



REPUBLIC OF KENYA



**KENYA LAW**  
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**Boru v Adan (Environment and Land Appeal E002 of 2023)  
[2025] KEELC 1429 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1429 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT AND LAND APPEAL E002 OF 2023**

**JO MBOYA, J  
MARCH 20, 2025**

**BETWEEN**

**BONAYA BORU ..... APPELLANT**

**AND**

**HASSAN ISSACK ADAN ..... RESPONDENT**

**JUDGMENT**

1. The Respondent herein [who was the Plaintiff in the subordinate court] approached the court vide Plaintiff dated the 8<sup>th</sup> October 2018 and wherein the Respondent sought for various reliefs. The Plaintiff under reference was subsequently amended culminating into the amended Plaintiff dated the 14<sup>th</sup> April 2021 and wherein the Respondent [who was the Plaintiff in the subordinate court] sought for the following reliefs;
  - i. An order of Eviction of the Defendant, his agents, employees, assigns or anyone acting at his behest from the suit property known as plot number 1176 Chechelesi C and demolition of the Defendant's structure constructed thereon.
  - ii. An order of Permanent injunction restraining the Defendant, his agents, servants, employees and whomsoever acting on his behalf or instructions from collecting rent from tenants and occupants of rooms and houses situated on the suit property and or trespassing onto, cultivating, fencing, developing or in any way interfering with the Plaintiff's quiet possession of the suit property known as land parcel number 1176 Chechelesi C.
  - iii. Costs and interests of the suit.
2. Upon being served with the amended Plaintiff, the Appellant herein [who was the Defendant in the subordinate court] filed an amended statement of defence. However, the amended statement of defence was undated.



3. The suit by and on behalf of the Respondent was heard and disposed of vide judgment rendered and delivered on the 31<sup>st</sup> January 2023 and whereupon the learned chief magistrate [the trial court] entered judgment in favour of the Respondent as sought for in the amended Complaint, save that each party was ordered to bear own costs of the suit.
4. Aggrieved by and dissatisfied with the judgment and decree of the trial court, the Appellant filed the memorandum of appeal dated the 7<sup>th</sup> February 2023 and wherein the Appellant has highlighted the following grounds of appeal;
  - i. That the learned Magistrate erred in law when she failed to find that the Respondent did not prove his case to the required standard, which is on the balance of probabilities.
  - ii. That the learned Magistrate erred in law by failing to find that failure by the Respondent to pay allotment and registration fee for the allotted plot No. C-1176 CHECHELESI C, within 30 days as provided for, the said Plot was forfeited back to the defunct Council of Isiolo for reallocation.
  - iii. That the learned Magistrate erred in law and fact by failing to consider the testimonies of the two Appellant's/Defendant's witness to wit DW-2 and DW-3 (an expert witness) present before the Honourable Court.
  - iv. That the learned Magistrate erred in law by failing to consider the fact that the Appellant is the legal bona-fide owner, in occupation and possession of plot No. 859 Kambi Garba East.
  - v. That the learned Magistrate so misdirected herself on matters of law and fact as to occasion a miscarriage of justice against the Appellant.
  - vi. That in light of the foregoing the learned Magistrate failed to do justice before her in the case at hand.
5. The appeal beforehand came up for directions on the 13<sup>th</sup> May 2024 whereupon the parties covenanted to canvass and dispose of the appeal by way of written submissions. To this end, the court ordered and directed that the written submissions be filed and exchanged within circumscribed timelines. For good measure, the parties duly proceeded to and filed their respective written submissions.
6. The Appellant raised and canvassed two [2] salient issues, namely; that the learned trial magistrate misconceived and misapprehended the totality of the evidence tendered by the parties and therefore arrived at an erroneous conclusion that the suit property lawfully belonged to the Respondent; and that the learned magistrate erred in proceeding to and decreeing that the suit property belongs to the Respondent even after finding that the Respondent did not pay the requisite charges within the 30 day period contained at the foot of the resettlement letter.
7. Regarding the first issue, learned counsel for the Appellant submitted that the learned trial magistrate erred in law and fact in finding and holding that the Respondent had proved his claim to and in respect of plot number 1176 Chechelesi, within Isiolo County, yet the Respondent neither tendered nor produced any letter of allotment.
8. Furthermore, it was submitted that the Respondent herein did not demonstrate that same was ever allocated the suit property or at all. In the absence of a letter of allotment, learned counsel for the Appellant has submitted that the decision by the chief magistrate was arrived at and/or reached in vacuum.



