



REPUBLIC OF KENYA



**Waithaka & 3 others v Gitau & 2 others (Environment and Land Appeal  
105 of 2021) [2024] KEELC 4573 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4573 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 105 OF 2021**

**BM EBOSO, J**

**JUNE 5, 2024**

**BETWEEN**

**MARGARET WANJIKU WAITHAKA ..... 1<sup>ST</sup> APPELLANT  
CATHERINE WAMBUI KAREKEZI ..... 2<sup>ND</sup> APPELLANT  
ANN NJERI WAITHAKA ..... 3<sup>RD</sup> APPELLANT  
ANGELA WANJIRU WOKABI ..... 4<sup>TH</sup> APPELLANT**

**AND**

**MARY MUTHONI GITAU ..... 1<sup>ST</sup> RESPONDENT  
ANDREA WAMBUI GITAU ..... 2<sup>ND</sup> RESPONDENT  
WAITHAKA GITAU ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Ruling of Hon G. Omodho, Principal Magistrate, delivered  
on 3/11/2021 in Kiambu Chief Magistrate Court MCL & E Case No. E045 of 2021)*

**JUDGMENT**

**Introduction**

1. This appeal challenges the ruling rendered by Hon. G. Omodho, Principal Magistrate, on 3/11/2021 in Kiambu Chief Magistrate Court MCL & E Case No E045 of 2021. The appellants are the defendants in the lower court. The respondents in this appeal are the plaintiffs. The dispute in the lower court relates to Land Reference Number 7838 comprised in Title/Grant Number 10034. The land is located in Tigoni, Limuru. The land is registered in the name of Prof James Mbugua Waithaka who was alive at the time of delivery of the impugned ruling. He is, however, reported to have died during the pendency of this appeal.



2. The appellants are daughters of Prof James Mbugua Waithaka and Joan Waithaka. The late David Christopher Gitau was also a child of the couple, hence a brother to the appellants. He died in December 2017. Their mother, Joan Waithaka, died in 2019. The 1st respondent is a widow of the late David Christopher Gitau and therefore a sister-in-law to the appellants and a daughter-in-law to the late Prof James Mbugua Waithaka. The 2nd and 3rd respondents are children of the late David Christopher Gitau and therefore niece and nephew of the appellants and grandchildren of Prof James Mbugua Waithaka, respectively. For convenience, I will in this Judgment refer to the late David Christopher Gitau as “D C Gitau”. The late Prof James Mbugua Waithaka will be referred to as “the late Prof Waithaka.” The late Joan Waithaka will be referred to as “the late Mrs Waithaka.”
3. The ruling which triggered this appeal disposed three items: (i) an application by the respondents, seeking interlocutory injunctive reliefs; (ii) a notice of preliminary objection by the appellants, challenging the validity of the suit; and (iii) an application by the appellants, seeking orders striking out the respondents’ suit. The trial court allowed the application for interlocutory injunctive reliefs. The preliminary objection and the application for an order striking out the suit were dismissed. Aggrieved by the findings and orders of the lower court, the appellants brought this appeal. Before I dispose the issues that fall for determination in the appeal, I will outline a brief contextual background to the impugned ruling and to this appeal.

