REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL E083 OF 2024

ARITHI ETAYA ……..1ST APPELLANT

TAITUMU MWIKUU……2ND APPELLANT

VERSUS

JULIUS MURUNGI …….……..RESPONDENT

[Being an Appeal from the Judgment/Decree of Hon A G Munene – Principal Magistrate in Maua CMCC No. 79 of 2017 delivered on 15th February, 2023]

JUDGMENT

1. The Respondent herein *[who was the plaintiff in the lower court]* filed the Plaint dated 15th May 2017; and wherein the Respondent sought various reliefs. The reliefs sought were:-

    a. ***A declaration that the land parcel number 6388 Antubetwe Kiongo Adjudication Section is ancestral/ family land [trust land] and that the Plaintiff's right to use and occupy the same has risen due to his considerable long possession and development thereon and order be issued that the suit land should be transferred to the Plaintiff.***

    b. ***An order of permanent injunction and inhibition restraining the defendants, their agents, servants, assigns, or successors, representatives and or anyone acting on his behest from entering, evicting, selling, occupying or interfering in any way with the***

plaintiff's peaceful occupation, enjoyment and possession of 6388 Antubetwe Kiongo Adjudication Section.

c. Cost and interest.

d. Any other relief that this honorable court may deem fit to grant.

2. The Respondent's claim in the lower court was based on various grounds. The grounds included: the suit property was inherited by the 1st Appellant from his deceased father; the suit property is ancestral/ family land; and the suit property was held in trust for the family. In addition, the Respondent posited that the suit property had been given unto him[respondent] on the basis of being the eldest son.

3. Furthermore, the Respondent contended that upon being given the suit property, same entered upon, took possession thereof and thereafter developed the suit property. Nevertheless, it has been contended that the 1st Appellant sought to sell and indeed sold the suit property to and in favor of the 2nd Appellant. Moreover, it has been averred that the sale of the suit property to and in favor of the 2nd Appellant was in breach of trust. To this end, the Respondent sought the various reliefs, whose details have been enumerated elsewhere herein before.

4. The 1st Appellant does not appear to have filed any statement of defence. Nevertheless, the 1st Appellant appears to have filed a witness statement dated 15th November 2021; and which statement was adopted during the hearing. The 1st Appellant denied that the suit property was family/ ancestral

land. In addition, the 1st Appellant contended that the suit land did not belong to his grandmother.

5. The 2nd Appellant duly entered appearance and thereafter filed a statement of defence and counterclaim. The defence/ counterclaim is dated 18th December 2017. Notably, the 2nd Appellant contended that same entered into a lawful sale agreement with the 1st Appellant; the 1st Appellant sold what is now the suit property; the suit property was transferred and registered in his name; and that the transfer was lawful and valid.

6. Furthermore, the 2nd Appellant posited that prior to entry into the sale agreement with the 1st Appellant, same [1st Appellant] undertook due diligence, ascertained ownership and also visited the suit property. Besides, the witness contended that at the time he visited the suit property, there was no development thereon. In addition, the 2nd Appellant averred that the plaintiff [now respondent] was not residing on the suit land. On the contrary, it was stated that the Respondent was residing on another piece/ parcel of land belonging to the 1st Appellant.

7. The suit in the lower court was heard and disposed of *vide* judgment dated and delivered on 15th February 2023 and wherein the learned trial magistrate found and held that the Respondent had proved his case to the requisite standard. The learned trial magistrate thereafter entered judgment in favour of the respondent.

8. It is the said Judgment and the consequential decree arising therefrom which has aggrieved the Appellants and thus provoking the subject appeal. The Appellants filed the memorandum of appeal dated 14th November 2024.