9. Secondly, learned counsel for the Appellant has submitted that having found and held that the Respondent did not pay the statutory levies highlighted at the foot of the resettlement letter and that the allotment of the suit plot was forfeited back to the county council of Isiolo, the learned chief magistrate erred in proceeding to decree that the suit property belongs to the Respondent.
10. Finally, learned counsel for the Appellant, has also submitted that the learned trial court erred in law in finding and holding that the Appellant had trespassed onto and or encroached upon the suit property, even though the Appellant had demonstrated that same [Appellant] was the lawful owner of plot number 859 Chchelesi. In addition, it was averred that the learned chief magistrate also ignored the documentary exhibits which had been tendered by the Appellant to demonstrate that the disputed grounds, which was being claimed by the Respondent constituted/comprised of plot number 859 Chchelesi and not otherwise.
11. Arising from the foregoing, it has been submitted that the judgment and the consequential decree of the chief magistrate is wrought with and replete of errors of omission and commission. To this end, the Appellant has implored the court to find and hold that the Appeal is meritorious and thus ought to be allowed.
12. The Respondent filed written submissions dated the 16<sup>th</sup> January 2025 and in respect of which the Respondent has highlighted four [4] issues, namely, that the Appellant has not demonstrated that the learned chief magistrate committed an error in evaluating the totality of the evidence that was tendered and produced; that the failure by the Respondent to pay the statutory levies at the foot of the resettlement letter did not vitiate the allotment of the suit plot; that the Appellant did not prove that same was duly allocated the suit property and finally that the learned chief magistrate arrived at a correct finding that the Respondent was the owner of the suit property, which had been trespassed upon by the Appellant.
13. Respecting the first issue, learned counsel for the Respondent has submitted that the Respondent tendered and placed before the trial court plausible, credible and believable evidence which demonstrated that the Respondent was duly allocated the suit property.
14. Furthermore, learned counsel for the Respondent has submitted that the totality of the evidence that was tendered by the respondent proved the Respondent's claim to an extent of 80%, which surpassed the balance of probabilities.
15. Secondly, learned counsel for the Respondent has submitted that though the Appellant had contended that the trial magistrate did not properly evaluate and take into account the evidence of DW2 and DW3, respectively, the Appellant has failed to demonstrate how the said evidence would have changed the clear findings of the trial court that the suit property belongs to the Respondent.
16. Thirdly, learned counsel for the Respondent has submitted that even though the Respondent failed to pay the statutory levies highlighted at the foot of the resettlement letter dated the 24<sup>th</sup> May 2005, the statutory levies were subsequently paid and same were duly accepted and received by the county council of Isiolo [now defunct]. In this regard, it has been posited that the acknowledgement of and subsequent issuance of receipts by the county council of Isiolo [now defunct] was sufficient to remedy the default.
17. Moreover, it was submitted that the mere fact that the statutory levies were paid outside the statutory duration, does not by and of itself negate the validity of the resettlement letter which was issued in favour of the Respondent.