## **Background**

4. The suit in the lower court was initiated by the respondents through a plaint dated 3/2/2021. The respondents sought: (i) a permanent injunction restraining the appellants from, inter alia, selling, alienating, entering, trespassing on, subdividing, or in any manner howsoever, dealing with Land Reference Number 7838, registered as IR 10034/1, located in Tigoni, Kiambu [referred to in this Judgment as “the suit property”]; (ii) an order inhibiting registration of dealings in the land register relating to the suit property; (iii) a declaration that the suit property constituted part of the estate of D C Gitau; (iv) a declaration that the respondents were the legal, equitable and beneficial owners of the suit property; (v) an order of general damages for trespass and breach of peace against the appellants; and (vi) costs of the suit.
5. Simultaneous with the plaint, the respondents filed a notice of motion of even date, seeking, inter alia, a temporary injunction and an interlocutory inhibition order restraining the appellants from dealing with the suit property, pending the hearing and determination of the suit. The application was premised on the ground that the respondents had a legal, proprietary, and beneficial right to the suit property because they were the administrators and beneficiaries of the estate of the late D C Gitau who allegedly owned the suit property, having been gifted the property by his parents. They added that the suit property was registered in the name of the late Prof Waithaka. They contended that the late Prof Waithaka, together with his wife, gifted the suit property to D C Gitau by virtue of him being their firstborn and only son. It was their case that D C Gitau peacefully lived on the suit property with his wife (the 1st respondent) and his two children (the 2nd and 3rd respondents) until he died in 2017. The respondents contended that in February 2021, the appellants who are sisters to the late D C Gitau unlawfully trespassed onto the suit property and attempted to “thwart” the 3rd respondent’s ongoing development construction on the land. Apprehensive that the appellants would attempt to eject them from the suit property, the respondents filed the suit together with the application dated 3/2/2021 in the lower court.
6. The appellants opposed the application through a replying affidavit sworn by Catherine Wambui Karekezi on 1/3/2021. Their case was that the suit property was neither transferred/ bequeathed/ gifted to D.C. Gitau by their parents nor was it the respondents’ family home. They added that on



23/1/2021, the respondents commenced construction of a structure on the suit property despite them not being the owners of the land, to the detriment of their father, the late Prof Waithaka, who was the registered owner of the suit property. The appellants averred that the respondents lacked the *locus standi* to file the suit hence the suit was incurably defective and should be struck out for being an abuse of the court process.

7. In addition, they filed a preliminary objection dated 11/3/2021, seeking an order striking out the suit on the grounds, inter alia, that: (i) the registered owner of the suit property was not joined as a party in the proceedings; (ii) and that the appellants not being the registered owners of the suit land, were non-suited, hence there was no cause of action against them.
8. Further, the appellants filed a notice of motion application dated 14/7/2021, seeking an order striking out the suit on the ground that the plaint did not disclose any reasonable cause of action against them.
9. In response to the preliminary objection and to the application dated 14/7/2021, the respondents filed a replying affidavit sworn by Mary Muthoni Gitau on 20/5/2021 and grounds of opposition dated 12/10/2021.
10. On 18/8/2021, the lower court issued directions in the following verbatim terms:

“Parties to canvass application and preliminary objection together by written submissions. Plaintiff has 21 days to file both replies and submissions. Defendant equally gets 14 days to file submissions. Ruling now fixed on 27/10/2021”

11. The respondents filed written submissions dated 12/10/2021 addressing the two applications and the preliminary objection. The appellants filed written submissions dated 12/10/2021 addressing the preliminary objection. The appellants also filed written submissions dated 28/9/2021 addressing their application dated 14/7/2021. They did not file written submissions addressing the respondents’ application dated 3/2/2021.
12. The ruling was not rendered on 27/10/2021. The ruling was subsequently delivered on 31/11/2021 in the presence of the advocates for all the parties. It is observed from the record of the lower court that on 13/10/2021, while delivery of the impugned ruling was pending, the respondents filed an application dated 12/10/2021 seeking to join the late Prof Waithaka as the 5th defendant in the suit.
13. The impugned ruling focused on and disposed the applications dated 3/2/2021 and 14/7/2021 respectively. It also disposed the preliminary objection dated 11/3/2021. The lower court observed in the impugned ruling that the respondents’ application dated 3/2/2021 was unopposed. The lower court pronounced itself as follows on the three items:

“As noted above, the said application is not opposed. It is evident that there is a dispute on the ground that can only dealt [sic] with in a full trial whose subject matter herein definitely needs to be preserved.

As to the preliminary objection, I will be guided by the much celebrated authority on this sphere of law; *Mukisa Biscuits Manufacturing Limited v West End Distributors* (1969) EA 696 in which the court took the position that a point of law qualifies for a preliminary objection. And that the objection has capacity to technically knock out an entire suit. This is the intent of the respondent in the preliminary objection and application dated 14/7/2021 to have the suit to be dismissed for lack *locus* [sic] and misjoinder. In the replying affidavit to the preliminary objection there is annexed a power of attorney to the 1st and 2nd defendants.



Further there is information before this court that the High Court is also dealing with a question of inquiry into the mental infirmity of the undisputed property owner.

In my view it would be premature to make a determination on the issue of *locus standi* and subsequently dismissing the suit.

