REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCLA E015 OF 2025

ELNATHAN MWETHERA GAKU
WALLACE KAHIGA WAITHANJI **…….APPELLANTS**
JOHN PETER MWANGI MBANYA
NAHASHON WAHOME

VERSUS

CHARLES ALEXANDER KIAI ……...……...…… RESPONDENT

(Being an Appeal from the whole judgment of the Court Murang'a MC ELC Case No. E069 of 2021 delivered by Honourable Susan N. Mwangi –PM on 16th day of April, 2025

JUDGMENT

(1) In the Memorandum of Appeal dated 25-4-2025, the Appellants seek one order.

"This Appeal be allowed and the judgment of the trial magistrate be set aside with costs of this appeal."

(2) The Appellants, aggrieved by the judgment of the lower Court in **Murang'a Law Court, MC ELC Case No. E069/2021** have nine (9) grounds upon which they fault the lower Court. The grounds are as follows.

"The learned trial magistrate erred in…

(i) holding that plot numbers 2647, 2836, 2837 and 2746 belonged to the Respondent without any documentary proof of ownership,

(ii) granting the Respondent Ksh.359,455/= (Kenya Shillings three hundred and fifty nine thousand four hundred and fifty five only) as costs without any evidence as to how the costs were incurred,

(iii) taking into consideration the judgment in Kangema Law Courts case No. 151/2010 which was not provided,

(iv) not holding that the Respondent had no authority from KENHA to act on its behalf on a road matter under it,

(v) not holding that only KENHA under Section 91(2) of the Traffic Act, has the authority to remove whatever has been placed or erected on the road under Section 91(2) and not the Respondents,

(vi) holding that the property, the subject matter of the suit belongs to Geoffrey Kairanga Mwangi and not the Defendants and the registered owner was not made a party to the case,

(vii) holding that the Appellant's building should be restricted to 2800 square feet without prove how that should be,

(viii) granting all the prayers in the plaint without the Respondent giving sufficient evidence for their proof and

(ix) deciding the case against the Appellants while the Respondent had not proved his case on a balance of probabilities.

(3) In the lower Court case, the Respondent herein Charles Alexander Kiai was the Plaintiff and his case was follows. Firstly, the Plaintiff owned plot numbers 2647, 2836, 2837 and 2746 at Kiri-aini market while the Defendants owned Plot No. Loc.14/1965/17 within the same market. The Appellants who were the Defendants in the lower court case had developed their plot by building a permanent building comprising of rented premises which they let to tenants and who allocated area was 2800 square feet. Secondly, the Appellants had constructed staircases and doors for plot No. Loc.14/Kiru/1965/17 in a manner that encroached on the road reserve. The construction of the Appellants building on the road reserve meant that the Respondent and other members of the public could not access their plots. As a result the Respondent incurred costs in transporting building materials and farm produce through a longer a route or manually by employing labourers to ferry the materials and produce as no vehicle could pass through the encroached road. The costs and enumerated as follows.

(a) Transport costs of building materials including stones, sand and ballast as Kshs. 1050/= per lorry for 105 lorries, Kshs 215,250/=

(b) Transport costs of farm produce to the market including coffee cherries, bananas and tea leaves at Kshs. 100 per trip for 14 trips.

(c) Transporting timber and iron sheets to the site, Kshs 103,000/=

Thirdly, the water from the Appellants' premises escaped to the Respondents land. Fourthly, the Appellants were issued with an enforcement notice dated 9-4-2015 to stop the encroachment but they did not heed. This is what made the Respondent file the suit in the lower court.

(4) The defence by the Appellants was as follows. Firstly, the Respondent had no mandate to enforce Murang'a County Government notices. Secondly, they denied the Respondent's claim in its entirety. Thirdly, the Appellants denied being the cause of the Respondents incurring any expenditure and they could be called upon to compensate him for Kshs. 359,455 or any other amount. Finally, the events complained of occurred in the year 2005 which was 16 years before institution of the suit and they were therefore time barred.

(5) In her judgement dated 16-4-2025, the learned trial magistrate found in favour of the Respondent and allowed all his prayers as per the plaint dated 7-9-2021.

(6) Counsel for the Appellants filed written submission dated 26-8-2025 and further submissions dated 23-1-2026. The Respondents submissions are dated 3-9-2025 and 19-12-2025 respectively . The submissions do not identify the issues for determination . I will therefore identify and frame the issues from the totality of the record including the pleadings, documents, testimony, the judgment of the lower court, the grounds of appeal and the written submissions. In so doing, I rely on **Order 15 rule 2 of the Civil Procedure Rules**. The issues that I identify are as follows.

(i) Whether plot number 2647, 2836, 2837 and 2746 can be said to belong to the Respondent in the absence of documentary proof.

(ii) Whether the special damages of Kshs 359,455/= were proved.

(iii) Whether the lower Court could properly consider the judgement in Kangema Case No. 151/2010 which was not provided.

(iv) Whether it is only KENHA that can enforce encroachment against a road reserve.

(v) Whether registration of the subject matter of the suit in the name of Geoffrey Kairanga Mwangi and not the Appellants affects this appeal.

(vi) Whether the Appellants should be restricted to the area of 2800 square feet and how this should be implemented.

(vii) Whether the Respondent case was proved on a balance of probabilities.

(7) I have carefully considered the appeal in its entirety including the record, the grounds and the submissions by both sides. Considering that this is a first appeal, I am guided by the case of **Selle and another vs Associated Motor Boat Co. Ltd [1968]EA**, whose *ratio decidendi* is to the following effect.

"An Apellate Court has a duty to reconsider, re-evaluate, and re-analyse the evidence presented in the trial Court and draw its own independent conclusions while bearing in mind that it did not see or hear the witnesses testify."

