

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ISIOLO**  
**ELC APPEAL NUMBER E014 OF 2024**

*[Being an appeal from the judgment and the decree of the learned Senior Principal Magistrate the Hon. Christine Wekesa delivered on 16/07/2024 vide Marsabit CMC ELC No. 10 of 2020]*

**HASSAN DAMBI LIYO .....APPELLANT**

**VERSUS**

**HAWO LIYO DAMBI .....RESPONDENT**

**JUDGMENT**

1. The subject appeal arises from the Judgment of the learned trial magistrate [ *Hon. Christine Wekesa – SPM*] wherein the learned trial magistrate found and held that the respondent herein [*who was the Plaintiff in the lower court*] had proved her claim to the effect that the suit property, namely; L R No. Marsabit/Jirime /228; was fraudulently transferred to and registered in the name of the appellant.
2. Additionally, the learned trial magistrate found and held that the suit property lawfully belonged to Dambi Liyo Bodha [ deceased] and who was the husband of the respondent. To this end, the learned trial magistrate proceeded to and decreed that the appellant’s title to and in respect of the suit property be cancelled; and that the suit property be registered in the name of the respondent as the bone fide owner thereof.
3. For good measure, the learned trial magistrate entered judgment in terms of prayers 1 and 2 at the foot of the plaint dated 13/08/2020.

4. The prayers which were granted by the learned trial magistrate are namely:

- i. Cancellation of the lease issued in respect of the suit property and all subsequent proprietors including the 5<sup>th</sup> defendant [ now the appellant].***
- ii. Cancellation of the certificate of lease issued to the 3<sup>rd</sup> defendant and the registration of the plaintiff as the bona fide owner of the suit property.***
- iii. Costs and interest of the suit.***

5. It is the said Judgment and the consequential decree which has aggrieved the appellant and thus provoking the subject appeal. The appeal is premised on the memorandum of appeal dated the 14.08.2024; and wherein the appellant has highlighted the following grounds:

- i. That the learned trial magistrate erred in law and in fact by failing to properly evaluate the totality of evidence adduced by both parties evidence adduced by both parties during the hearing of the suit before her, hence arriving at a wrong decision.*
- ii. That the learned trial magistrate clearly failed to evaluate the evidence and pleadings before her, thus arriving at the wrong decision.*
- iii. That the learned trial magistrate erred in law in failing to find that the plaintiff who had raised issues of fraud, had a duty to prove the alleged fraud on the standards required in law.*

- iv. *The learned magistrate misdirected herself to the principles of cancellation of cancellation of title and hence arrived at a unjustifiable decision.*
  - v.
  - vi. *That the learned trial magistrate failed to interpret the Provisions of Land Registration Act 2012, particularly, section 26 whereof, and arrived at a wrong decision.*
  - vii. *That the trial magistrate failed in law and in general knowledge in finding that the respondent had proved their case on the required standard albeit to the contrary.*
6. The appeal beforehand came up for direction on the 18<sup>th</sup> of September, 2025; whereupon the advocate[s] for the appellant intimated to the court that same had filed and served the record of appeal. In addition, learned counsel for the appellant also posited that the record of appeal was complete. To this end, the appellant sought directions as pertains to the hearing and disposal of the appeal. Moreover, the appellant implored the court to authorize the filing and exchange of written submissions.
7. With the concurrence of learned counsel for the respondent, the court proceeded to and issued directions. The directions of the court were: the appeal shall be heard before one judge, sitting at Isiolo; the parties shall file and exchange written submissions; and the appellant shall be at liberty to file and serve rejoinder submissions [if any].
8. The appellant filed written submissions dated 18/11/2025; and wherein the appellant has highlighted four [4] key issues. The issues highlighted by the appellant are: The respondent was divested of requisite locus standi to mount and sustain the suit and hence the suit in the subordinate court was incompetent; the respondent failed to prove her case on balance

of probabilities; the respondent did not discharge the burden of proof as pertains to fraud; the judgment of the learned trial magistrate is replete with errors of principles.