9. The grounds of appeal are:

   i. ***The court erred in law and facts by Construing a trust that was never proved and does not exist.***

   ii. ***That the learned magistrate erred in law and in fact by concluding the Appellant land was Respondent family land yet no land is referred to as family land as all land is distinctively owned.***

   iii. ***That the learned magistrate erred in law by taking away Appellant rights provided for in section 25 and 26 of the land registration Act.***

   iv. ***That the leaned magistrate erred in law and fact by forcing a father to give out this land to children.***

   v. ***That the learned magistrate erred in law and fact by upholding the Appellant title deed was issued in violation of a court order whereas no evidence that the title land parcel number Igembe/Antubetwe Kiongo/18109 has never been affected by any court order.***

   vi. ***That the learned trial magistrate erred in law and fact by filing gaps of evidence through assumptions to the detriment of the Appellant.***

vii. That the learned trial erred in law and fact by ignoring the Appellant evidence submissions and not giving the same consideration at all.

viii. That the learned magistrate erred in law by dismissing the Appellant counterclaim against the wait of his evidence.

ix. That learned magistrate erred in law and facts by failure to make a conclusive judgment in the matter but subjected his judgment to another parcel given to the respondent.

x. That the learned trial magistrate erred in law and fact by choosing which parcel was to be given to the Respondent by his father against the rights provided under law for the registered proprietor.

xi. The learned magistrate erred in law and facts by failure to hold that the Appellant and the Respondent land are separate and distinct.

10. The instant appeal came up for directions on 26th January 2026, whereupon learned counsel for the Appellants intimated to the court that same had filed and served the record of appeal. In addition, learned counsel for the Appellants indicated that the appeal was ready for hearing. Moreover, the counsel sought directions as pertains to the hearing and disposal of the appeal.

11. With the concurrence of learned counsel for the respondent, the court proceeded to and issued directions as pertains to the hearing and determination of the appeal. The directions were: the appeal shall be heard before one judge sitting at Meru for one day; the appeal shall be canvassed by way of written submissions; the Appellants shall file and serve written submissions within 14 days from the date of the directions; the Respondent shall be at liberty to file and serve written submissions within 14 days from the date of service and the Appellant shall be at liberty to file rejoinder submissions[if any] within 7 days from the date of service by the respondent.

12. The Appellants filed written submissions dated 14th January 2026. The Appellants have raised and highlighted four [4] key issues. The issues are: the suit property was never ancestral/ family land; the suit property was never held on trust for the respondent; the suit by the Respondent was/ is a disguised attempt to coerce the 1st Appellant to give to the Respondent the suit property albeit without any color of right; and the 2nd Appellant is a bona fide purchaser for value without notice.

13. Regarding the first issue, it has been submitted that the suit property was gathered by the 1st Appellant during the adjudication and demarcation process. In addition, it was contended that the suit property was thereafter demarcated and adjudicated in favor of the 1st Appellant. Learned counsel for the Appellants has posited that the suit property was never inherited from the 1st Appellant's father or at all.

14. Secondly, it has been submitted that the Respondent herein failed to tender and adduce any credible evidence to demonstrate that the suit property was held on trust for him. In particular, it was submitted that the obligation of proving trust laid on the shoulders of the respondent. However, it was submitted that the Respondent did not discharge the burden of proof to the requisite standard or at all.

15. Thirdly, it has been submitted that the respondent's suit in the lower court and by extension the claim as against the 1st Appellant is a disguised attempt by the Respondent to coerce and force the 1st Appellant to give land to the Respondent, contrary to his [1st Appellant's] wishes. Nevertheless, it has been submitted that the 1st Appellant cannot be forced to alienate/ distribute his land contrary to his wishes and during his lifetime.

16. The last issue that has been submitted upon relates to the sale; transfer; and eventual registration of the suit property in the name of the 2nd Appellant. It has been submitted that the 1st Appellant sold and transferred the suit property to the 2nd Appellant to enable him [1st Appellant] to obtain money for medical treatment/ expenses.

17. Additionally, it has been submitted that by the time the suit property was being sold to the 2nd Appellant, the Respondent was not in occupation of the suit property. In addition, it was posited that the Respondent had neither undertaken any developments nor improvements on the suit property. On the contrary, it was submitted that it is the 1st Appellant, who was using the suit property prior to and before the sale thereof. Flowing from the foregoing, learned counsel for the Appellants has submitted that the 2nd

Appellant therefore acquired valid and lawful rights/ interests to the suit property.

