlement Scheme/98 and that consequently, the Subordinate Court's finding that such a road existed was without any basis. They further submitted that it was clear from the testimonies of both the Land Registrar and the surveyor that no such road existed.
 14. The Appellants also submitted that the counterclaim filed by the 1st and 5th Respondents lacked legal basis since the suit property did not belong to the 1st and 5th Respondents and no access road previously existed on it. They relied on the case of *Motachwa v Ogari* (Environment & Land Case 11 of 2015) [2022] KEELC 92 (KLR) (26 May 2022) (Judgment) and contended that the Respondents' claim that an easement originated from the suit property was hollow and that it was the Respondents' intention to create a new road on the suit property.
 15. The Appellants also relied on the case of *David Sironga Ole Tukai Versus Francis Arap Muge & 2 others* [2014] eKLR and submitted that parties are bound by their pleadings and that the Learned Magistrate erred in granting an order for opening up of a road, yet the First and Fifth Respondents did not seek such an order in their counterclaim.



16. The Appellants further faulted the Subordinate Court for placing the duty of opening the road on the National Lands Commission, yet the said commission only deals with public land. Relying on the case of Patrick Musimba Versus The National Land Commission & 4 Others [2016] eKLR, the Appellants submitted that parties in the dispute were private individuals without any public entity and that in the circumstances, the order involving the National Land Commission was irregular and unlawful.
17. Based on those submissions, the Appellants urged this Court to allow the appeal and to grant orders sought in the Amended Plaint.
18. The First and Fifth Respondents filed submissions dated 30th September 2025. They submitted that it was not in dispute that the Appellants were the registered proprietors or beneficiaries of the suit property while the First Respondent was the registered owner of parcel number Gesima Settlement Scheme/98 and that there exists no public access road on the suit property.
19. They added that the dispute between the parties was whether or not there existed an access road between the suit property and Gesima Settlement Scheme/52 that led to Gesima Settlement Scheme/98. They also contended that it was not in dispute that the Appellants had granted the First and Fifth Respondents access to a private pathway within the suit property for convenience for over 40 years and that the pathway was not the subject of the suit in the Subordinate Court and this appeal.
20. The First and Fifth Respondents further pointed out that whether they have an alternative road from a different scheme was never the subject of the litigation and that in any case, there is no law that prohibited multiple access to a property. They added that the RIM presented in the Subordinate Court indicated that there existed a public access road in the disputed area and contended that the judgment rendered by the Subordinate Court was well-founded and should be upheld. Nevertheless, they urged this Court to find that the Appellants' actions in obstructing the public access road between the suit property and Gesima Settlement Scheme/52 had caused them significant hardship and that in those circumstances, they should be awarded the appropriate remedies.
21. The First and Fifth Respondents identified the issues for determination in this appeal as being firstly; whether the trial Court erred in adopting the Registry Index Map (RIM) as the guiding map to establish the existence of the access road between the suit property and Gesima Settlement Scheme/52 leading to Gesima Settlement Scheme/98; secondly, whether the Appellants established a claim for trespass; thirdly, whether the First and Fifth Respondents are entitled to costs and damages arising from the Appellants' actions; and lastly, who bears cost of the appeal.
22. On the first issue for determination, they argued that the Appellants' main contention was that they (First and Fifth Respondents) had another access from a different scheme which they could improve and use. That the Appellants relied on a Part Development Plan (PDP) to support their contention that the disputed access road was not a public road. The First and Fifth Respondents argued that the dispute was not whether they had an alternative access but whether there existed an access road between the suit property and Gesima Settlement Scheme/52.
23. They added that the Nyamira County Land Registrar who was the custodian of all land records testified that the RIM was the official cadastral record maintained by his office indicating boundaries as well as existing roads within a settlement scheme and further confirmed through his report dated 26th January 2023 that the road existed in the disputed area. That in the circumstances, the Subordinate Court correctly relied on the RIM whose contents were corroborated by the testimonies of both the County Land Registrar and County Surveyor.
24. On the issue of whether the Appellants had established a claim for trespass, the First and Fifth Respondents submitted that a claim of trespass requires clear evidence of unlawful interference of



property rights that results in damages and that the Appellants had not availed any evidence to demonstrate actual damage or loss. Further, that the Appellants neither specifically pleaded the nature of trespass nor the loss suffered. Relying on the case of IEBC & Another -vs- Stephen Mutinda Mule & Others [2014] eKLR, they contended that any evidence which is at variance with pleadings must be disregarded. They therefore urged the Court to find that the Subordinate Court correctly held that the Respondents did not commit trespass.