9. Regarding the first issue, learned counsel for the appellant has submitted that the respondent had contended that the property known as Parcel 122 Majengo/Jirime/Marsabit [which is purported to be the same as the suit property] belonged to her late husband. In particular, learned counsel has referenced paragraph 7 of the plaint which essentially captures the crux/ substratum of the respondent's suit.

10. It was submitted that insofar as the respondent suit relates to the estate of Dambi Liyo Bodha [deceased], the respondent herein could not mount, maintain and or prosecute the said suit without having obtained the requisite grant of letters of administration. In the absence of the letters of administration, it was contended that the respondent was *devoid* of locus standi and hence the suit ought to have been struck out.

11. The next issue which has been canvassed by learned counsel for the appellant is to the effect that the learned trial magistrate failed to appreciate that the respondent had sought to cancel a certificate of lease, yet the suit property is underpinned by a certificate of title and not a lease. In this regard, it has been submitted that the judgment of the learned trial magistrate offends the doctrine of departure and essentially, that parties and by extension the court are bound by the pleadings.

12. The other issue that has been canvassed by the learned counsel for the appellant touches on and concerns proof of fraud. It has been submitted

that even though the respondent had pleaded fraud, same failed to tender and produce plausible evidence to establish and prove fraud. Moreover, it has been submitted that proof of fraud must be established to a standard which is higher than balance of probabilities. To this end, learned counsel for the appellant has cited and referenced the holding in the case of **Kinyanjui Kamau versus George Kamau [2015] eKLR**.

13. Lastly, learned counsel for the appellant has submitted that the learned trial magistrate failed to appreciate the totality of the evidence that was tendered by the appellant and more particularly, the evidence showing that the suit property was lawfully adjudicated upon and thereafter registered in the name of the appellant. In this regard, it has been contended that the judgment of the learned trial magistrate is wrought with errors of principles.

14. Flowing from the foregoing, learned counsel for the appellant has invited the court to find and hold that the appeal beforehand is meritorious and thus same ought to be allowed. In particular, the court has been invited to set aside the impugned judgment and consequential decree; and thereafter dismiss the respondent suit.

15. The respondent filed written submissions dated 29.01.2026 and wherein same has highlighted four [4] key issues. The issues highlighted by the respondent are: Whether the Honourable Trial Magistrate erred in holding that the registration of the suit land was contrary to law; whether the Honourable Trial Magistrate erred in holding that the suit land was fraudulently acquired by the appellant; whether the Honourable Trial Magistrate erred in finding that the due process was not followed in issuing and registering the title to the suit land in favour of the appellant;

and whether the Honourable Trial Magistrate erred in cancelling the title to the suit land and reverting same to Dambi Liyo Bodha [deceased] for succession.

16.Regarding the first issue, learned counsel for the respondent has submitted that the respondent tendered credible and compelling evidence to demonstrate that the suit property belonged to Dambi Liyo Bodha [deceased]. Furthermore, it has been submitted that the respondent also tendered evidence to show that she is the widow of the deceased and thus the suit property beneficially belongs to her.

17.Additionally, learned counsel for the respondent has submitted that the suit property herein initially was not registered and that when the respondent started the process of registration, same discovered that the appellant [who is her son] had caused the land to be transferred and registered in his name without her knowledge.

18.Based on the foregoing, learned counsel for the respondent has submitted that the learned trial magistrate correctly found and held that the transfer and registration of the suit property in the name of the appellant was contrary to law.

19.Secondly, learned counsel for the respondent has submitted that the appellant herein did not tender or produce any document to demonstrate/prove his ownership of the suit property. In particular, it was submitted that the appellant did not submit any receipt to prove

payments of rates to Marsabit town council; or any register/plot card to show how the land was registered in his name.

20. According to counsel for the respondent, the suit property belonged to Dambi Liyo Bodha [ deceased] as per various documents and thus the transfer in favour of the appellant was informed by fraud.

21. Thirdly, learned counsel for the respondent has submitted that the appellant by virtue of being the eldest son of the respondent was tasked with the authority of managing the properties of Dambi Liyo Bodha [ deceased] however, it has been contended that instead of managing the suit property on trust for the estate of his deceased father and the rest of the beneficiaries of the estate, same [Appellant] fraudulently transferred the property to his name.