18. Moreover, it has been contended that the 2nd Appellant was/ is a bona fide purchaser for value and therefore his title to the suit property ought to be protected by dint of **section 24 of the Land Registration Act 2012.**

19. Based on the foregoing, learned counsel for the Appellants has invited the court to find and hold that the appeal is meritorious. The court has been implored to allow the appeal; set aside the judgment; dismiss the respondent's suit in the lower court; and allow the 2nd Appellant's counterclaim dated 18th December 2017.

20. The Respondent filed written submissions dated 9th March 2026; and wherein the Respondent has canvassed four [4] key issues. The issues canvassed by the Respondent are: the 1st Appellant did not file any statement of defence and because there was no such defence, the 1st Appellant's testimony was not predicated on any pleading; the evidence by and on behalf of the 1st Appellant ought to be expunged from the record; the suit property was family/ ancestral land and thus same was affected by trust; and the 2nd Appellant is not a bona fide purchaser for value without notice.

21. With regard to the first issue, learned counsel for the Respondent has submitted that though the 1st Appellant was duly served with the plaint and the attendant documents, the 1st Appellant did not file any statement of defence. It was contended that in the absence of a statement of defence, it was deemed that the 1st Appellant had admitted/ conceded the respondent's claim.

22. Additionally, it was submitted that in so far as the 1st Appellant had neither filed nor served a statement of defence, the 1st Appellant could therefore not be allowed to tender evidence before the court. To this end, it was submitted that the evidence by/ on behalf of the 1st Appellant was admitted by error and thus same ought to be expunged from the record.

23. Secondly, learned counsel for the Respondent has submitted that the Respondent tendered and adduced credible evidence to show that what now constitute[s] the suit property was indeed ancestral/ family land. Moreover, it was submitted that the land in question was being held by the 1st Appellant on trust for his family.

24. Thirdly, learned counsel for the Respondent has submitted that the Respondent met and satisfied the various elements/ ingredients underpinning the plea of trust. In particular, it was submitted that the evidence that was tendered by the Respondent accord with the principles that were espoused in the case of **Kiebia versus Isaiah Theuri M'Litari 2018 eKLR.**

25. Lastly, learned counsel for the Respondent has submitted that the 2nd Appellant did not acquire the suit property lawfully. In particular, it has been submitted that the 2nd Appellant was knowledgeable of and privy to a family dispute touching on and concerning the suit property. In addition, it has been submitted that the 2nd Appellant was equally aware of an objection/

protest letter that was lodged with the District Land Adjudication and Settlement officer over and in respect of the suit property.

26. *In a nutshell*, learned counsel for the Respondent has posited that the transfer and registration of what now constitute[s] the suit property is vitiated by breach of trust and lack of consent by the 1st Appellant's family members. Simply put, it has been submitted that the 2nd Appellant was therefore not an innocent purchaser for value.

27. From the foregoing submissions, learned counsel for the Respondent has invited the court to find and hold that the Judgment of the lower court aligned with the evidence tendered; and that the instant appeal is devoid of merit. The court has been invited to dismiss the appeal with cost to the respondent.

28. Having reviewed the record of appeal; the written submissions filed by/ on behalf of the parties; and upon consideration of the applicable law, three [3] key issues crystalize for consideration and determination. The issues are: whether the Respondent plea of trust was properly pleaded and competent in the eyes of the law; whether the Respondent proved/ established trust [if at all]; and whether the 2nd Appellant is a bona fide purchaser for value or otherwise.

29. Before venturing to address the thematic issues that have been isolated in the preceding paragraph, it is important to highlight that what is before me is a first appeal. By virtue of being a first appeal, this court is mandated to undertake a fresh and exhaustive scrutiny, review, and analysis of the totality of evidence tendered before the court of first instance. The court is obligated to review the evidence and determine whether the finding[s] and conclusion[s] arrived at by the trial magistrate accord with the evidence on record and the legal principles.

30. The court is seized of the authority and jurisdiction to arrive at an independent conclusion and to depart from the findings of the trial court. However, it is established that the appellate court can only depart from the factual finding and conclusion of the trial court where it is demonstrated; that the conclusions were based on no evidence; the conclusions are perverse to the evidence on record; the findings are based on misapprehension of the evidence and law; and that there is a demonstrable error of principle [error of Law] which vitiates/affects the findings of the trial court.