18. To this end, learned counsel for the Respondent has cited and referenced the decision in the case of *Golicha Roba Toto v Zainabu Abdikadir & Another* [2021]eKLR, where it is contended that the court stated that the payment of the standard premium and other levies outside the stipulated timeline is capable of remedying the default. In this regard, the court was implored to find and hold that the acceptance of the payments by the county council of Isiolo [now defunct] was sufficient in the circumstances.
19. Finally, learned counsel for the Respondent has submitted that even though the Appellant herein contended to have been allocated plot number 859 Chechelesi; the documentation which were being relied upon by the Appellant were issued in the year 2010 and thereafter. In this regard, it has been submitted that the said documentation being relied upon by the Appellant cannot defeat the allotment in favour of the Respondent which was made in the year 2005.
20. Additionally, it has also been submitted that even though the Appellant has also contended that same [Appellant] is the one in possession of the suit property, it is imperative to note that it is the impugned occupation and possession of the suit property which underpins the filling of the suit before the subordinate court.
21. In a nutshell, learned counsel for the Respondent has submitted that the learned chief magistrate correctly evaluated and analysed the evidence that was presented before her and thereafter arrived at a correct conclusion. To this end, learned counsel for the Respondent has posited that the actions by the Appellant constitutes and amount[s] to trespass.
22. Arising from the foregoing, learned counsel for the Respondent has invited the court to find and hold that the appeal beforehand is devoid of merits and thus same [appeal] ought to be dismissed with costs to the Respondent.
23. Having reviewed the record of appeal; the pleadings that were filed by the parties before the subordinate court; the totality of the evidence [both oral and documentary] and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the instant appeal turns on two [2] salient issues, namely,
  - i. Whether the Respondent established and demonstrated that same was the owner/proprietor of plot number 1176 Chechelesi C [suit property] or otherwise.
  - ii. Whether the Respondent proved trespass by the Appellant or otherwise.
24. Before venturing forward to analyse and consider the issues which have been highlighted in the preceding paragraph, it is imperative to state that this being a first appeal, this court is conferred/ vested with statutory mandate and jurisdiction to undertake exhaustive scrutiny, analysis, appraisal and evaluation of the totality of the evidence that was tendered before the trial court and thereafter come to an independent conclusion subject to the evidence on record.
25. Pertinently, the statutory mandate and jurisdiction is circumscribed by the provisions of Section 78 of the *Civil Procedure Act*. For coherence, the provisions of Section 78 of the *Civil Procedure Act* [supra] states as hereunder;
  78. Powers of appellate court
    - (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
      - (a) to determine a case finally;



- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require the evidence to be taken;
- (e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

26. Despite the fact that this court being the first appellate court is conferred with the mandate and jurisdiction to undertake exhaustive scrutiny, analysis and appraisal of the evidence placed on record and despite the jurisdiction that the court is at liberty to arrive at an independent conclusion, there is no gainsaying that the court is only called upon to depart from the factual findings of the trial court when such findings are contrary to the weight of the evidence on record or better still, perverse to the evidence on record.
27. Additionally, there is no gainsaying that in its endeavour to depart from the factual findings and or conclusion of the trial court, the court must exercise due caution and circumspection. In any event, it is worth reiterating that the 1<sup>st</sup> Appellate court must take into account that same [appellate court] did not have the occasion to see and/or watch the witnesses testify.
28. Simply put and taking into account the provisions of Section 78 of the *Civil Procedure Act* [supra], it is common ground that the jurisdiction of the first appellate court is statutorily circumscribed and thus first appellate court must operate within the circumscribed circumferences. That however, does not mean that the first appellate court must rubberstamp erroneous factual findings [if any] by the trial court.
29. Suffice it to state that the scope and extent of the jurisdiction of the first appellate court has received judicial pronouncement in a number of decisions. Furthermore, the parameters and demarcations that guide the first appellate court are now well settled.
30. 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...”
31. 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:-

“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:

“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”.

32. Having taken cognizance of the principles espoused vide the various decisions referenced in the preceding paragraph[s], it is now apposite to revert to the subject matter and address the legal issues that were highlighted and adverted to herein before.
33. Regarding the first issue, namely; whether the Respondent established and demonstrated that same was the owner/proprietor of plot number 1176 Chechelesi C [suit property] or otherwise, it is important to underscore that the suit in the subordinate court was filed by the Respondent. For good measure, it is the Respondent who contended that same was the lawful owner and/or proprietor of the suit property. To this end, the burden of proof laid on the shoulders of the Respondent and not otherwise. [See the provisions of Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya].
34. Moreover, it was incumbent upon the Respondent to place before the trial court plausible, cogent and credible evidence to prove ownership. In fact, the Appellant herein would only be called upon to rebut the evidence tendered by the Respondent upon the Respondent discharging the evidential burden in the first place and not otherwise.
35. To buttress the foregoing exposition of the law, it suffices to 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;
  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 1<sup>st</sup> respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1<sup>st</sup> 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 1<sup>st</sup> respondent.

36. In the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, the Court of Appeal addressed the question of burden of proof; and stated as hereunder;

In that regard, to prove or disprove a matter of fact, a claimant bears the burden of proof as stated in sections 107, 108 and 109 of the *Evidence Act*, as follows;

“ 107

- (1) 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.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either said.

109. 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 be on any particular person.”

