

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELCA NO. E009 OF 2024**

**JOHN SOO.....1<sup>ST</sup>**  
**APPELLANT**

**ISAIAH KOECH.....2<sup>ND</sup>**  
**APPELLANT**

**LEONARD ROTICH.....3<sup>RD</sup>**  
**APPELLANT**

**BETHWEL KIRUI.....4<sup>TH</sup>**  
**APPELLANT**

**WESLEY NGENO.....5<sup>TH</sup>**  
**APPELLANT**

**VERSUS**

**THE CHURCH OF LIVING**  
**ELOHIM-KIMAYA LOCAL CHURCH.....**  
**.....RESPONDENT**

*(Being an appeal arising from the judgement of Hon. Boke delivered on 16<sup>th</sup> July, 2024 in Bomet CM ELC Case No. E030 of 2023)*

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**JUDGEMENT.**

**INTRODUCTION.**

1. By a Memorandum of Appeal dated 18<sup>th</sup> July, 2024 the Appellants challenge the decision of **Hon. Boke CM** in Bomet CM ELC Case No. E030 of 2023.

### **FACTUAL BACKGROUND**

2. In the subordinate Court, the Respondent filed a suit vide a Plaint dated 17<sup>th</sup> August, 2023 wherein it sought the following orders;

***a. An order that the Plaintiff is the registered absolute proprietor of 0.4 acres of the parcel registered as Kericho/Segemik/818.***

***b. A permanent injunction restraining the Defendants by themselves, their agents, servants and/or anyone claiming under the Defendants from entering, trespassing onto, interfering with and/or any other manner dealing with the church premises and the property thereon.***

- c. An order directing the Defendants to surrender to the Plaintiff the sale agreement for 0.4 acres of the parcel registered as Kericho/Segemik/ 818.***
- d. General damages for trespass.***
- e. Costs of the suit.***
- f. Interest on (d) and (e) above at Court rates.***
- g. Such other relief that this honourable Court may deem fit to grant.***

**3.** The Appellants filed their Statement of Defence dated 22<sup>nd</sup> September, 2023 where they denied the averments in the Plaintiff and sought that the Respondent's suit be dismissed with costs.

**4.** The Learned Trial Magistrate delivered judgement on 16<sup>th</sup> July, 2024. The judgement was in the following terms;

- a. Prayer (a) not granted for no registration as owner has been proved for no title deed or lease hold title has been produced. Thus Court***

**cannot declare Plaintiff as the registered owner of the land as requested by the Plaintiff. (sic)**

**b. Prayer (b) on permanent injunction, is hereby granted as prayed. However, it does not mean to stop Defendants from attending church services to fellowship/worship like any other normal church worshippers/attendees/goers.**

**c. Prayer (c) regarding surrender of sale agreement, was not prosecuted therefore abandoned. (sic)**

**d. Prayer (d) on general damages not granted for no general damages has been proved.**

**e. Cost of the suit and interest at Court rates granted from date of this judgment.**

- 5.** The Appellants being aggrieved by the said judgment approached this Court by way of Appeal.

6. The appeal was admitted for hearing on 17<sup>th</sup> September, 2025 and the Court issued directions that it be heard by way of written submissions.
7. On 25<sup>th</sup> September, 2025 the appeal was mentioned to confirm filing of submissions and then reserved for judgement.

#### **THE APPEAL.**

8. The grounds of appeal are as follows;

***a. The learned trial Magistrate grossly misdirected herself in ignoring the principles and tenets of law applicable in regards to the principle of permanent injunction by granting the Respondents permanent injunction against the Appellants despite her own finding that they did not prove ownership of the land. (sic)***

***b. The Learned Trial Magistrate's decision is against the weight of evidence and the law applicable in the circumstances.***

**9.** The Appellants prays for orders that;

***a. This Appeal be allowed and the Judgment granting the Respondents (sic) permanent injunction as against the Appellants be set aside.***

***b. Costs of the subordinate Court's suit (sic) and this Appeal be awarded to the Appellants.***

***c. Such other or further, incidental, alternative or consequential orders and reliefs as this Honourable Court may deem just and expedient.***

**ISSUES FOR DETERMINATION.**

**10.** The Appellants filed their submissions on 17<sup>th</sup> September, 2025 while the Respondent filed its submissions on 27<sup>th</sup> June, 2025.