31. Suffice it to state that, barring the foregoing, the first appellate court is enjoined to defer to the findings and conclusions of the trial court. Notably, the jurisdiction of the first appellate court to interfere with the findings/conclusions of the trial court is circumscribed. The jurisdiction is not at large. The same must be exercised with circumspection.

32. The jurisdictional remit of the first appellate court, while undertaking its mandate as pertains to the first appeal, has been the subject of various court decisions. In the case of **Odera t/a AJ Odera & Associates v Machira t/a**

Machira & Co Advocates [2013] KECA 208 (KLR), the Court of Appeal expounded on the scope of the jurisdiction.

33. The court stated thus

> ***46. We also wish to be guided by the reasoning of this court in the case of Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934 thus:-"Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in Sottos Shipping versus Sauviet Sohold, The Times, March 16, 1983."It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said" Again in Peters versus Sunday Post Limited (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, P said at page 429:***
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> ***"It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses***

34. Recently, the Court of Appeal revisited the jurisdictional remit in the case of **Kenya Urban Roads Authority & another v Belgo Holdings Limited [2025] KECA 764 (KLR).** The court stated as hereunder:

37. *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 judgment. This position is anchored in section 78 of the* Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess, and re-analyze 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 circumstance 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 judgment 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."

35. Back to the issues for consideration. I beg to address the issues sequentially. I shall start with the first issue, namely; whether the plea of trust was suitably pleaded and particularized in accordance with the law or otherwise.

36. The Respondent herein contended that what now constitute[s] the suit property was ancestral/ family land. In addition, the Respondent posited that the suit property was inherited by the 1st Appellant from his [1st Appellant's father], namely M'etaya Monyinga. To this end, the Respondent contended that the suit property was therefore being held on trust by the First Appellant for the whole family.

37. To the extent that the Respondent had sought to propagate or canvass the plea/ claim of trust, it was incumbent upon the Respondent to not only plead trust, but to supply the particulars [sic] of the trust. The Respondent was enjoined to demonstrate *vide* the particulars how the trust arose.

38. Additionally, the Respondent was also required to plead and particularize breach of trust. The law as pertains to pleading of trust is captured/ provided

for in terms of **Order 2 Rule 10 of the Civil Procedure Rules**. The said rules are couched in mandatory terms.

39. The provisions of **Order 2 Rule 10 of the Civil Procedure** rules [supra] state thus:

> ***(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—***
> ***(a)particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and***
> ***(b)where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.***

40. The necessity to plead and particularize inter alia; trust/ breach of trust was underscored in the case of ***John Gitiba Buruna & another v Jackson Rioba Buruna [2007] KECA 431 (KLR)***. The Court of Appeal stated thus:

> ***Mr. Makoloo is also correct that the resulting trust on which the learned Judge relied was not pleaded by the respondent. <u>Under Rule 8 (1) (a) of Order VI Civil Procedure Rules, a plaint should contain the specified particulars including particulars of trust on which a party relies. The Respondent did not however, rely on a breach of a trust</u>. The finding that there was a resulting trust was merely an inference arising from the facts as accepted by the learned Judge. The learned Judge however, with respect, erroneously categorized the trust arising***

from the circumstances of the case as a resulting trust rather than a constructive trust which arises by operation of law. [Emphasis supplied].

41. It is imperative to observe that the Respondent was not propagating constructive trust. In any event, if the respondent's claim was predicated on contractive trust, which is not the case, then same ought to have stated as much.

42. Suffice it to underscore that a claim based on constructive trust does not require to be particularized. Constructive trust arises by inference and by operation of the law.

43. In so far as the Respondent did not properly plead and particularize the plea of trust, it then means that the learned trial magistrate did not have before him/ her a competent suit capable of being entertained and adjudicated upon, as far as the plea of Trust is concerned.

44. It is not lost on me that any evidence tendered in the absence of a proper suit/ pleading do not go towards proving a case. Such evidence are in vain in so far as parties are bound by their pleadings. Instructively, the provisions of **Order 2 Rule 6** of the **Civil Procedure Rules, 2010**; prohibit the adduction of evidence which is at variance with the pleading. This is the rule of departure.