25. On the third issue as to whether they were entitled to costs and damages arising from the Appellants' actions, the First and Fifth Respondents submitted that they had suffered tangible damage as a direct result of the Appellants' obstruction of the public access road. They contended that they availed evidence of damage which showed inter alia that the Fifth Respondent, an elderly woman with chronic illnesses, was denied timely access for medical care for over two years and her farm operations were disrupted due to loss of employees and inability to transport produce. They also contended that they incurred additional expenses to ensure medical treatment of the Fifth Respondents at home and further that they incurred costs so as ensure the re-opening and reconstruction of the access road once it was demarcated by the Land Registrar on 13th January 2023.
26. The First and Fifth Respondents further that their counterclaim dated 22nd February 2024 was undefended, yet the Subordinate Court did not consider that aspect at all. Relying on the case of Morgan Air Cargo Ltd -vs- Evrest Enterprise Ltd (whose citation they did not provide) as well as Section 27 of the [Civil Procedure Act](#), they contended that they were entitled to damages and costs.
27. In response to the Appellants' submissions, the First and Fifth Respondents relied on Article 159 (2) (d) of [the Constitution](#) as well as the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR and submitted that the Subordinate Court had wide powers to do justice and to prevent illegality. That in the circumstances, the Subordinate Court did not err in issuing some orders suo moto regarding who was to open the road and how it was to be opened. That the orders were a natural consequence of the Subordinate Court's findings, consistent with constitutional principles, and necessary to protect public land from encroachment.
28. On the issue of costs of the appeal, the First and Fifth Respondents argued that the Appellants should bear the costs of both the appeal and of the proceedings in the Subordinate Court since the Appellants' actions were the primary cause of the dispute. They relied on the cases of Super Marine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR and Devram Dattan v Dawda [1949] EACA 35 in support of that contention.
29. In conclusion, the First and Fifth Respondents urged the Court to dismiss the Appellants' appeal with costs and, pursuant to the cross appeal, to order the Appellants to pay them damages for inconvenience, loss of farm productivity, and additional expenses incurred. They also urged this Court to issue appropriate directions on how the re-opening of the road should be done and who should oversee the exercise.
30. The Second to Fourth Respondents filed submissions dated 21st October 2025. They argued that they were sued in their capacities as public officers who participated in opening of a road of access between the suit property and Gesima Settlement Scheme/52 leading to Gesima Settlement Scheme/98. That the First and Fifth Respondents had earlier on lodged a complaint with the Second Respondent concerning the road of access and a series of summonses were issued through the Third Respondent to the owners of the neighbouring parcels of land including the Appellants.
31. They submitted that after several adjournments occasioned by the Appellants, the Second Respondent scheduled a site visit on 13th January 2023, and all affected parties were invited to participate in the



exercise of establishing whether or not there existed a road of access. That the exercise proceeded on 13th January 2023 in the Appellants' presence when the access road was opened and the Second Respondent prepared a report dated 26th January 2023.

32. The Second to Fourth Respondents further submitted that the Second Respondent testified as DW3 and produced the report dated 26th January 2023 while the County Surveyor, Nyamira testified as DW4 and stated that on the day of the site visit, he relied on the Registry Index Map for Gesima Settlement Scheme, Sheet No. 2, which showed that the suit property and parcel number Gesima Settlement Scheme/52 were separated by an access road which served parcel number Gesima Settlement Scheme/98. That DW4 also testified that the road of access existed independently and did not affect any boundary therefore one cannot say that the road was on the suit property.
33. The Second to Fourth Respondents relied on the Court of Appeal case of *Kibos Distillers Limited & 4 others v Benson Ambuti Adege & 3 others* [2020] KECA 875 (KLR) where the Court interpreted and applied the doctrine of presumption of regularity and underscored the fact that a Court of law cannot substitute its discretion for that of a public servant. That pursuant to the said doctrine, a court presumes that official duties have been properly discharged and all procedures duly followed until the challenger presents clear evidence to the contrary.
34. In conclusion, the Second to Fourth Respondents submitted that the Appellants failed to discharge the burden of proof to the required standard as provided under Sections 107 and 109 of the *Evidence Act*. They contended that the appeal lacks merit and urged the Court to dismiss it with costs to them.
35. This is a first appeal. Consequently, this Court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned Trial Magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this Court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR and *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123.
36. I have carefully considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issues that arise for determination are whether there exists a road of access between the suit property and Gesima Settlement Scheme/52 leading to Gesima Settlement Scheme/98, whether trespass was established, whether the parties were entitled to the reliefs that they had sought and lastly, who pays costs?
37. The Appellants' case is that there is no road of access either through the suit property or between the suit property and Gesima Settlement Scheme/52 running to parcel number Gesima Settlement Scheme/98. A road of access is a road often created during subdivision, whose purpose is to provide access between a particular parcel or parcels and a public road.
38. The legal framework on roads and their classification is found in the *Public Roads and Roads of Access Act*, Cap. 399 and the *Kenya Roads Act*, Cap. 408. The former is an old statute which commenced on 10th August 1920 and has survived in our laws to date while the latter is a more recent legislation which was enacted and commenced in September 2007.
39. Section 9 (1) of the *Public Roads and Roads of Access Act* provides in part:

Where any owner or occupier of land is in respect of his land so situated in relation to a public road which is passable to vehicular traffic, or to a railway station or halt that he has not



reasonable access to the same, he may make application to the board of the district in which such land is situate for leave to construct a road or roads (hereinafter called a road of access) over any lands lying between his land and such public road or railway station or halt

40. Generally, public roads are governed under the [Kenya Roads Act](#), Section 2 of which defines "road" to mean "a public road as defined under the [Public Roads and Roads of Access Act](#)." In turn, Section 2 of the [Public Roads and Roads of Access Act](#) defines "public road" to mean:
- (a) any road which the public had a right to use immediately before the commencement of this Act;
 - (b) all proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise held under the East Africa Land Regulations, 1897, the Crown Lands Ordinance, 1902, or the Government Lands Act at any time before the commencement of this Act;
 - (c) all roads and thoroughfares hereafter reserved for public use.
41. It is important to note that Article 62 (1) (h) of [the Constitution](#) defines public land to include "all roads and thoroughfares provided for by an Act of Parliament."
42. Pursuant to Article 62 (3) of [the Constitution](#), public land including roads "shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission."
43. The Appellants have based their contention that there is no road of access either through the suit property or between the suit property and Gesima Settlement Scheme/52 leading to parcel number Gesima Settlement Scheme/98 on their own oral testimony and on a map which they produced. I have perused the map. It is titled DRG No. TPA/77/168 and is dated December 1964.
44. The Appellants testified that they do not know the origin of the map, save that they got it from the deceased. It is also important to note that the Appellants testified that when the deceased moved into the suit property, the First and Fifth Respondents were already in occupation of parcel number Gesima Settlement Scheme/98.
45. On the other hand, the Respondents maintain that there is in fact a road of access running between the suit property and Gesima Settlement Scheme/52 and leading to parcel number Gesima Settlement Scheme/98. In support of that position, they relied on Registry Index Map (RIM) Sheet number 2 (131/3/1). I have also perused the said RIM.
46. A Registry Index Map is one of the documents that were required to be maintained in the land registry, pursuant to Section 6 (1) (b) of the Registered [Land Act](#) (repealed). It was prepared pursuant to Section 18 (1) of the said Act which provided:
- The Director of Surveys shall prepare and thereafter maintain a map or series of maps, to be called the registry map, for every registration district.
47. Provisions similar to those at Section 6 (1) (b) of the Registered [Land Act](#) (repealed) are found at Section 7 (1) (b) and (d) of the [Land Registration Act](#), which stipulate that a cadastral map and plans shall be kept at the registry. Pursuant to Section 15 of the [Land Registration Act](#), the Director of Survey is required to "prepare and thereafter maintain a map or series of maps, to be known as the cadastral map, for every registration unit."



48. By law, the Court is required to accept the RIM or cadastral map as conclusive proof of its contents. That is the essence of Section 35 (3) of the [Land Registration Act](#) which provides:

Every entry or note in or on any register, cadastral map or filed plan shall be received in all proceedings as conclusive evidence of the matter or transaction that it records.

49. Similarly, Section 37 (3) of the Registered [Land Act](#) (repealed) provided:

Every entry or note in or on any register, registry map or filed plan shall, subject to sections 142 and 143, be received in all proceedings as conclusive evidence of the matter or transaction which it records.

50. The RIM that the Respondents relied on states on its face that it is compiled by Survey of Kenya and bears a stamp of the said office, dated 4th April 2024. By virtue of Section 35 (3) of the [Land Registration Act](#), this Court is bound to accept it as conclusive evidence of its contents.

51. On the other hand, DRG No. TPA/77/168 does not disclose its maker and is not signed. The Appellants' own private surveyor (PW3) referred to it in his testimony as a Part Development Plan (PDP) while the County Surveyor Nyamira (DW4) referred to it in his testimony as an adjudication map. Simply put, DRG No. TPA/77/168 is neither authenticated nor does it emanate from the land registry.

52. There is no doubt that as between DRG No. TPA/77/168 and the RIM, the RIM is authoritative since it is authenticated by the Director of Survey pursuant to Section 32 of the [Survey Act](#) which provides as follows:

No land shall be deemed to have been surveyed or resurveyed until the plan thereof has been authenticated by the signature of the Director or of a Government surveyor authorized in writing by the Director in that behalf, or by the affixing of the seal of the Survey of Kenya in accordance with section 5.