In these proceedings and particularly the claim that the appellant sold off properties of three companies to the detriment of the 1<sup>st</sup> respondent, the three provisions reproduced above require that the 1<sup>st</sup> respondent who laid the claim that certain facts existed had the burden to prove existence of those facts. It is no matter that the appellant did not refute the claim by way of a replying affidavit. The 1<sup>st</sup> respondent was still bound to lay evidence on a balance of probability of the alleged facts before the learned judge. The 1<sup>st</sup> respondent claimed that there were three companies in which he, the appellant and others held shares. Each of those companies owned the properties stated in the petition. That the appellant sold off those properties and had them accordingly transferred and as a result the 1<sup>st</sup> respondent suffered loss and damage.

In our view we think that the facts to be proved required documentary evidence. The 1<sup>st</sup> respondent ought to have produced the certificates of incorporation of the three companies together with their respective Articles and Memoranda of Association, the names and addresses of the shareholders, the shareholding of each, and documents of title to show that each of those companies owned parcels of land as pleaded. Evidence that the properties were sold, to who, at what consideration and when the sales took place, ought to have been adduced. By that or such evidence as the learned judge should have required, the 1<sup>st</sup> respondent would have been on his way to prove existence of facts to satisfy the court that indeed those facts existed. That was his burden. He did not discharge it.

On perusing the judgment and hearing Mr. Mwangi, what comes through clearly and was repeated several times over, was the position that since the appellant did not deny the facts stated in the affidavits of the 1<sup>st</sup> respondent then he was deemed to have admitted those facts.



With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1<sup>st</sup> respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the Evidence Act to be demanding of a party like the 1<sup>st</sup> respondent that:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.” [Emphasis supplied].

That he did not do. The claim he put forth that three limited liability companies existed, they had shareholders including himself, each holding a certain percentage of shares, were not proved. The claim that those companies held certain properties which were sold and transferred was also not proved. Accordingly, the learned judge fell in error to assume that those facts indeed existed.

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.

37. Bearing the foregoing in mind, it is now apposite to return to the subject matter and to discern whether the Respondent tendered credible evidence before the subordinate court and indeed proved his [Respondent's] claim to and in respect of the suit property.
38. It is worthy to recall that the Respondent herein testified and thereafter called one witness, namely, Cheruyiot Kimutai [PW2]. During his testimony, the Respondent tendered and produced various documents at the foot of the list and bundle of documents dated the 20<sup>th</sup> June 2021.
39. Other than the foregoing, the Respondent herein averred that same was issued with a resettlement letter dated the 24<sup>th</sup> May 2005. For good measure, the resettlement letter was tendered and produced as exhibit P2. It was the further testimony of the Respondent that pursuant to the resettlement letter same [Respondent] was obligated to pay the sum of kes.4, 400/= only within 30 days.
40. Moreover, the Respondent testified that same did not pay the monies adverted to at the foot of the resettlement letter within the stipulated period. Nevertheless, it was the further testimony of the Respondent that same paid the monies in question outside the stipulated period and that the payments were duly accepted and receipted by the county council of Isiolo [now defunct].
41. Other than the foregoing, the Respondent herein also conceded that despite having been issued with the resettlement letter same [Respondent] was never issued with a letter of allotment over and in respect of the suit property.
42. On the other hand, PW2; namely, Cheruyiot Kimutai testified and produced a survey report before the court. However, whilst under cross examination PW2 conceded that though same prepared the survey report, same PW2 was not certain of the date when he visited the locus in quo.
43. Perhaps, it is expedient and appropriate to reproduce the evidence of PW2 whilst under cross examination by learned counsel for the Appellant.



44. Same [PW2] testified as hereunder;

“I prepared the report. I did conduct scene visit. I am not certain that I visited the scene. I am not sure that I did so. The report does not indicate the date of scene visit. I cannot tell who was present at the scene. The parties were aware of the scene visit. I did consult the defence counsel but I have no proof. It was verbal communication. I did not consult the defence counsel about the scene visit. I did not confirm about counsel for the Plaintiff. we were only to file our findings. Chechelesi and Kambigarba neighbor each other. My finding have not captured the geographical area of the plot. I do not know who resides on the plot”.

45. Suffice it to state that the Respondent’s case was premised and anchored on the evidence of only two witnesses, namely; the Respondent himself [PW1] and Cheruyiot Kimutai [PW2].

46. From the testimony on record, three perspectives arise and which are pertinent in determining whether the Respondent duly proved his claim of ownership of the suit property or otherwise.

