Roba & 2 others v Huka & 3 others (Environment and Land Appeal E002 of 2023) [2025] KEELC 903 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELC 903 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E002 OF 2023

JO MBOYA, J

FEBRUARY 13, 2025

BETWEEN

GUYO HUKA ROBA ..... 1ST APPELLANT

TADESA MOHAMED ..... 2ND APPELLANT

ROBA ARERO ..... 3RD APPELLANT

AND

SORA GUYO HUKA ..... 1ST RESPONDENT

GUYO OKOLA HARO ..... 2ND RESPONDENT

MICHAEL MALICHA GUYO ..... 3RD RESPONDENT

IBRAHIM ABDI SORA ..... 4TH RESPONDENT

(Being on appeal from the judgment made on the 20th day June 2023 by Hon. Christine Wekesa principal magistrate in the principal magistrate's court Marsabit ELC Civil Suit number E001 of 2020)

JUDGMENT

1. The Respondents herein [who were the Plaintiffs in the subordinate court] approached the court vide Plaint dated 6th October 2020; and wherein same [Respondents] sought for various reliefs. For coherence, the reliefs that were sought at the foot of the Plaint are as hereunder;

    a. A declaration that the defendants' acts of trespass and forceful detainer are illegal and constitute a breach of the plaintiff's proprietary rights as protected by *the constitution* of Kenya.

    b. An order restoring actual possession and exclusive occupation of the suit lands to the plaintiffs as registered and removal of any/all structures made therein at the defendants on costs.

c. An order of Permanent injunction against further or future trespass.

d. An order for general damages for illegal trespass and forcible detainer.

e. Costs of this suit and interests thereon.

2. Upon being served with the Plaint and summons to enter an appearance, the Appellants herein [who were the Defendants] in the subordinate court duly entered appearance and thereafter filed a statement of defence. Notably, the statement of defence is dated 3rd of August 2021; and where in the Appellants denied the claims by and on behalf of the Respondents herein.

3. The suit by the Respondents was heard and disposed of vide Judgment rendered on 20th June 2023; and whereupon the Learned Principal Magistrate found and held that the Respondents [Plaintiffs in the subordinate court] had proved their claim. In this regard, the Learned Principal Magistrate proceeded to and granted various orders, inter alia a declaration that the Appellants herein had trespassed onto the properties belonging to the respondents.

4. Moreover, the Learned Principal Magistrate [Court] also ordered the restoration of actual possession and exclusive occupation of the suit properties to the Plaintiffs. Finally, the trial court decreed an order of permanent injunction and costs in favour of the Respondents.

5. Aggrieved and dissatisfied with the Judgment and consequential decree of the Learned Principal magistrate, the Appellants herein filed the Memorandum of Appeal dated 11th July 2023; and wherein the Appellants have highlighted the following grounds:

i. The learned trial magistrate erred in law and in fact in failing to appreciate that the evidence on record did not support the decision arrived at.

ii. That the Learned magistrate erred in law and fact in ordering the appellants to pay the respondent costs for removal of any/all structures made on the respondent land parcels Marsabit/Jirime/1401, Marsabit/Jirime/1373 and Marsabit/Jirime/1427.

iii. That the learned magistrate erred both in law and fact in allowing the Respondents unsubstantiated and contradictory claims.

iv. That the learned magistrate erred in law and in fact in failing to decide on all issues submitted by the appellant and making a determination against all the weighty evidence tendered by the Appellants.

v. That the Judgment and decree of the principle magistrate's court amounts to a miscarriage of justice.

vi. That the Learned magistrate erred in law and in fact inf ailing to find that the appellants Marsabit/Jirime/1924, Marsabit/Jirime/1331, Marsabit /Jirime/2238 and the respondents Marsabit/Jirime/1401, Marsabit/Jirime/1373 are different and distinct land parcels.

vii. The Learned trial magistrate erred in law and fact by imposing very high and excessive conditions to the appellants against the weight of evidence.

viii. The Learned trial magistrate erred in law and fact by failing to appreciate fully the probative value of the evidence before it and the conduct of the respondents.

ix. That in the circumstances of this case, the finding of the Honourable magistrate was without support either in law or fact.

6. The appeal beforehand came up for directions on 2nd October 2023 whereupon the court [differently constituted] directed that the appeal be canvassed by way of written submissions. In this regard, the court proceeded to and directed that the written submissions be filed and exchanged within set/ circumscribed timelines.

7. The Appellants filed written submissions dated 25th March 2024; whereas the respondent filed submissions dated 11th April 2024. The two [2] sets of written submissions are on record.