53. For a survey plan to be valid, it has to be authenticated. The Court of Appeal held in *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] KECA 706 (KLR) thus:

Although a licensed surveyor is duty bound to ensure the correctness, accuracy, fidelity and completeness of every survey carried out by him, and even though Government will not be held liable for any defective survey performed by a licensed surveyor, plainly the role of the Director elaborately set out in the above provisions is not merely mechanical. As a regulating office the Director is not expected to approve surveys presented to him as a matter of routine. That is so for these reasons. The Director is required to make sure that all surveys are carried out in accordance with his directions and the law. That is also why, once survey plans and records are deposited with him they become the property of Government. If any surveyor forwards to the Director any plan which does not conform substantially with the appropriate requirements, the Director, at his discretion, may return the plan to the surveyor and for that reason may refuse to authenticate the plan. In addition, if before a plan is registered it is found to be inaccurate by reason of any error or omission in the survey the Director may cancel the authentication of such plan and may recall any copies which may have been issued. But the more emphatic and clear statement that the Director is required to do more in authenticating the plans is contained in section 22 which imposes a duty on the Director to superintend over all surveys of land. It states that;



“22. Any survey of land for the purposes of any written law for the time being in force relating to the registration of transactions in or of title to land (other than the first registration of the title to any land made in accordance with the provisions of the *Land Consolidation Act* (Cap. 283) or the *Land Adjudication Act* (Cap. 284)) shall be carried out under and in accordance with the directions of the Director.”

54. While DRG No. TPA/77/168 does not show any road of access either running through the suit property or between the suit property and Gesima Settlement Scheme/52, the RIM clearly shows a road running between the suit property and Gesima Settlement Scheme/52 and leading to parcel number Gesima Settlement Scheme/98. The existence of the road is supported by the testimony of the Land Registrar and his report dated 26th January 2023 as well as the testimony of the County Surveyor who stated that the standard width of such a road is 9 metres.

55. In view of the foregoing, I am satisfied that there exists a road of access between the suit property and Gesima Settlement Scheme/52 leading to Gesima Settlement Scheme/98. The Learned Magistrate’s holding in that regard cannot be faulted.

56. The next issue for determination is whether trespass was established. In *Charles Ogejo Ochieng vs. Geoffrey Okumu* [1995] KECA 169 KLR, the Court of Appeal described trespass thus:

Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. See Halsbury’s Laws of England 3rd edition Volume 38 at pg 744.

57. More recently in *Doshi v Chemutut & 7 others* (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment), the Court of Appeal stated as follows:

Trespass, as stated by this Court in the case of *Charles Ogejo Ochieng v Geoffrey Okumu* [1995] KECA 169 (KLR), is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. As for the ingredients of trespass, the Court in *William Kamunge Gakui v Eustace Gitonga Gakui* (Civil Appeal 16 of 2013) [2014] KECA 39 (KLR) stated that trespass is a violation of the right to possession, and that a plaintiff must prove that he has the right to immediate and exclusive possession of the land.

58. The Appellants contended that the Respondents trespassed into the suit property. Their complaints revolve around the activities connected with establishing the existence of the road of access and opening it. The Appellants were persuaded that there was no road of access and that the Respondents’ activities took place in the suit property. As I have held above, the road of access existed. Consequently, the Appellants did not have any exclusive right of possession in respect of the road of access. They did not demonstrate any violation of a right to possession.

59. In view of the answer to the first two issues for determination, it follows that the Appellants were not entitled to the reliefs that they had sought. On the other hand, the First and Fifth Respondents established a case for re-opening of the road of access.

60. In light of the provisions at Articles 62 (1) (h) and 62 (3) of *the Constitution*, the road of access is public land, and the National Land Commission has a clear mandate in its administration. The Learned



Magistrate cannot be faulted for involving the said commission. Considering the public nature of a road of access, the First and Fifth Respondents have not persuaded me that there was any trespass or that they are entitled to any damages in that regard.

61. Regarding costs, those are usually at the discretion of the Court. The discretion must be exercised judiciously. The Learned Magistrate ordered that each party bears own costs. I note that in his testimony, the Fifth Respondent stated that the Appellants were his relatives and by extension the First Respondent's relatives. In those circumstances, the order that each party bears own costs was well founded.
62. In view of the foregoing discourse, this appeal and the cross appeal are bereft of merit and, I therefore dismiss both. Considering the outcome and the relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 4TH DAY OF FEBRUARY 2026.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Ochwangi for the Appellants

Ms Mosomi for the First and Fifth Respondents

No appearance for the Second to Fourth Respondents

Court Assistant: B Kerubo