For the above reasons I will on a balance of convenience allow application dated 3/2/2021 with a view of preserving the status quo of the subject matter dismiss [sic] both the preliminary objection as well as application dated 14/7/2021 for now pending the outcome of the soundness of the mind of the legitimate owner of the suit property.”

## Appeal

14. Aggrieved by the ruling of the lower court, the appellants brought this appeal, advancing the following ten (10) verbatim grounds:
  1. The learned magistrate erred in law and fact in dismissing the appellants’ preliminary objection dated 11/3/2021.
  2. The learned magistrate erred in law and fact in dismissing the appellants’ application dated 14/7/2021.
  3. The learned magistrate erred in law and fact in considering the respondents’ application dated 3/2/2021 which application was not before the court before hearing.
  4. The learned magistrate erred in law and fact in considering matters and/or issues that did not lie for determination before the court.
  5. The learned magistrate erred in law and in fact in its application suo moto of the provisions of Section 6 Civil Procedure Act and which was without basis in fact.
  6. The learned magistrate erred in law and fact in finding that there was no response to the respondents’ application dated 3/2/2021.
  7. The learned magistrate erred in law and fact in failing to find that the appellants were non-suited and hence there was no cause of action against them.
  8. The learned magistrate erred in law and fact in having found that the appellants were not the registered owners of the suit property, failed to consequently hold that no cause of action lies against them.
  9. The learned magistrate erred in law and fact in failing to find that the court did not have jurisdiction to hear the suit.
  10. The learned magistrate erred in law and fact in finding that the appellants’ preliminary objection and application dated 14/7/2021 were opposed.
15. The appellants urged this Court to: (i) set aside the ruling of the Honourable G. Omodho delivered on 3/11/2021 at Kiambu in MCELC No. E045 of 2021; (ii) reinstate and set down for hearing and determination on merits, the preliminary objection dated 11/3/2021 and the application dated 14/7/2021; (iii) award costs of this appeal to the appellants; and (iv) grant any other relief it may deem fit.



## Appellants' Submissions

16. The appeal was canvassed through brief written submissions dated 24/2/2023 and supplementary submissions dated 12/9/2023 filed by M/s Kihara & Wyne Advocates. Counsel for the appellants contended that this appeal stood as a matter of right as provided in Section 75 (1) (h) of the Civil Procedure Act and Order 43, rule 1 (a), (b) and (c) of the Civil Procedure Rules, 2010. Counsel added that the appeal fell within the ambit of Order 43 rule 1 (a), (b) and (c), which relate to appeals arising from issues involving parties to a suit, hence leave to appeal was not a requirement.
17. On grounds 1, 2, 7, 8, and 9, counsel for the appellants faulted the respondents for failing to join Prof Waithaka, the registered owner of the suit property, in the suit. Counsel contended that the inhibitory order sought in the plaint affected Prof Waithaka since he was the registered proprietor of the suit property. Counsel relied on Section 25 of the Land Registration Act and the decision in the case of Julius Waweru Maina v Land Registrar Nyeri & Another [2015] eKLR. Counsel further relied on the decisions in the cases of Salim Seif Ambunya Andanje & Another v Alex Jepkoech Yano & Another [2019] eKLR and Kuya Ole Masikonde & 11 Others v The Attorney General [2007] eKLR where the courts held that orders affecting people who were not parties to the suit could issue. Counsel submitted that the respondents were not proprietors of the suit property hence had no legal right over the land. Counsel faulted the trial court for granting the respondents injunctive orders.
18. On grounds 3 and 4, counsel contended that what was before the lower court for determination was the appellants' preliminary objection dated 11/3/2021 and the application dated 14/7/2021. Counsel added that according to the proceedings of 18/8/2021, the trial court directed the parties to canvass the preliminary objection and the application dated 27/10/2021 by way of written submissions and a ruling was reserved for 27/10/2021. Counsel contended that it was trite law that once a preliminary objection is raised in a suit, it ought to be considered instantly. Counsel faulted the trial court for considering and determining the respondents' application dated 3/2/2021 yet it was not before the court for determination.
19. On ground 10, counsel faulted the trial court's finding that the preliminary objection and the application dated 14/7/2021 were opposed. Counsel submitted that the respondents never filed responses to the two items. Counsel further faulted the trial court for its finding that the appellants did not file a response to the respondents' application dated 3/2/2021. Counsel contended that the respondents filed a replying affidavit sworn on 1/3/2021 in opposition to the application. Counsel urged the Court to allow the appeal and grant the reliefs sought in the memorandum of appeal.