8. The Appellants herein raised and canvassed two [2] salient issues, namely; that the Respondents had not proved their claim as pertains to trespass or at all; and that the court was not seized of the requisite jurisdiction to entertain the suit in so far as same [suit] was a boundary dispute and thus ought to have been dealt with in accordance with provisions of Section 18 (2) of *Land Registration Act*, 2012.

9. Regarding the first issue, namely; whether the Respondents had proved their claim against the Appellants, learned counsel for the Appellants has submitted that the Respondents did not place and or tender any plausible/cogent evidence to demonstrate that the appellants had trespassed onto the suit properties or at all. In this regard, it was submitted that the Respondents bore the burden of proving the case of trespass.

10. It was the further submissions by the learned counsel for the Appellants that even though the Respondents tendered and produced evidence showing and demonstrating that same [Respondents] are the registered owners of the suit properties, proof of registration by and of itself does not establish trespass.

11. Additionally, it was submitted that in an endeavor to prove and demonstrate trespass, it was incumbent upon the Respondents to procure and obtain a report by a surveyor and or the land registrar. For coherence, it was posited that several consents were entered into by the advocates for the parties to facilitate visitation to the locus in quo and determination of the boundaries by a surveyor, but the consents were ultimately vacated.

12. Moreover, it was submitted that in so far as there was no survey report or otherwise, the Respondents herein cannot contend that same discharged the burden of proof. In any event, it was contended that both the Appellants and the Respondents have their own separate parcels of land, duly registered and bearing certificate[s] of title.

13. Furthermore, it has also been submitted that even though the Respondents had contended that the persons [mercenaries] who had encroached upon the suit properties were acting on behalf of the Appellants, no evidence was tendered to demonstrate that the alleged mercenaries were indeed agents and or servants of the Appellants.

14. Secondly, learned counsel for the Appellants has submitted that the dispute beforehand touched on and or concerned the boundary between the suit properties and the parcels of land belonging to and were registered in the names of the Appellants.

15. To the extent that the dispute touched on and or concerned the boundary of the suit properties, it was submitted that the Respondents herein ought to have referred the dispute to the Land Registrar for determination in accordance with the provisions of Section 18 (2) of the *Land Registration Act*, 2012.

16. Arising from the foregoing, Learned counsel for the Appellants has invited the court to find and hold that the appeal beforehand is meritorious and thus same [appeal] ought to be allowed.

17. In the alternative, learned counsel for the appellants has submitted that the court ought to order and or direct that the matter be remitted back to the Chief Magistrate's court for purposes of determination of the boundary with the assistance and or intervention of the Land Registrar.

18. The Respondents filed written submissions and same highlighted two [2] salient issues. Firstly, the Respondents contended that the Appellants herein had trespassed upon and or interfered with their [Respondents properties].

19. In particular, it was submitted that the Respondents tendered and produced plausible and cogent evidence to demonstrate that the Appellant[s] had indeed trespassed onto the suit properties, belonging to and registered in the names of the Respondents.

20. Furthermore, it was submitted that the appellants herein had previously filed and or mounted a suit at Meru law courts, namely, Meru ELC No. 2 of 2016; and wherein it was contended that the Respondent's title were illegal and unlawful. In addition, it was submitted that the appellants herein are on record as positing that the Respondendents parcels of land constitute and or comprise of community land.

21. Learned counsel for the Respondents has submitted that having found and held that the Respondents were the lawful and registered owners of the suit properties, the Learned trial magistrate was right in finding and holding that the Respondents had proved their case to the requisite standard. In addition, it was submitted that the orders which were granted by the Learned Principal magistrate were merited and thus ought not to be disturbed.

22. In a nutshell, learned counsel for the Respondents implored the court to find and hold that the appeal beforehand is devoid of merits. Consequently, and in this regard, the court has been invited to dismiss the appeal with costs to the Respondents.

23. Having reviewed the record of the court, including the pleadings that were filed before the trial court; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed by the respective parties, I come to the conclusion that the determination of the instant appeal turns on two [2] salient issues namely; whether the Respondents duly proved their case as against the appellants; and whether the orders that were issued by the trial court are well grounded.

24. Before venturing to analyze the issues, which have been isolated and highlighted in the preceding paragraph, it is imperative to state and underscore that this being a first appeal, this court is mandated to undertake an exhaustive scrutiny, evaluation and analysis of the evidence that was tendered before the trial court and thereafter endeavor to arrive at an independent conclusion/finding. Pertinently, by virtue of being the 1st appellate court, this court is at liberty to differ from the findings and conclusions of the trial court, subject to there being a reasonable and lawful basis for doing so.