22. Lastly, learned counsel for the respondent has submitted that the respondent and her witnesses tendered/ adduced credible evidence to show that the suit property belonged to the deceased. In addition, it has been submitted that the respondent also tendered evidence to show that the suit property has never been intentionally transmitted to another person. In this regard, it was posited that insofar as the suit property belonged to the deceased and in the absence of succession, the process leading to the registration of the suit property in the name of the appellant was therefore questionable.

23. According to learned counsel for the respondent, the appellant herein did not prove the root of his title to the suit property and thus the learned trial magistrate was right in finding and holding that the appellant's title was

vitiated by fraud and illegality. To this end, learned counsel has invoked the provisions of **Section 26 of Land Registration Act, 2012**; and the holding in the case of **Dina Management Limited Versus The County Government of Mombasa and 5 others [2023] KESC 30**.

24. Flowing from the foregoing submissions, learned counsel for the respondent has submitted that the judgment of the learned trial magistrate was well reasoned; well grounded; and thus unassailable. In a nutshell, the court has been invited to find and hold that the appeal beforehand is meritless and thus courts dismissal.

25. Having reviewed the record of appeal; the evidence that was tendered before the trial court [both oral and documentary]; the judgment of the trial court and upon taking into account the written submissions filed by/on behalf of the parties, I come to the conclusion that the determination of the subject appeal turns on three key issues. The issues are: Whether the respondent was seized of the requisite locus standi to commence the suit in subordinate court or better still, whether the suit in the subordinate court was competent; whether the respondent proved fraud to requisite standard or otherwise; and whether the judgment of the trial court is wrought with errors of principles.

26. Before addressing the thematic issues, which have been highlighted in the preceding paragraph, it is imperative to highlight that what is before me is a 1<sup>st</sup> appeal. Being a first appeal, this court is enjoined to undertake exhaustive scrutiny, review, evaluation and analysis of the entirety of the evidence that was tendered before the court of 1<sup>st</sup> instance [ Lower court]

and thereafter to discern whether the conclusion/finding[s] arrived at by the lower court accords with the evidence or otherwise.

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

28. The scope and jurisdictional remit of the first appellate court while handling an appeal has been expounded in a plethora of decisions. **In Selle & another v Associated Motor Boat Co Ltd of Kenya & others [1968] EA 123**, the court of appeal for Eastern Africa, which is the predecessor of our court of appeal stated thus:

*“An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. [see also Kenya Urban Roads Authority & another Vs Belgo Holdings Limited [2025]KECA ; and Gitobu Imanyara versus Attorney General [2016] Eklr.*

29. Recently in the case of **Kenya Urban Roads Authority & another Vs Belgo Holdings Limited [2025]KECA**, the Court of Appeal re-visited the scope of the jurisdiction of the first appellate court while entertaining an appeal. The court stated as hereunder:

*“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 circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case*

*in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement 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.”*

30. Back to the issues for consideration. The respondent is the one who approached the subordinate court contending that the suit property lawfully belonged to and was registered in the name of Dambi Liyo Bodha

[deceased]. Moreover, the respondent also contended that she is the lawful wife/widow of the deceased. [See paragraph 7 of the plaint].

31. Additionally, the respondent herein testified before the subordinate court that the suit property arose from or is the same plot number 122 Majengo. Nevertheless, the respondent reiterated that plot number Marsabit/Jirime/228 belonged to her late husband.

32. Other than the appellant P W4 [Mohammed Halkano Dambi] also testified that according to him the suit property belonged to his father, namely; Dambi Liyo Bodh. Furthermore, the witness posited that the suit property should be reverted to the name of the deceased so as to facilitate succession and eventual distribution to the beneficiaries of the estate of the deceased.

33.The bottom line is that the respondent's claim touches on and concerns ownership of the suit property, which is contended to have belonged to Dambi Liyo Bodha [ deceased] before same was transferred and registered in the name of the appellant. To this end, the crux of the respondent's suit in the subordinate court was to the effect that the suit property formed part of the property of the deceased.