47. Firstly, the Respondent herein had posited that same was duly allocated the suit plot by the county council of isiolo [now defunct]. To this end, it was incumbent upon the Respondent to tender and produce before the court a copy of the letter of allotment [if any] that was issued by the county council of isiolo [now defunct].

48. However, it is common ground that no letter of allotment was ever tendered and/or adduced by the Respondent. In this regard, it is difficult to understand how the learned trial magistrate came to the conclusion that the Respondent was duly allocated the suit plot. Instructively, such a finding could only have been made if and only if, the Respondent had tendered and produced the letter of allotment.

49. The second perspective which does arise relates to the fact that the Respondent herein tendered and produced two documents namely, a notification of displacement by the airport dated the 1<sup>st</sup> march 2005 and the resettlement letter dated the 24<sup>th</sup> may 2005. Nevertheless, it is worth recalling that the resettlement letter, which underpins the Respondent’s claim was time bound.

50. For ease of appreciation, it is apposite to reproduce the contents of the resettlement letter dated the 24<sup>th</sup> May 2005.

51. The contents are reproduced as hereunder;

Re: Resettlement Of Those Affected By The Expunction Of Isiolo Airstrip.

Following your successful balloting on the 18<sup>th</sup> May 2005, I am pleased to inform you that your plot number is C-1176.

You are now required to pay the following fees;

- i. Administration fees.....1000
- ii. Plot rent for the year 2005.....400
- iii. Demarcation fees.....3000

The above fees can be paid immediately or within 30 days from the date of this letter failure to which the plot shall be forfeitated back to the council for re-allocation.

52. From the special stipulation[s] contained at the foot of the resettlement letter, it is evident that if the allottee [Respondent] did not comply with the timelines, then the allotment in question lapsed and the plot under reference reverted to the county council for re-allocation.



53. During the hearing, the Respondent herein testified and acknowledged that same did not pay the statutory levies adverted to at the foot of the resettlement letter. Nevertheless, the Respondent ventured forward and stated that same made the payments albeit outside the stipulated timeline.
54. According to the Respondent, the payments were received and acknowledged by the county council of Isiolo [now defunct]. In this regard, the Respondent opined that receipt of the said payments sufficed.
55. Indeed, the learned trial magistrate appears to have believed the testimony and position taken by the Respondent. Thereafter, the learned trial magistrate proceeded to and returned a finding that the Respondent was the lawful owner and/or proprietor of the suit property.
56. Be that as it may, it is important to underscore that the resettlement letter dated the 24<sup>th</sup> May 2005 was in the nature of an offer. Furthermore, the offer in question was time bound. In this regard, the allottee thereof, namely, the Respondent herein was obliged to comply within the set timeline, which was not the case.
57. Suffice it to state that upon the failure to comply with the set timelines, the offer in question lapsed and thus same could not [sic] be acted upon ex post facto. The offer in question was dead and no amount of payments after the lapse of the circumscribed timeline could reinstate the lapsed offer.
58. In this respect, it is important to adopt and reiterate the decision of the Court of Appeal in the case of *Waterfront Holdings Limited v Kandie & 2 others (Civil Appeal 88 of 2019) [2023] KECA 1223 (KLR) (6 October 2023) (Judgment)*, where the court held and observed as hereunder;

“54. From the foregoing, the legal position is not that once issued, the letter of allotment lasts indefinitely. There must be an acceptance of the offer to allot the land by the allottee fulfilling the conditions specified for the said allotment. To that extent, we associate ourselves with this Court’s decision in *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR which express the general law in contractual matters. “It is elementary learning that for there to be a contract, there has to be an acceptance of an offer on the same terms of the offer and such acceptance must be unconditional, unequivocal and absolute, accompanied by consideration.”

59. Moreover, the legal position that payment of the stand premium and/or statutory levies made after the lapse of the timeline does not revive the terms of the letter of offer was also adverted to in the case of *Dr. Syedna Mohammed Burhannuddin Saheb & 2 others vs Benja Properties & 2 others* [2007] eKLR;

“In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for Defendant’s argument, that the expired letter, when acted upon, had been “revived” through conduct. The letter had expired. It was dead. There was nothing to “revive”.