25. Put differently, even though the court is at liberty to undertake exhaustive scrutiny and analysis of the evidence tendered and thereafter arrive at an independent conclusion, caution and circumspection must be taken by the court. In any event, it suffices to underscore that the 1st appellate court ought to defer to the findings of the trial court and same [first appellate court] ought only to depart from the findings of the trial court where it is shown/evident that the findings of the trial court were contrary to the weight of the evidence on record; were perverse to the evidence tendered; were/are contrary to known and established legal principles; and where there exist[s] an error of principle, which vitiate[s] the conclusion[s].

26. The extent and scope of the mandate/jurisdiction; or better still, the primary duty of the 1st appellate court, while exercising its statutory powers as a 1st appellate court has been elaborated in a plethora of

decisions. To this end, it is imperative to cite and reference the holding in Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, where Court of Appeal for Eastern Africa [EACA] elaborated on the applicable principle and stated thus;

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

27. Likewise, the extent and scope of the Jurisdiction of the first appellate court was also elaborated upon in the case of Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where the Court of Appeal held thus;

> 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:-
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> > " 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"
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> 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".

28. Duly guided by the principles elaborated upon in the various decisions [supra], I am now disposed to revert to the subject matter and to discern whether the learned trial magistrate correctly appraised, analyzed and evaluated the evidence that was tendered before the court and thereafter arrived at an objective and justifiable conclusion.

29. To start with, there is no gainsaying that the Respondents herein had posited that same [Respondents] are the lawful and registered proprietors of LR No's Marsabit/Jirime/1401; 1373 and 1427, respectively [herein after referred to suit properties]. Furthermore, it is apposite to state that the appellants herein did not contest and or dispute the facts that the Respondents were/are the registered owners of the suit properties.

30. It is also worthy to recall that during the hearing the appellants herein testified and indicated that same have no interests and or claims over the Respondents' parcels of land. Furthermore, the appellants averred that same are the registered owners and proprietors of L.R No's Marsabit/Jirme/1924, 1331 and 2238.

31. Moreover, during the examination in chief of PW 1 [Michale Malicha] stated as hereunder;

> "In their defence, they say they are not interested in my portion of land and that they are occupying theirs. I submit that they don't have any land of theirs within mine. I urge the court to grant the prayers that I am seeking. The land was measuring 18.45.

32. While under cross-examination by learned counsel for the appellants, PW 1 is on record as testifying that Jirime area has no beacons. However, the witness ventured forward and stated that everyone in Jirme area knows where their land is situated.

33. For ease of appreciation, it is apposite to reproduce the testimony of PW 1 verbatim. Same stated thus;

> " I got this land through an adjudication program. Jirme area has no beacons but everyone knows where their land is. I haven't seen any beacon in the whole of Jirme area but it was marked, people were called and shown their respective parcels.

34. It is not lost on this court that the dispute beforehand touched on and concerned trespass. Instructively trespass denotes unlawful, illegal and offensive entry upon and intrusion onto the land of another, albeit without the consent or permission of the owner. Notably, for there to be trespass, the claimant must not only demonstrate ownership or title to the designated land but must go further and prove that there is offensive entry. Pertinently, it is the entry or unlawful activity on the land, without the consent of the owner that underpins trespass.

35. The Court of Appeal in the case of Church Commissioners for Kenya of the Anglican Church of Kenya v Wayuga (Civil Appeal 111 of 2018) [2024] KECA 1048 (KLR) (16 August 2024) (Judgment); spoke to and highlighted the meaning and tenor of what constitutes trespass.

36. For coherence, the Court stated thus;

> 53. Trespass is described under the *Trespass Act* Cap 294 to mean "any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof".
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> On the other hand, a continuing trespass is defined in Jowitt's Dictionary of English Law 2nd Edition (page or paragraph?) as follows:-
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> "A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor's land".
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> In Black's Law Dictionary 8th Edition (page or paragraph?), a continuing trespass is defined as:-
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> > "A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property."
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> Finally, in Clerk & Lindsel on Torts 16th Edition, paragraph 23 - 01, it is stated that:-
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> > "Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues."
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> 54. From the above definitions of the term "trespass" by the eminent learned authors, it is clear that any unauthorized entry whether present or continuous is trespass. In this case, it is indeed common ground that the appellant entered into and has remained in occupation of the suit

property. The appellant's continued occupation of the said property from the 1st date of entry in so far as it is unauthorized by the respondent amounts to trespass and remains as such to date. The respondent's claim for trespass being a continued tort is, therefore, not time-barred. We find no fault with that finding by the trial court".

37. Flowing from the definition supplied in the decision [supra], there is no gainsaying that the Respondents were called upon to not only prove that same were the registered owners of the suit properties but that the appellants had indeed entered upon [invaded] and trespassed onto the suit properties.