## **The Appellants Submissions.**

**11.** The Appellants submit on the following issues;

***a. Whether the trial Court erred in law and fact by granting permanent injunction to the Respondents herein.***

***b. Who should bear the cost both at the lower Court and at the High Court. (sic)***

**12.** On the first issue, the Appellants submit that before the trial Court, the Respondent did not produce any document to prove that it was the owner of the land where the church stands.

**13.** The Appellants also submit that the Learned Trial Magistrate found that the Respondents did not prosecute prayer C in the Plaint which sought for surrender of the sale agreement and it was therefore deemed abandoned.

**14.** The Appellants further submit that the Respondent produced the following documents;

***a. Exhibit 1 - Demand Letter***

- b. Exhibit 2 - Receipt of payment.***
- c. Exhibit 3 - Letter from the Senior State Counsel for registration of Society dated 9<sup>th</sup> May, 2024.***
- d. Exhibit 4 - Copy of Annual Returns.***
- e. Exhibit 5 - Letter from registrar which confirms the current leaders.***
- f. Exhibit 6 - Copy of Certificate to confirm that the church is registered.***

**15.** It is the Appellants submissions that the documents produced by the Respondent related to the registration and ownership of the Church as a society which issue was not in dispute.

**16.** It is also the Appellants submissions that the Respondent contends that it proved trespass as per the document attached to the application dated 17<sup>th</sup> July, 2023.

**17.** It is further the Appellants submissions that the present appeal is not from the application dated 17<sup>th</sup> July, 2023 and

therefore the documents attached to it could not be relied on to prove the claim in the main suit.

- 18.** The Appellants submit that in any event, the said application was compromised and orders of *status quo* issued.
- 19.** The Appellants also submit that before trial Court, the Respondent did not lead any evidence to prove trespass and neither did it prove that it had a right to possess the suit parcel of land.
- 20.** The Appellants further submit that **Paul Cheruiyot Rono** testified as **PW1** and admitted during cross examination that he had not produced any documents to show that the Respondent owned the land where the church was constructed.
- 21.** It is the Appellants submissions this was also the finding of the Learned Trial Magistrate.

22. The Appellants rely on **Sections 107 & 108** of the Evidence Act, the judicial decision of **Miller vs Minister of Pensions [1947] 2 ALL ER 372** and submit that the Respondent did not also prove trespass.
23. On the second issue, the Appellants submit that since the Respondent failed to prove its case to the required standard, then the Appellants ought to have been awarded costs.
24. The Appellants conclude their submissions by urging the Court to allow the appeal as prayed.

**The Respondent's Submissions.**

25. The Respondent submits on the following issues;
- a. Whether the trial Court erred in law and in fact by granting the permanent injunction against the Appellants.***

***b. Who should bear costs of this appeal.***

- 26.** On the first issue, the Respondent relies on the judicial decisions of **Jamal Salim versus Yusuf Abdulahi Abdi and another [2018] KECA 14 (KLR)**, **Swastic Holdings Limited versus Kimani [2023] KEELC 16296 (KLR)** and submits that the Learned Trial Magistrate found that it had the right to sue for trespass.
- 27.** The Respondent also submits that it was an uncontroverted fact that it had purchased the suit parcel of land and had always been in possession of it.
- 28.** The Respondent further submits that it attached photographs of the defaced church sign posts which were marked as annexure “**PR3a-b**” to the application dated 17<sup>th</sup> July, 2023 that proved trespass.

- 29.** It is the Respondent's submissions that the trial Court granted the permanent injunction to protect the church property from being wasted.
- 30.** It is also the Respondent's submissions that ownership of land is not a prerequisite for granting a permanent injunction.
- 31.** The Respondent reiterates that it proved that it was in possession of the suit parcel of land and the trial Court was satisfied as the validity of the sale agreement and therefore the permanent injunction was properly granted.
- 32.** It is further the Respondent's submissions that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants did not give evidence and the 1<sup>st</sup> Appellant who testified did not have the authority to testify on their behalf.

- 33.** The Respondent relies on the judicial decision of **Stephen Gachau Githaiga & another v Attorney General [2015] KEHC 655 (KLR)** in support of its submissions.
- 34.** The Respondent submits that costs follow the event and it should therefore be awarded costs of the appeal.
- 35.** The Respondent concludes its submissions by urging the Court to dismiss the appeal with costs.