45. Before concluding on this issue, I wish to reference the decision in the case of ***Matemu v Trusted Society of Human Rights Alliance & 5 others***

[2013] KECA 445 (KLR.). The Five Judge bench of the Court of Appeal were emphatic about the role and significance of pleadings.

46. The Court stated thus:-

> ***41. We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.***
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> ***42..... ..... What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."***

47. From the foregoing analysis, it is my finding that the plaint dated 15th May 2017; and which underpinned the respondent's claim was fatally deficient

and thus incapable of sustaining the plea of trust. Further, and in any event, it is not lost on me that the plaint in question was devoid of particularity, as pertains to the nature of trust which was being propagated.

48. The next issue that falls for determination relates to whether the Respondent indeed tendered and adduced credible evidence towards proving trust [if at all]. I have already pointed out that the plea of trust was not properly pleaded and placed before the court.

49. Nevertheless, I do acknowledge that the matter in the lower court proceeded for hearing and that the Respondent indeed tendered evidence in an endeavor to prove his case. In this regard, it is only appropriate that I descend onto the evidence and discern whether what was placed before the trial court could sustain the plea of trust.

50. However, before I venture forward and commence the process of interrogating the evidence, it is apposite to highlight that the burden of proving the claim [plea of trust] lay on the shoulders of the respondent. It is the Respondent who was contending that the 1st Appellant held the suit property on trust for the family. It is the Respondent who had posited that the suit land was family/ ancestral land.

51. In the case of ***Moi v Muriithi & another [2014] KECA 642 (KLR)*** the Court of Appeal reaffirmed the law as pertains to burden and standard of proof.

52. The court stated thus:

55 It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the

defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

53. While still on the question of burden of proof, I wish to take cognizance of the holding of the Supreme Court in the case of ***Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] KESC 66 (KLR)***.

54. The apex court stated as hereunder:-

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 1st Respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st 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 1st respondent.

55. Did the Respondent prove his case? The Respondent had contended that the suit property was inherited by the 1st Appellant from his [1st Appellant's father]. In this regard, there was need for the Respondent to adduce evidence to show that indeed the suit property was inherited by the 1st Appellant.

56. However, while under cross examination, the Respondent is on record stating that he did not have any document to show that the suit property had been inherited. On the contrary, evidence abound that what now constitute[s] the suit property was demarcated and adjudicated in favor of the 1st Appellant.

57. Secondly, the Respondent had averred that the suit property had been given unto him by the 1st Appellant. In addition, the Respondent contended that he had been in occupation of the suit property since 1986; he had developed the suit property; he had planted assorted crops; and he was therefore entitled to the suit property on the basis of longevity of occupation.

58. However, during his cross examination, the Respondent conceded that he did not have any report to show any development on the land. Additionally, the trial court also noted from the cross examination of the Respondent that even though the Respondent took an agricultural officer to the suit land, there was no evidence / photographic evidence to show that the Respondent was in occupation of the suit land.

59. It is the Respondent who had predicated his case on the basis that the suit land was inherited from his [Respondent's] grandfather; and that he was in occupation. Suffice it to state that the Respondent was therefore obligated to tender evidence to prove his assertions.

60. Other than the foregoing, the Respondent had also contended that the suit property was family/ ancestral land. Nevertheless, no evidence was tendered to vindicate this position.

61. Though learned counsel for the Respondent has cited and referenced the decision in **Isaac Kiembia M'inanga & others versus Isaiah Theuri M'Litari 2018 eKLR,** there is no gainsaying that the elements that were highlighted by the supreme court cannot be invoked and be deployed in vacuum. Needless to say that, the claimant is obligated to tender evidence to ground the claim. Suffice it to state that the learned counsel for the respondent cannot now fill in the gaps in the evidence by way of submissions. Simply put, submissions cannot take the position of the pleadings or evidence.

62. It is also worthy to recall that the 1st Appellant tendered evidence to show that the plaintiff herein was living/ residing on another parcel of land belonging to the 1st Appellant. This evidence by the 1st Appellant was not controverted.