38. Did the Respondents prove illegal and unlawful intrusion onto the suit properties? To my mind, the totality of the evidence that was tendered and placed before the court did not establish and or prove the incidence of trespass.

39. Moreover, it is worthy to recall that the Respondents herein had contended that the trespass complained of was perpetrated by agents [mercenaries] on behalf of the appellants. Furthermore, the Respondents had posited that arising from the offensive actions perpetrated by the defendants' mercenaries, the mercenaries were arrested and charged vide Marsabit SRM Criminal Case No. 334 of 2020.

40. Nevertheless, there is no gainsaying that other than the postulation and statements contained in the body of the Plaint, the Respondents herein did not tender and or adduce any evidence to connect [sic] the mercenaries; if any, to the appellants herein. Suffice it to state that it is not enough to make an allegation and throw same on the face of the court believing that the mere allegation would suffice.

41. At any rate, it is also important to state that during the cross-examination of PW 1, same conceded and acknowledged that none of the appellants had been charged with any offence either of trespass, forcible entry and or detainer.

42. For good measure, PW 1 stated as hereunder;

> " If you say none of those defendants were there, I would say those people attacked us while in the group. I had a friend who would recognize him. Guyo Roba wasn't charged. The 2nd defendant has not been charged. The 3rd defendant has not been charged in that case but Guyo Huka has attacked me severally".

43. To my mind, if the appellants herein [who were the defendants in the subordinate court] were responsible for the purported mercenaries, who entered upon the Respondents' parcels of land, same [appellants] ought to have been arrested. Furthermore, if for any reason the appellants were not arrested then the Respondents herein had a lawful basis to escalate their complaints to the Inspector General of Police or such other security agency for appropriate action.

44. Additionally, it is also important to underscore that the Respondents and the appellants herein entered into several consents and wherein same [parties] had required the land registrar, Marsabit County to visit the locus in quo and to file a report. However, the various consents including the one recorded on the 8th June 2022, were subsequently vacated and the parties agreed to proceed with the hearing.

45. Pertinently, the entry into and adoption of the consent[s] were intended to facilitate the determination of the ground location of the suit properties vis-a -viz the properties owned by the appellants. In addition, the purpose of the visitation was to discern whether there was trespass or otherwise.

46. I have said that the consent[s] orders were subsequently vacated. In this respect, the court was never availed any report to show the ground location of the suit properties and whether there was any trespass and if so, by whom?

47. In my humble view, the report by the land registrar or by the county surveyor [whichever is applicable], would have gone a long way in helping the Respondents to prove their case. The absence of such a report militates against proof of trespass.

48. Suffice it to state that it was the Respondents who had contended that the appellants had trespassed onto the suit properties. In this regard, it was the Respondents who bore the burden of proof, namely proving, that the appellants had trespassed. [see Sections 107, 108 and 109 of the *Evidence Act* Cap 80 Laws of Kenya].

49. The legal position that the claimant must discharge the burden of proof beforehand has been amplified and elaborated upon in various decisions. Suffice it to cite and reference the decision of the Supreme Court [the apex Court] in the case of Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment) where the court stated as hereunder;

> 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."
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> 50. This Court in Raila Od*inga & 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...."
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> 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.

50. The incidence of burden of proof and on whom same lies was also articulated by the Court of Appeal in the case of Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi (2014) eKLR, where the court stated thus;

> 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.

51. Arising from the settled position of the law, it was not enough for the learned trial magistrate to throw caution to the wind and merely state thus;

> " Having proved ownership, the plaintiffs have the right to possession, occupation and use of the suit land, the plaintiffs availed evidence to show that the defendants through their mercenaries and other people acting on their behalf have trespassed and illegally taken possession of the plaintiffs land and they are utilizing the land for their own benefits. These actions on the part of the defendants amount to violation of the plaintiffs' rights as guaranteed in *the constitution* and must be stopped.

52. The analysis and or observations, [which have been reproduced in the preceding paragraphs] are at variance with the evidence on record. For clarity, no evidence was tendered to connect the alleged mercenaries and [sic] other people to the appellants herein. Quite clearly, the learned trial magistrate was proceeding on the basis of hypothesis and not on the basis of the evidence tendered by the parties.

53. Other than the foregoing exposition of the law, it is also not lost on this court that the learned trial magistrate misconceived and misapprehended the burden of proof and on whom same [burden of proof] lay.

54. To this end, it is important to reproduce yet another aspect of the impugned Judgment of the learned trial magistrate.