34.Insofar as the respondent's claims/ right[s] to and in respect of the suit property on behalf of the estate to the deceased, it was incumbent upon the respondent to procure and obtain the requisite grant of letters of administration before filing the suit. Simply put, no suit can be filed for or on behalf of the deceased person, prior to and before issuance of grant of letters of administration. Where a suit is filed by a claimant before the grant of letters, such a suit is not only misconceived but legally untenable. [ **See the provisions of Section 82 of the Law of Succession Act Chapter 160 Laws of Kenya**].

35.The importance of procuring and obtaining grant of letters of administration before filing a suit on behalf of the estate of a deceased was underscored in the case of **Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] KECA 250 (KLR)**.

36.The Court of Appeal stated as hereunder:

*“As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased's estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In Otieno v Ougo (supra) this Court differently constituted rendered itself thus:*

***“... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”***

*Besides, the respondent seemed to have confused the issue of locus standi and a cause of action. In Alfred Njau & Others v City Council of Nairobi (supra) this Court had occasion to discuss the two. They stated:*

***“Lack of locus standi and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; ...”***

*The court proceeded to state:*

***“To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”***

37. In my humble view, there is no way the respondent herein could propagate a claim on the basis of being a widow and thus beneficiary of Dambi Liyo Bodha [deceased] prior to and before obtaining grant of letters of administration. Moreover, there is no way that the respondent herein could purport to speak for and on behalf of the deceased. In particular, the respondent's suit in the subordinate suit was vitiated by lack of locus standi.

38. Before concluding on this issue, I wish to state that even though the issue has been raised and canvassed by the learned counsel for the appellant, the respondent gave the issue a wide berth. There is not even a single response on the question of whether the respondent had the legal capacity to mount or sustain the suit in the lower court or at all.

39. Turning to the 2<sup>nd</sup> issue, I wish to point out that the respondent's suit in the subordinate court was premised on fraud. To this end, it was incumbent upon the respondent to not only plead and particularize fraud,

but to tender and adduce plausible, cogent, concrete and compelling evidence towards proving fraud. Moreover, it is common ground that the standard of proof in matters fraud is higher than the balance of probabilities, but below beyond reasonable doubt. The standard in question has often been referred to as the Intermediate Standard.

40. The standard of proof in matters fraud has been the subject of various decisions of the Court of Appeal; and the other superior courts. Suffice it to reference the decision in the case of **Kuria Kiarie & 2 others v Sammy Magera [2018] KECA 467 (KLR)** where the court stated thus:

*“25. The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:*

***“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”** [Emphasis added].*

*The same procedure goes for allegations of misrepresentation and illegality. See **Order 2 Rule 4 of the Civil Procedure Rules.***

*26. As regards the standard of proof, this Court in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows;-*

***“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery***

**and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases......In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."**

41. Did the respondent prove/establish fraud? The respondent contended that the suit property is the same as plot number 122 Majengo. However, despite making the said averment the respondent did not tender or produce any evidence to show that plot number 122 Majengo, is one and the same as the suit property. Additionally, the respondent had posited that the suit property was registered in the name of the deceased, but yet again the respondent failed to tender and or produce evidence to this effect.

42. Other than the foregoing it is important to take cognizance of the evidence of PW6.

43. While under cross examination by the learned counsel for the appellant [the 5<sup>th</sup> Defendant in the Lower Court] in the lower court, the witness stated thus:

*" I am not familiar with LR Marsabit/Jirime/228. For purposes of clarification, we have numbers for the county council. I don't know Marsabit/Jirime/228. I cannot confirm if number 121 is the same as the above plot number 228'*

44. I am afraid that the totality of the evidence that was placed before the trial court fell short of proving fraud. Moreover, there is no gainsaying that the respondent could not connect the suit property to either plot number 121 of 122 Majengo.

45. The respondent bore the burden/ obligation of proving her claims before the lower court. Furthermore, it is common ground that the respondent could only succeed on the basis of strength of her case and not on the weakness of the appellants defence [if at all].