**ANALYSIS AND DETERMINATION.**

- 36.** The issues that arise for determination are as follows;
- a. Whether the Learned Trial Magistrate erred in issuing a permanent injunction against the Appellants.***
  - b. Who should bear costs of the appeal.***
- 37.** The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of **Gitobu Imanyara & 2**

**others Vs Attorney General [2016] eKLR.** It was held as follows;

***“An appeal to this Court from a trial by the High Court is by way of retrial 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 allowances in this respect.”***

**38. In Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** the Court held as follows;

***“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge***

***are to stand or not and give reasons either way.”***

**A. Whether the Learned Trial Magistrate erred in issuing a permanent injunction against the Appellants.**

- 39.** The Appellants contend that the Learned Trial Magistrate erred in issuing an order of permanent injunction and yet she found that the Respondent had not proved ownership of the suit parcel of land.
- 40.** The Appellants submit that the Respondent did not prove that it was in possession of the suit parcel of land and neither did it prove trespass and submit, therefore, that the Learned Trial Magistrate erred in issuing an order of permanent injunction.
- 41.** The Respondent on the other hand submits that the Learned Trial Magistrate found that it had the right to sue for trespass.

**42.** The Respondent also submits that ownership of land is not a prerequisite for issuance of an order of permanent injunction.

**43.** The Respondent further submits that it attached photographs to its application dated 17<sup>th</sup> July, 2023 which photographs were of defaced church sign posts. It is the Respondent's submissions that the said photographs proved trespass.

**44.** It is also the Respondent's submissions that it proved that it was in possession of the suit parcel of land.

**45.** Under prayer (b) of the Plaint, the Respondent sought the following order;

***“b. A permanent injunction restraining the Defendants by themselves, their agents, servants and/or anyone claiming under the***

***Defendants from entering, trespassing onto, interfering with and/or any other manner dealing with the church premises and the property thereon.”***

**46.** The Learned Trial Magistrate held as follows on the last paragraph the judgement delivered on 16<sup>th</sup> July, 2024;

**“Determination**

***I have considered the Plaintiff and defence case, including written submissions filed by both counsels (sic). It is not in dispute that the church bought the land in issue. Though DW1 puts it that the church him included hired the land, it does not matter because if it was hired it was hired in the name of the plaintiff/church or if it was bought, it was bought in the name of the church. So the plaintiff is the lawful owner or occupier or possessor.***

***Whether or not the church has title deed or land sale agreement, we have not been told that the church has a land tile deed and none has been produced. It is however claimed that the sale agreement is with the Defendants.***

***It is then clear that no document has been availed to prove that Plaintiff (sic) is the registered owner of the land in question. However, in cases of trespass one does not have to prove ownership in order to prove trespass. One has to prove trespass and right to sue. Plaintiff having purchased the land or hired it as DW1 says, it has a right to sue for trespass.***

***Defendants have denied trespass claims and have claimed that they are worshippers in the church and they do not hold leadership positions and that they only preach if the pastor of the church allows them to do so. It is also clear that from (sic) evidence on record there may be leadership***

**wrangles in the church as DW1 has admitted in his evidence on record. But the case before Court is about land therefore Court (sic) will restrict itself to the orders sought.**

**Regarding prayer 1 that asks Court (sic) to declare that the Plaintiff is the registered owner of the land, it is not granted because no ownership document like title deed or lease hold title has been produced in Court to prove that Plaintiff (sic) is the registered owner. That prayer is dismissed and not granted.**

**Prayer two, seeking for a permanent injunction, as I have already stated above, one does not have to prove ownership in order to prove case of trespass, so even if Plaintiff (sic) has not produced title deeds and even if Defendants have denied that they have trespassed, I find it being in the interest of justice to grant that prayer, in order to protect the suit property from wastage in case**

**someone would like to trespass or to continue trespassing. (Emphasis mine)**

**That does not however mean that Defendants (sic) have been stopped from attending church services for PW1 the church chairman admitted that defendants (sic) are or were their church members. The church services however, should be the ones authorised by the owners of the church and not ones that are conducted in a manner that show or exhibit trespass.**

**As regards prayer c, an order directing Defendants to surrender the sale agreement, PW1 did not talk about it, and DW1 did also not talk about it. So we do not know whether Defendants (sic) have the said sale agreement or not. I will therefore leave the issue that way to be handled by the parties themselves for they are the ones who know where the sale agreement is.**

**Prayer (d) on general damages for trespass, no damage has been proved therefore I believe that once an injunction order is granted it will sort out the Plaintiff. Cost of the suit will follow the event (sic). I therefore enter judgment in favour of the plaintiff against the defendants as follows..."**