## Respondents' Submissions

20. The appeal was opposed through written submissions dated 15/8/2023 and supplementary submissions dated 26/9/2023, filed by M/s Ngonyo Munyua & Company Advocates. Counsel for the respondents identified the following as the issues that fell for determination in the appeal: (i) Whether the respondents opposed the objection; (ii) Whether there was a cause of action against Prof Waithaka; (iii) Whether Prof Waithaka had sound mind to be joined in the suit; and (iv) Whether there was a dispute necessitating preservation of the suit property.
21. On whether the respondents opposed the objection, counsel submitted that the respondents filed a replying affidavit sworn by the 1st respondent and grounds of opposition in opposition to the objection. Counsel added that the court referred to the said replying affidavit at the last page of its ruling.



22. On whether there was a cause of action against Prof Waithaka, counsel submitted that the respondents did not have a cause of action against Prof Waithaka, adding that Prof Waithaka did not attempt to trespass on the land nor attempt to evict DC Gitau or the respondents from the suit property. Counsel further submitted that the cause of action was strictly against the appellants who unlawfully trespassed on the suit property and attempted to evict the respondents from the suit property. Counsel added that the appellants were at liberty to join Prof Waithaka to the suit if they deemed him a necessary party.
23. On whether Prof Waithaka was of sound mind, counsel submitted that Prof Waithaka was mentally infirmed, a fact well known to the appellants, thus he did not have the mental capacity to participate in the court proceedings. Counsel further submitted that the respondents not only informed the lower court that Prof Waithaka was mentally infirmed, but also filed Kiambu High Court O.S No. 4 of 2021 seeking a determination on the mental soundness of Prof Waithaka. Counsel added that the appellants not only consented to the aforementioned suit but also filed Milimani High Court Petition No. HCFCC E012 of 2021 where they beseeched the High Court to find that Prof Waithaka was mentally unsound and therefore a guardian had to be appointed for him. Counsel argued that the High Court (Hon. Lady Justice Nyaundi) subsequently found Prof Waithaka to be mentally infirmed and thus appointed the 2nd appellant as his guardian. Counsel contended that the appeal was an abuse of the court process.
24. On whether there was a dispute necessitating preservation of the suit property, counsel submitted that there was a serious dispute over ownership, use and occupation of the suit property, between the appellants and the respondents. Counsel contended that the suit property ought to be preserved to allow the trial court to hear and determine the dispute. Counsel urged the Court to uphold the ruling delivered by the lower court on 3/11/2021.

### **Analysis and Determination**

25. I have read and considered the original record of the lower court, the record filed in this appeal, the grounds of appeal, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The appellants presented ten (10) grounds of appeal. The following are the key issues that flow from the 10 grounds of appeal that were advanced and argued in this appeal: (i) Whether the lower court erred in considering and disposing the respondents' application dated 3/2/2021; (ii) Whether the lower court erred in finding that there was no response to the respondents' application dated 3/2/2021; (iii) Whether the lower court erred in dismissing the appellants' application dated 14/7/2021 and the respondents notice of preliminary objection dated 11/3/2021; (iv) Whether the lower court erred in failing to find that the appellants were non-suited; and (v) Whether the lower court erred in finding that the preliminary objection and the application dated 14/7/2021 were opposed. I will dispose the five key issues sequentially in the above order. Before I dispose them, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
26. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The Court of Appeal outlined the principle in the case of *Susan Munyi v Kesbar Shiani* (2013) eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”



27. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR 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 re-analyse 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.”

28. Did the lower court err in considering and disposing the respondents’ application dated 3/2/2021? The appellants contended that the application dated 3/2/2021 was not one of the items that fell for consideration and disposal in the impugned ruling. They faulted the lower court for considering and disposing the application through the impugned ruling. For clarity, through the application dated 3/2/2021, the respondents sought interlocutory injunctive orders against the appellants. In their submissions before this Court, the respondents did not address the Court on the question as to whether the application dated 3/2/2021 fell for consideration and disposal through the impugned ruling. They similarly did not address the Court on the question as to whether the lower court had given any disposal directions on the said application.