63. Despite the observations that were captured by the learned trial magistrate at the foot of page 3 of the judgment, the learned trial magistrate took an about turn and thereafter made an assumption based on the statement [unproven statement] contained in the body of the Plaint.

64. I wish to state that a statement that is made in the body of the pleading does not constitute evidence. Moreover, the statement in the body of the pleadings can only be proved by adduction of evidence. [See **Section 3[2] of the Evidence Act].**

65. In the case of ***General & another v Hussein & 3 others [2025] KECA 1022(KLR)*** the Court of Appeal addressed the manner of proving facts. It was stated thus:-

> ***39. The Law of Evidence, in all its complex glory, naturally revolves around two cardinal things: facts and proof. It is these two that combine to form evidence, which the court may or may not accept as showing the merit or otherwise of a party's case. Some facts are however more important than others and it is not just expected but demanded that these facts be proved by the party seeking to rely on them. Section 3 (2) & (3) of the Evidence Act provides as follows:***

2. A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.

3. A fact is disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its nonexistence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.

66. Finally, I wish to state that the learned trial magistrate misapprehended the burden of proof and of whom same lay. Instead of interrogating the evidence by the Respondent and ascertaining whether same aligned with the pleadings filed, the learned trial magistrate chose to discern whether the 1st Appellant adduced any evidence to show that he [1st Appellant] had purchased the suit land.

67. The issue was not whether the 1st Appellant had bought the suit land, but whether the suit land had been inherited by the 1st Appellant from his father, in the manner that was contended in the Plaint.

68. The learned trial magistrate could not, with respect, adopt and deploy a slanted/skewed approach in analyzing the evidence on record. To my mind, the approach that was adopted and deployed by the learned trial magistrate colored his/ her judicial mind and thereafter blinded same from engaging with the critical facts which needed to have been proved.

69. Simply put, I am unable to discern any plausible; compelling; cogent; and credible evidence that was tendered by the Respondent to prove the plea that

the suit property was [sic] family land; was inherited from one M'Etaya Monyinga; and was thus held on trust.

70. Furthermore, it is apposite to underscore that proof of trust depends on evidence. The evidence must be crystal clear to warrant the presumption of trust by a court of law. This was the position espoused in the case of **Kazungu Fondo Shutu & another v Japhet Noti Charo & another [2021] KECA 592 (KLR)**, where the Court of Appeal stated thus**:**

> **28. The concept of trust must however be proved. This Court in the case of *Mumo v Makau [2002] 1EA.170,* held that "*trust is a question of fact to be proved by evidence…..*"** See also ***Kanyi Muthiora v Maritha Nyokabi Muthiora, Nairobi Court of Appeal No.19 of 1982***.
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> 29. In ***Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR***, this Court dealt with the issue of trust at length. The Court made reference to ***Twalib Hatayan Twalib Hatayan & Anor v Said Saggar Ahmed Al-Heidy & Others [2015] eKLR*** and re-stated the law on trusts as follows: -
>
> ***"According to the Black's Law Dictionary, 9th Edition; a trust is defined as***
>
> ***"1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."***
>
> ***Under the Trustee Act, "… the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property…"***
>
> ***In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. … It arises where the intention of***

the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. …

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ...

This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra)."

31. ***As earlier stated, the existence of a trust is a question of evidence. In the*** *Juletabi* ***case (supra), the court held that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because:***

"The law never implies, the Court never presumes a trust, but [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

32. ***The onus to prove existence of a trust lay squarely on the appellants.*** **Section 107** ***of the*** **Evidence Act** ***further provides that:***

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

71. Turning to the last issue, namely; Whether the 2nd Appellant was a bona fide purchaser for value without notice. The 2nd Appellant testified and averred that same entered into a sale agreement with the 1st Appellant. In addition, the 2nd Appellant posited that prior to entering into the sale agreement, he undertook due diligence. The 2nd Appellant posited that he procured a letter of confirmation of ownership from the land adjudication office; he visited the suit land; he established that it was the 1st Appellant who was in possession of the suit property; and that the Respondent herein was not living/ residing on the suit property.