- 47.** I am inclined to first address the question of trespass and its bearing on the orders of permanent injunction.
- 48.** This is based on the Appellants submission that Respondent did not prove that it was in possession of the suit parcel of land and neither did it prove trespass and submit, therefore, that the Learned Trial Magistrate erred in issuing an order of permanent injunction.
- 49.** In her analysis the Learned Trial Magistrates observes that the Appellants are worshipers and further observes that the allegation of trespass might have been fueled by leadership

wrangles in the church as admitted by **DW1-** a witness before the trial court. The Learned Magistrate then, and rightly so, declines to comment further on these wrangles and addresses each prayer sought in the plaint.

- 50.** From the judgement, it is apparent that the Learned Trial Magistrate found that the Respondent had a right to sue for trespass and observed that the Appellants denied the allegations of trespass.
- 51.** It is evident, therefore, that the Learned Trial Magistrate did not make a finding on whether or not there was trespass onto the suit parcel of land apart from mentioning that the Appellants denied having trespassed onto it and that the Respondent had a right to sue for trespass.
- 52.** It is also important to mention that the Learned Trial Magistrate declined to award damages for trespass. This further supports my finding that the Learned trial magistrate

did not make a finding that the Appellants trespassed onto the suit land.

**53.** I shall now interrogate whether the Learned trial magistrate erred in issuing orders of permanent injunction against the Appellants.

**54.** A further reading of the judgment reveals that the Learned Trial Magistrate issued a permanent injunction *in the interest of justice* in order to protect the suit property from wastage *in case someone would like to trespass or to continue trespassing.*

**55.** The Court of Appeal in **Mohamed Ndoge v Mohamed Golo Ndogo & 3 others [2015] KECA 184 (KLR)** held as follows;

***“As opposed to an order of temporary injunction issued provisionally before the court has had the opportunity to assess the merits of the application, a***

**permanent injunction comes at the end of the trial after parties have presented evidence and been cross examined on their rival claims. A temporary injunction serves to preserve the subject matter in status quo during the pendency of a suit. It follows, therefore that the standard of proof in either case will be different. At the interlocutory stage the proof is on a prima facie plane (sic). Based on the evidence of the parties the court may grant a permanent injunction if it is satisfied, on a preponderance of that evidence that irreparable harm, loss or damage, not capable of being compensated by an award of damages, in the absence of injunction, will be occasioned. At the interlocutory stage the threshold (prima facie) is lower than that expected at the trial (on a balance of probabilities). See Giella v Cassman Brown (1973) EA 358 and Mrao Ltd v First America Bank of Kenya and 2 others (2003) KLR 125.**

**56.** In the above cited judicial decision, the Court of Appeal held that a permanent injunction is issued at the end of the trial and after parties have presented evidence. The Court of appeal further stated that it is issued in instances where there is evidence that irreparable harm, loss or damage which cannot be compensated by an award of damages will be occasioned.

**57.** I find that the Learned Trial Magistrate erred in issuing orders of permanent injunction in the ***interest of justice*** and according to her, so as to ***protect the suit property from wastage in case someone would like to trespass or to continue trespassing.***

**58.** The law on when a permanent injunction is issued and the purpose for which it is issued have been set out succinctly in **Mohamed Ndoge v Mohamed Golo Ndogo & 3 others [2015] KECA 184 (KLR) Supra.**

**59.** This ground of appeal therefore succeeds.

**B. Who should bear costs of the appeal.**

**60.** The general rule is that costs shall follow the event. This is in accordance with the **Provisions of Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

**61.** The Appellants and the Respondent are members of a church and a church respectively. For this reason, I do not find it fit to grant costs as this will continue to widen the rift between them which will in turn affect the peaceful co-existence of the church and its members.

**DISPOSITION.**

**62.** In the result, the appeal succeeds and I find and order as follows;

***a. The permanent injunction issued in the judgement delivered in Bomet CM ELC Case No. E030 of 2023 on 16<sup>th</sup> July, 2024 as against the Appellants is hereby set aside.***

***b. Each party shall bear own costs of the Appeal.***

**63.** It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO  
THIS 19TH DAY OF FEBRUARY, 2026.**

**L. A. OMOLLO  
JUDGE.**

**In the presence of: -**

**The firm of Kadet & Co. Advocates for the Appellants-  
Absent**

**Mr. Mugunya for the Respondent.**

**Court Assistant; Mr. Joseph Makori.**