29. A perusal of the original record of the lower court reveals that the impugned ruling was a culmination of the presentations that were tendered to the lower court by the parties’ advocates on 18/8/2021. The verbatim proceedings and directions of the lower court on 18/8/2021 read as follows:

“ 18/8/2021

Before Hon G Omodho PM

C/A Teresia

Ngonyo for the plaintiff

Nduati for defendant

Nduati: Its application dated 14/6/2021. I seek directions on hearing of application.

Ngonyo: We seek time to file replying affidavit. I seek 21 days to respond.

Nduati: 21 days is long.

G. Omodho

Court: Application on file of 14/6/2021. Plaintiff to file

reply within 14 days. Parties to take directions on hearing on 8/9/2021.

G Omodho

18/8/2021

Nduati: We considered just file response and submissions. There is a also a preliminary objection.

Ngonyo: No objection. We can file submissions. We



will file reply to preliminary objection as well.

Court: Parties to canvass application and preliminary objection together by written submissions. Plaintiff has 21 days to file both replies and submissions. Defendant equally gets 14 days to do submissions. Ruling now fixed on 27/10/2021.

G. Omodho

18/8/2021

30. The subsequent proceedings of the lower court read as follows:

“ 27/10/2021

Before Hon. G. Omodho PM

C/A Teresia

Yatich holding brief for Wanjiku for Defendant/ Applicant

Munyua for plaintiff

Sang for Defendant/applicant

Court: Ruling not ready because of pressure of work.

Ruling to be read on 3/11/2021.

G. Omodho

27/10/2021

3/11/2021

Before Hon. G Omodho PM

C/A Teresia

Munyua for plaintiff

Wanjiku for defendants

Munyua: We are ready to rake ruling

G. Omodho

Court: Ruling delivered virtually

G. Omodho

3/11/2021”

31. It is clear from the above verbatim record of the proceedings of the lower court that the application dated 3/2/2021 was not one of the two items that fell for consideration and disposal in the ruling that was rendered on 3/11/2021. What fell for consideration and disposal in the impugned ruling was the appellants' application said to be dated 14/6/2021 [the correct date of the application was 14/7/2021] and the appellants' preliminary objection dated 11/3/2021. It was therefore wrong for the lower court to consider and dispose the application dated 3/2/2021 through the impugned ruling.
32. A perusal of the lower court record reveals that the appellants opposed the application dated 3/2/2021 through a replying affidavit sworn on 1/3/2021 by Catherine Wambui Karekezi. However, at the time



of the erroneous consideration and disposal of the application, the appellants had not filed written submissions on the application.

33. Given the above circumstances, this court agrees with the appellants that the lower court erred in considering and disposing the application dated 3/2/2021 through the impugned ruling without affording the appellants the opportunity to be heard on the application. The application dated 3/2/2021 did not fall for consideration and disposal in the impugned ruling. This is the finding of the court on the first issue.

34. The second issue is whether the lower court erred in finding that the application dated 3/2/2021 was unopposed. The application dated 3/2/2021 was a plea for interlocutory reliefs. In the second last paragraph on page 3 of the impugned ruling, the lower court rendered itself on the application as follows:

“As noted, the said application is not opposed. It is evident that there is a dispute on the ground that can only dealt [sic] with at full trial whose subject matter herein definitely needs to be preserved.”

35. The above observation was factually incorrect. A perusal of the record of appeal [page 100] and the original record of the lower court reveals that the respondents’ application dated 3/2/2021 was vehemently opposed by the appellants through a replying affidavit sworn on 1/3/2021 by Catherine Wambui Karekezi. The said replying affidavit was served on the respondents’ advocates on 4/3/2021. It was therefore clearly an error on the part of the lower court when it observed that the application dated 3/2/2021 was unopposed and proceeded to consider and dispose it on the basis that it was unopposed. That is the finding of the Court on the second issue.