60. Finally, it is also important to take cognizance of the decision of the Supreme court of Kenya in the case of *Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)*, while dealing with the issue, expressed itself as hereunder:

62. Back to the facts of this case, the Allotment Letter issued to Renton Company Limited was subject to payment of stand premium of Kshs. 2,400,000.00, annual rent of Kshs. 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited



would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.

61. The third and last perspective relates to the part development plan [PDP] which was also tendered and relied upon by the Respondent. Suffice it to state that though the Respondent contended that same was allocated the suit plot [sic] on the 24<sup>th</sup> May 2005, the impugned PDP which was availed by the Respondent is said to be dated the 23<sup>rd</sup> December 2014. Furthermore, there is no gainsaying that the PDP is neither approved nor dated on behalf of the approving authority.
62. Moreover, it is also worthy to recall that the impugned PDP does not bear on the face the approved PDP Number or at all. In this regard, there is no gainsaying that the PDP is incomplete, deficient and devoid of the requisite authentication.
63. Notwithstanding the foregoing, it is pertinent to state that a PDP is a preliminary document and which ordinarily precedes the issuance of the letter of allotment. For coherence, the PDP is the document which confirms the availability or otherwise of the plot or parcel of land which is intended to be allocated.
64. As pertains to the role of a PDP and its place in the process of allotment of land, it suffices to reference the decision of the supreme court in the case of *Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment) Neutral citation: [2023] KESC 30 (KLR)*, where the court stated thus;

104. The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in *Nelson Kazungu Chai & 9 others v Pwani University [2014] eKLR* as follows: "...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013* where Njagi J held as follows:

"Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed..."



105. This process is restated in *African Line Transport Co Ltd v Attorney General*, Mombasa, HCCC No 276 of 2003 [2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot.
106. We note that the suit property was allocated to HE Daniel T Arap Moi who was not a party to the suit. The 2<sup>nd</sup> to 6<sup>th</sup> respondents on the other hand at the trial court in the replying affidavit of Gordon Odeka Ochieng in response to ELC Petition 12 of 2017 stated that certain documents that were required to support the allocation of the suit property to HE Daniel T Arap Moi were missing. These were, “the letter of application addressed to the Commissioner of Lands seeking to be allocated the suit land; and a Part Development Plan (PDP) showing the suit property in relation to the neighbouring parcels of land.”
107. We are careful to note that this court has no jurisdiction to revisit the factual findings of the superior courts, and we are limited to the court’s jurisdiction under article 163(4)(a) in this case. It has not been disputed that indeed there was no evidence produced of the letter to the Commissioner of Lands seeking allocation of the suit property by the first registered owner, and there was no PDP before the survey was done. We therefore agree with the trial court and the appellate court that the allocation of the suit property to HE Daniel T Arap Moi was irregular.
65. Arising from the foregoing analysis, I am obliged to depart from the factual finding by the learned trial magistrate which found and held that the Respondent was the lawful owner of the suit plot. Instructively, the finding by the learned trial magistrate was arrived at without due regard to the established position of the law. In any event, there is no gainsaying that the learned trial magistrate failed to properly interrogate the totality of the evidence that was tendered by the Respondent.
66. Respecting the second issue, namely, whether the Respondent proved that the Appellant had trespassed onto and/or encroached upon the suit plot, it is important to posit that trespass constitute[s] the unlawful invasion and intrusion onto the land of a third party without lawful consent and/or permission of the third party [owner].
67. Pertinently, before a claimant can venture forward to prove unlawful intrusion/ invasion onto a designated land, the claimant must demonstrate and prove ownership. For good measure, ownership of the designated land is a precursor to proving trespass. In this regard, a claimant cannot be heard to complain against trespass over and in respect of a property that does not belong to him [claimant].
68. Having found and held that the Respondent did not prove ownership to and in respect of the suit property, the question that does arise is whether the Respondent’s claim of trespass was proved or otherwise.
69. To my mind, the answer as to whether the Respondent proved trespass is in the negative. On this account only, the Respondent’s claim against the Appellant fails.