72. Additionally, it was the testimony of the 2nd Appellant that upon entering into the sale agreement, same paid the agreed purchase price; took possession of the suit property; and has since been issued with a certificate of title. Moreover, the 2nd Appellant also averred that he bought the suit property in good faith and for valuable consideration.

73. I beg to state that the evidence which was adduced by / on behalf of the 2nd Appellant was not controverted. The said evidence remained *in situ.* The evidence established the requisite ingredients/elements underpinning the doctrine of bona fide purchaser for value.

74. Notably, the claimant seeking to rely on the plea of bona fide purchaser for value is obligated to establish certain ingredients. The ingredients were re-affirmed in the case of ***Dina Management Ltd v County Government of Mombasa & 5 others [2023] KESC 30 (KLR).***

75. The Apex Court stated as hereunder***:***

90. The Black's Law Dictionary 9th Edition defines a bona fide purchaser as:

"<u>One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."</u>

91. The Court of Appeal in Uganda in Katende v Haridar & Company Ltd [2008] 2 EA 173, defined a bona fide purchaser for value as follows:"For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:

1. he holds a certificate of title;

2. he purchased the property in good faith;

3. he had no knowledge of the fraud;

4. he purchased for valuable consideration;

5. the vendors had apparent valid title;

6. he purchased without notice of any fraud; and

7. he was not party to the fraud."

92. On the same issue, the Court of Appeal in Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR stated as follows:"…in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, <u>secondly,</u>

they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property..."

CONCLUSION

76. It is the Respondent who had contended that the suit property was ancestral/ family land; and that same was held on trust. It was therefore incumbent upon the Respondent to tender evidence and demonstrate that indeed the suit property was held in trust.

77. The Respondent made various assertions but did not tender any evidence. The assertions by/on behalf of the Respondent remained in the realm of allegations. Quite clearly, facts are never substantiated on the basis of allegations. Suffice it to state that there must be evidence known to law.

78. Despite the failure to substantiate the assertions in the body of the plaint, the learned trial magistrate returned a finding in favor of the respondent. It is the said findings that provoked the appeal. The findings were however, not based on evidence. To this end, I find merit in the appeal.

79. On the contrary, it is my finding and holding that the findings and conclusions of the learned trial magistrate, are not aligned with the totality of the evidence on record. Simply put, the findings are inconsistent with and perverse to the evidence. Consequently, and in this regard, I am obliged to and do hereby depart from the impugned findings.

FINAL ORDERS.

80. Flowing from the forgoing, the final orders that commend themselves to the court are:

i. ***The appeal be and is hereby <u>allowed.</u>***

ii. ***The Judgment of the learned trial magistrate dated and delivered on 15th February 2023 and the consequential decree be and are <u>hereby set aside.</u>***

iii. ***<u>In lieu thereof,</u> an order be and is hereby made dismissing the Respondent's suit vide Plaint dated 15th May 2017.***

iv. ***Additionally, the 2nd Appellant's counterclaim dated 18th December 2017 be and is <u>hereby allowed</u>.***

v. ***<u>In particular</u>, there be and is hereby issued an order of permanent injunction to restrain and or prohibit the plaintiff/ 1st defendant to the counterclaim from entering upon, interfering with and or otherwise dealing with the suit property in any manner adverse to the rights/ interest of the 2nd Appellant.***

81. Regarding cost, I wish to state that the 1st Appellant and the Respondent are father and son. Though the 2nd Appellant is an outsider, and only a purchaser, the dispute turns around family disagreements. In this regard, the order that commends itself to me, is to the effect that each party shall bear own cost of the appeal. In this regard, I am persuaded and duly guided by

the holding in the cased of **Jasbir Singh Rai and 3 others versus Tarlochan Singh Lai and 4 others [2014] eKLR.**

82. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 25TH DAY OF MARCH, 2026.

OGUTTU MBOYA, FCIArb;CPM[MTI-EA]

JUDGE

In the presence of-:

Naserian Court Assistant

Ms Asuma holding brief for Mr Mutembei for the Appellants

Mr. Kubai for the Respondent.