46. In the case of **Caroget Investment Limited v Aster Holdings Limited & 4 others [2019] KECA 79 (KLR)** the court of appeal stated thus

*“Put differently, a claimant will succeed on the strength of his own case and not on the weakness of the opponent’s case, save to add that the standard of proof in a case for declaration of title is on a preponderance of evidence.”*

47. Turning to the last issue, namely; whether the judgment of the learned trial magistrate is wrought with errors of principles or otherwise. To start with, the learned trial magistrate appreciated that the respondent was laying a claim to ownership of the suit property on the basis of being a widow of the deceased. However, despite the nature of the claim, the learned trial magistrate failed to address her judicial mind to the legal implications attendant to a suit, touching on the estate of the deceased and which has been filed before the issuance of Grant of letters of administration.

48. Secondly, even though the respondent had contended that the suit property belonged to and was registered in the name of the deceased, the learned trial magistrate failed to interrogate the evidence tendered; and to ascertain for herself whether the said contention was correct. However, there is no gainsaying that the assertion by the respondent that the suit property belonged to the deceased was never proven.

49. Thirdly, the learned trial magistrate failed to address her judicial mind to the issue of burden of proof and on whom same lay in the first instance. In particular, the learned trial magistrate failed to appreciate that the respondent bore the burden of proof and it was therefore incumbent upon her to establish the assertions to requisite standards. Sadly, the assertion by the respondent were never proved. Same remained on the level of allegations. However, the learned trial magistrate did not discern this much; and same proceeded on the assumption that the allegation[s], which were unproven sufficed.

50. It is instructive to reference the holding of the Supreme Court in the case of **Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] KESC 66 (KLR)**, where the apex court highlighted the law as pertains to burden and standard of proof in civil matters; and how the burden is to be discharged.

51. The court stated thus:

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

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

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

52. Finally, the learned trial magistrate does not seem to have focused her mind to the fact allegations of fraud require proof beyond the balance of probabilities. Despite the gravity attendant to allegations of fraud, the learned trial magistrate with respect did not address the evidence on record with the requisite standard in mind. On the contrary, the learned trial magistrate appears to have shifted the burden of proof the appellant.

53. To this end, it is imperative to reproduce a segment of the Judgment under reference.

54. The paragraph states thus:

*‘ The 5<sup>th</sup> defendant has provided the title deed to the suit land. He is categorical that he followed due process in acquiring the title. He has maintained that his deceased father never owned the land. It is incumbent upon him to demonstrate the above.’*

55. My reading and understanding of the *except* above is to the effect that the learned trial magistrate shifted the burden of proof to the appellant [5<sup>th</sup> defendant] to prove the validity of his title. Moreover, the learned trial magistrate also shifted the burden onto the appellant to disprove fraud even before the respondent had discharged the evidential burden of proof.

Simply put, the holding by the learned trial magistrate in terms of the quote [supra] runs contrary to the golden thread governing burden of proof.

56. Flowing from the foregoing, and taking into account the established principles espoused in **Mwanasokoni Versus Kenya Bus Service Limited [1985] eKLR; Ephantus Mwangi versus Duncan Mwangi Wambugu [1984] eKLR; and Jabene Versus Olenja [1986] eKLR**, I am constrained to and do hereby depart from the conclusions of the learned trial magistrate.

#### **FINAL DISPOSITION.**

57. From the foregoing analysis, it is apparent that the impugned Judgment is vitiated by errors of commission and omission. Furthermore, it is evident that the suit in the subordinate court was defeated by the provisions of **Section 82 of Law of Succession Act, Chapter 160 Laws of Kenya.**

58. In the upshot, the final orders that commend themselves to the court are as hereunder:

- i. The appeal be and is hereby allowed.**
- ii. The Judgment of the learned trial magistrate delivered on 16.07.2024 and the consequential decree arising therefrom be and is hereby set aside.**
- iii. In lieu thereof, the respondent's suit *vide* Plaint dated 13/08/2020 be and is hereby dismissed.**

- iv. **Given the relationship between the parties, I direct that each party shall bear own costs of the appeal.**
  
- v. **Similarly, each party shall bear own costs of the proceedings in the subordinate court.**

59.It is so ordered.

**DATED SIGNED AND DELIVERED AT ISIOLO ON THE 9<sup>TH</sup> OF FEBRUARY, 2026.**

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

**JUDGE**

***In the presence of:***

Hussein/Mukami Court Assistant

Mr. Leonard Ondari for the Appellant

Mr. Yussuf for the Respondent.