36. Did the lower court err in dismissing the appellants’ application dated 14/7/2021 and the preliminary objection dated 11/3/2021? The lower court’s entire pronouncement on the preliminary objection dated 11/3/2021 and the application dated 14/7/2021 reads as follows:

“As to the preliminary objection, I will be guided by the much celebrated authority on this sphere of law; *Mukisa Biscuits Manufacturing Limited v West End Distributors* (1969) EA 696 in which the court took the position that a point of law qualifies for a preliminary objection. Ant that the objection has capacity to technically knock out an entire suit. This is the intent of the respondent in the preliminary objection and application dated 14/7/2021 to have the suit to be dismissed for lack *locus* and misjoinder. In the replying affidavit to the preliminary objection there is annexed a power of attorney to the 1st and 2nd defendants. Further there is information before this court that the High Court is also dealing with a question of inquiry into the mental infirmity of the undisputed property owner.

In my view it would be premature to make a determination on the issue of *locus standi* and subsequently dismissing the suit.

For the above reason I will on a balance of convenience allow application dated 3/2/2021 with a view of preserving the status quo of the subject matter dismiss both the preliminary objection as well as application dated 14/7/2021 for now pending the outcome of the soundness of the mind of the legitimate owner of the suit property.”

37. It is clear from the above excerpt of the impugned ruling that the lower court did not consider the merits of both the application dated 14/7/2021 and the preliminary objection dated 11/3/2021. Given that the lower court had decided that the issues raised in the application and in the preliminary objection would await a determination on the mental capacity of Prof Waithaka, the proper order to issue would



have been to defer the ruling to a future date. By dismissing the application and the preliminary objection without considering their merits, the lower court clearly made an error.

38. Did the lower court err in failing to find that the appellants were non-suited? The case of the respondents was that the suit property had been gifted to D C Gitau and that D C Gitau's family had been in occupation of the suit property for many years. The respondents contended that in February 2021, the appellants trespassed onto the suit property and attempted to prevent the 3rd plaintiff from growing mushrooms on the suit property. On their part, the appellants contended that the suit property was still the property of their father [Prof Waithaka] who was still alive at the time the impugned ruling was rendered.
39. The lower court failed to consider and make a merit determination on the issue. Secondly, the errors that the court has outlined render the ruling of the lower court entirely untenable. Given the above circumstances, this court will refrain from making a merit pronouncement on the issue and let the two applications and the preliminary objection be heard afresh and determined by the lower court.
40. Did the lower court err in failing to find that both the preliminary objection and the application dated 14/7/2021 were opposed? A preliminary objection does not require a replying affidavit or grounds of opposition; it only requires submissions. Once submissions are tendered opposing the preliminary objection, the preliminary objection is deemed to be opposed. A perusal of the record of the lower court reveals that the respondents opposed the preliminary objection dated 11/3/2021 through their written submissions [See Part D of the written submission]. To this extent, the preliminary objection was opposed.
41. A party seeking to challenge factual aspects of an application is required to file a replying affidavit to controvert the factual assertions made by the applicant. A party who does not wish to tender controverting evidence has the option to oppose an application through grounds of opposition. A party who has neither filed a replying affidavit nor filed grounds of opposition may, with leave of the court, address the court only on clear points of law that do not require evidence or prior formal notice.
42. Whereas the respondents contended that there was a response to the application dated 14/7/2021, none has been brought to the attention of this court. All that is on record is Part E of the respondents' written submissions. There is, however, no indication that the respondents had been allowed to raise issues in opposition to the application without filing a replying affidavit or formal grounds of opposition as required under the Civil Procedure Rules. To this extent, the lower court erred in finding that the application dated 14/7/2021 was, at that point, properly opposed by the respondents.

### **Disposal Orders**

43. For the above reasons, this appeal succeeds. The impugned ruling dated 3/11/2021 is wholly set aside. The respondents' application dated 3/2/2021; the appellants' preliminary objection dated 11/3/2021; and the appellants' application dated 14/7/2021 shall all be heard afresh by a different magistrate.
44. Given that the errors giving rise to this appeal were committed by the lower court, parties will bear their respective costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 5TH DAY OF JUNE 2024**

**B M EBOSO**

**JUDGE**

In the Presence of: -



Ms Wanjiku for the Appellants

Mr Kuria for the Respondents

Court Assistant: Hinga/Melita