70. Nevertheless, it is important to venture forward and to highlight the evidence that was tendered by the Appellant. To this end, it suffices to underscore that the Appellant herein tendered and produced before the court various documents including a letter of allotment issued in pursuance to the minutes of the council arising from the meeting held on the 24<sup>th</sup> November 2010; copies of the minutes of the council as well as the letters dated 13<sup>th</sup> April 2016 and 16<sup>th</sup> September 2016, respectively, which duly confirmed that same [Appellant] had been lawfully allocated plot number 859.
71. Other than the foregoing, it is also important to reproduce a segment of the letter dated 16<sup>th</sup> September 2016; and which was produced as exhibit D2. The relevant portion of the said letter states as hereunder;
- “According to the record held and maintained in Isiolo Ardhi House records, plot of land number 858 is registered in the name of Muhamud Mohamed Ali; and plot number 859 is registered in the name of Bonaya Boro. They are the legitimate and bona fide owners of the above plots. In a nutshell, the duo Amina Abdulahi Adano and Hassan Issack should desist from interfering with the peaceful enjoyment of the allottees properties”.
72. My reading of exhibit D2 drives me to the conclusion that the County Government of Isiolo is confirming that the Appellant is the lawful owner of plot number 859. Furthermore, the same county government of Isiolo being alive to the claims by the Respondent herein is clearly underscoring the position that the Respondent should desist from interfering with the Appellant’s occupation, possession and enjoyment of his [Appellant’s] property.
73. Surely, the designated plot, which is being claimed by the Respondent belongs to the Appellant. In this regard, there is no basis upon which the Appellant can be held to have trespassed onto the designated property, which lawfully belongs to and is registered in his [Appellants] name.
74. Before departing from this issue, it is important to take cognizance of the letter dated the 13<sup>th</sup> April 2016; and which was produced as exhibit D1. The contents of the said letter indicate that even though the Respondent herein had been allocated plot number C-1176 Chechelesi, same [Respondent] has never been shown the plot yet.
75. For ease of appreciation, it suffices to reproduce the second paragraph of the said letter.
76. Same states as hereunder;
- “Records held and maintained in this office indicate that parcel of plot number Chechelesi C 1176 is under the name of Hassan Issack beneficiary of balloting exercise which was conducted way-back in 2005 but he is not in the list of those who were shown the plots. He has not been shown the plot yet.
77. According to the County Government of Isiolo, the Respondent has not been shown the ground location and position of the suit plot. How then does the Respondent venture forward and purport that the ground in question constitutes the suit plot whereas the suit plot [if at all] has not been duly shown to him.
78. From the foregoing analysis, it must have become evident that the Respondent did not prove that the Appellant had trespassed onto the suit plot. In this regard, the orders of eviction and permanent injunction which were issued against the Appellant were certainly issued in vacuum.
79. Before departing from this issue, I beg to take cognizance of the decision of 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.

80. 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”.

On the other hand, a continuing trespass is defined in Jowitt’s Dictionary of English Law 2nd Edition (page or paragraph?) as follows:-

“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”.

In Black’s Law Dictionary 8th Edition (page or paragraph?), a continuing trespass is defined as:-

“A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property.”

Finally, in Clerk & Lindsell on Torts 16th Edition, paragraph 23 - 01, it is stated that:-

“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.”

53. 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”.

81. Simply put, trespass is not proven by mere proof of ownership of the designated land. The claimant must venture forward and demonstrate the offensive intrusion[invasion] of the Land in question by [sic] the trespasser.

82. Short of such proof, the allegation of trespass is misplaced.

#### **Final Disposition:**

83. For the reasons that have been highlighted in the body of the Judgment, it must have become evident, nay, apparent that the appeal beforehand is meritorious and thus deserving of being allowed.

84. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder;



- i. The Appeal be and is hereby allowed.
- ii. The Judgment of the learned chief magistrate delivered on the 31<sup>st</sup> January 2023 and the consequential decree be and are hereby set aside.
- iii. The Judgment and decree of the subordinate court is hereby substituted with an order dismissing the Respondent's suit in the subordinate court.
- iv. Costs of the Appeal be and are hereby awarded to the Appellant.
- v. The Appellant be and is hereby awarded costs in the subordinate court.
- vi. The costs in terms of [iv] and [v] shall be taxed/assessed in the conventional manner.

85. It is so ordered.

**DATED, SIGNED; AND DELIVERED AT ISIOLO ON THE 20<sup>TH</sup> DAY OF MARCH, 2025.**

**OGUTTU MBOYA**

**JUDGE.**

In the presence of .

Mr. Mutuma – Court Assistant

Mr. Caleb Mwiti h/b for Mr. Abdulahi Halkanu for the Appellant

Mr. Muchiri for the Respondent