(8) On the first issue, I find that plot number 2647, 2836, 2837 and 2746 can be said to belong to the Respondent even without documentary proof. When The Respondent testified on 29-8-2023, he adopted his witness statement filed in Court on 9-9-2021. In the plaint at paragraph 7, the Plaintiff has stated that he is the owner of plot Nos. 2647, 2836, 2837 and 2746. Under section 62 of the Evidence Act it is provided as follows.

" All facts except the contents of documents may be proved by oral evidence".

This means that the Respondent's oral evidence was sufficient to prove that he owned the four plots. At the trial, he was not cross-examined on ownership and the Appellants in their short defence dated 8-10-2021 did not aver that the four plots did not belong to the Respondent. In other words, this issue was not a trial issue and it should not be an issue in the Appeal.

(9) I find that the damages of Kshs. 359,455 were proved. They were specifically pleaded and broken down at paragraph 7 of the plaint. At the trial on 29-8-2023, the Respondent was cross-examined on the special damages. He was also cross-examined largely on the blocked road. He said that he had to deposit his materials beside the road and had to hire a lorry belonging to Karumba and Kabue Karira. I find that he was not shaken in cross-examination

and even in the absence of the receipts, he proved the special damages to the satisfaction of the Court.

(10) At page 17 of the record of appeal, I can see some proceedings dated 14-11-2012. The only problem is that the case number is not given. Looking at the original file, I can see the case number is given as 151 of 2010. It is a judgment between **Mwangi Kamau vs. Charles Kiai Maina**. The outcome is the dismissal of the case. The record of appeal omits the first page of the judgment which contains the case number. The trial magistrate seems to have known the case to be a Kangema case probably going by the name of the trial magistrate Mrs. A. Too, Resident Magistrate. Whatever the case may be, under **Section 60(1) (a) of the Evidence Act,** the court is commanded to take judicial notice of, inter alia,

"rules and principles, written and unwritten having the force of law…"

If there is a judgment from Kangema court, the court was entitled to take judicial notice of the same. That judgment was part of the record of the lower court.

(11) Regarding the fourth issue, I find that it is not only KENHA that could enforce or deal with an encroachment of a road reserve. Any party affected by the encroachment has the requisite *locus standi* to file a suit seeking redress. The Respondent has shown that he was directly affected by the Appellants encroachment on the road reserve.

(12) As for the fifth issue, I find that it immaterial who the registered owner of the suit is. Firstly, the 1st Appellant is on record as saying on oath that they were not intending to sell the suit plot. This is in his replying affidavit dated 10-4-2024 where he states in paragraph 3 as follows.

" That it is not true that the Respondents intend to sell Plot No. Loc.14/Kiru/1965/17."

The Appellants cannot be heard to say that the said plot does not belong to them. They cannot be allowed to blow hot and cold. They must either blow hot or cold. Under the general estoppel rule in Section 120 of the Evidence Act the Appellants cannot raise ownership by another person as an issue when they made the Respondent and the court believe that they were not selling the suit plot. After all, there is a court order dated 2-10-2023 restraining the Appellants from selling the suit land pending the hearing and

determination of the suit. Anything done in contravention of a lawful court order is null and void. The Appellants are essentially confirming their contempt of the court order dated 2-10-2023 when they say that land belongs to someone else.

Section 120 of the Evidence Act provides.

> **"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief , neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."**

Secondly on this point, the judgment in this case is in rem and not in personam. A judgment in personam is directed against the specific person. A judgment in rem is directed against a property, thing, or legal status and not a specific person. The judgment in the lower court is directed against the suit property and not against the owner. It is therefore immaterial who the registered owner is.

Finally, there is a principle of law called caveat emptor which means ***"let the buyer beware"***

(13) According to the surveyor's report dated 11-2-2025, the size of the suit plot is 35 feet by 80 feet. This means the total area is 2,800 square feet. Yet according to the report by upcountry valuers to be found at pages 36-40 of the record of appeal, the area is 45 feet by 90 feet. This means that it occupies an area of 4,050 square feet.

The two reports were considered by the Court in its judgment which has been appealed. From the two reports, it is obvious that the suit premises occupies an area bigger than its allocated size by 1,250 square feet. This is the difference between the size in the valuation report and the size in the surveyor's report.

It is my finding in answer to the sixth issue that Appellant's should be restricted to the land allocated to them which is 35 feet by 80 feet and the way to implement the court order is to demolish everything that is outside the 35x80 feet.

(14) Finally, on the seventh issue, I find that the Respondent's case has been proved on a balance of probabilities. There is overwhelming evidence from the District Commissioner, the County Government of Murang'a and its predecessor that the Appellants were time and again ordered to demolish their building on the part that encroached on the access road but through same unexplained impunity, they ignored all those lawful orders. The size they occupy as

compared to the size allocated to them is further proof of their impunity. Their building of a septic tank on the road, operating eateries without toilets and proper sanitary standards is well proved by the Respondent in his various documents. The final act of impunity is transferring the suit premises to one Geoffrey Kairanga Mwangi when there is a valid Court order against such transfer. The defence filed by the Appellants does not answer the strong, consistent and candid evidence adduced by the Respondents. It is a mere denial that merely evades the truth.

(15) For the above stated reasons, I find **no merit** in the Appellants' appeal. I **dismiss** it with costs to the Respondents and I order that the judgment and decree of the lower court be implemented in full.

It is so ordered.

Dated, signed and Delivered virtually at Murang'a this 2nd day of March, 2026.

M.N. GICHERU
JUDGE.

Delivered online in the presence of; -
Court Assistant – Jackline
Appellant's Counsel – Mr. Karuga Wandai
Respondent – Present in person
Third Party's Counsel – Mrs Magua