55. Same stated as hereunder;

> " In this case, the defendants have relied on assertions without providing proof, ironically, they had the opportunity of doing so and solving this dispute once and for all in their own words. They recorded several consents to have the land registrar and land surveyor visit the site and compile their respective report, these consents were adopted severally and the defendants kept on adjourning and eventually announced that they had abandoned the above, this is as per the proceedings of 28th February 2023; and in a strange twist of event, the defendants hit out at the plaintiffs for frustrating the entire process.

56. With respect, it is apposite for the learned principal magistrate to re-engage with and internalize the provisions of 107, 108 and 109 of the *Evidence Act*, Chapter 80, Laws of Kenya. Suffice it to underscore that a proper construction and interpretation of the said provisions, would have enabled the Learned Principal Magistrate to appreciate that the burden of proof lay on the Plaintiffs [Respondents herein] and not otherwise.

57. Nevertheless, it is evident that the manner in which the learned principal magistrate dealt with and addressed the disputes, blinded his/her judicial mind and thus culminated into the erroneous conclusion. The conclusion by the trial court constitutes a grave misapprehension of the principles of law and in particular, the person[s] chargeable with the burden of proof.

58. Next is the issue as to whether the Respondents were entitled to the reliefs that were impleaded at the foot of the Plaint. Pertinently, the Respondents had sought for a declaration that the Defendants [now, the Appellants] had trespassed onto the suit properties and that the trespass complained of constituted a breach of the Respondent's proprietary rights as protected by *the constitution* of Kenya.

59. Barring repetition, it suffices to recall and reiterate that while addressing the 1st issue, this court has found and held that the Respondents did not place before the court plausible and cogent evidence to demonstrate trespass. Simply put, no trespass was proven and or established.

60. In the absence of proof of trespass, as known to law, the declaration that the Defendants [who are the Appellants herein] had trespassed onto the suit properties, was arrived at and made in vacuum.

61. Other than the prayer for a declaration that the Defendants had trespassed onto the suit property, which prayer was granted; the learned trial magistrate also ventured forward and granted an omnibus order namely; an order restoring actual possession and exclusive occupation of the suit lands to the Plaintiffs as registered and removal of any/structures made therein at the Defendant's costs.

62. Surely, one would ask how would such an order be implemented and by whom? In addition, there is also the question as to whether the omnibus order references eviction and if it does, how the same was to be actualized. Furthermore, there is also the question as to the costs and how such costs were to be ascertained.

63. Without belaboring the point, I beg to state that courts, the trial court herein not excepted, ought and should issue orders which are capable of implementation, enforcement and or execution. Such clarity will serve the ends of justice. Such clarity shall also mitigate unnecessary and multiple applications being filed by the parties.

64. Nevertheless, I am afraid the order under reference was also issued without any legal/lawful basis. In any event, it appears that the issuance of the order under reference was induced by sympathy; if not empathy.

65. Finally, the trial court ventured forward and granted an order of permanent injunction. In appropriate cases and upon proof of trespass, a court of law is obligated to decree an order of permanent injunction. [see the case of Kenya Power and Lighting Co. Ltd vs Sharrif Molana Habib (2018) eKLR; See Moya Drift farm Ltd vs Theuri (1973) E.A 173 and See Mohanson [K] Ltd vs The Registrar of Titles (2017) eKLR. However, in respect of the instant matter, no evidence had been tendered to demonstrate trespass. In the absence of trespass, the order of permanent injunction was misconceived and legally untenable.

Final Disposition

66. From the analysis [details highlighted in the body of the judgment] it must have become evident that the learned trial magistrate failed in her/his duty to appraise and evaluate the evidence that was tendered by the parties. Furthermore, it is evident that the conclusions and findings that were arrived at by the trial court were contrary to and at variance with the weight of evidence tendered.

67. Inevitably, I come to the conclusion that the appeal beforehand is meritorious. Consequently, and in the premises, the appeal be and is hereby allowed on the following terms:

    i. The Judgment of the trial court dated 20th June 2023; be and is hereby set aside.

    ii. The Respondents suit in the subordinate court be and is hereby Dismissed.

    iii. The Appellants be and are hereby awarded costs of the Appeal.

    iv. The Appellants be and are hereby awarded costs in the subordinate court.

    v. That the Costs in terms of clauses [iii] &[iv] above, shall be taxed in the conventional manner.

68. It is so ordered.

DATED SIGNED AND DELIVERED ON THE 13TH DAY OF FEBRUARY, 2025.

OGUTTU MBOYA

JUDGE.

In the presence of .

Mr. Mutuma – Court Assistant

Mr. Nelko Misati for the Appellants.

Mr. Kaumbi for the Respondents.