



REPUBLIC OF KENYA



**Fungicha & 3 others v Musa & another (Environment & Land Case  
019 of 2021) [2025] KEELC 3306 (KLR) (23 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3306 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT & LAND CASE 019 OF 2021**

**JO MBOYA, J  
APRIL 23, 2025**

**BETWEEN**

**HERSI FUNGICHA ..... 1<sup>ST</sup> PLAINTIFF  
ABDI OKILE ..... 2<sup>ND</sup> PLAINTIFF  
JILO HERSI ..... 3<sup>RD</sup> PLAINTIFF  
SADIA SORA DIBAH ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**BISHAR MUSA ..... 1<sup>ST</sup> DEFENDANT  
SADIA ALI HUKA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs approached the court vide Plaint dated 6<sup>th</sup> August 2009 and wherein same sought various reliefs. The Plaint under reference was thereafter amended resting with the Amended Plaint dated 19<sup>th</sup> May 2019 and wherein the Plaintiffs have sought the following reliefs:
  - i. An order of permanent injunction restraining the Defendants, their agents, servants or employees from interfering with the Plaintiffs user of Plot Nos. A, B, C, D PDP No. ISL/117/98/132
  - ii. Costs of the suit and interest.
2. The 1<sup>st</sup> Defendant [who was the only Defendant at the onset] duly entered appearance and filed a Statement of Defence dated 26<sup>th</sup> August 2009. The 1<sup>st</sup> Defendant denied the allegations at the foot of the Plaint. In particular, the 1<sup>st</sup> Defendant contested that the Plaintiffs herein were the owners nor proprietors of the suit plots.



3. The instant suit proceeded for hearing culminating into judgement being rendered against the 1<sup>st</sup> Defendant. For coherence, the judgement was delivered on 28<sup>th</sup> September 2017.
4. Upon the delivery of the judgement under reference, the Plaintiffs attempted to execute the judgement. At this point in time, the 2<sup>nd</sup> Defendant who was hitherto not a party sought leave of the court to be joined into the suit and to have the judgement set aside. For good measure, the 2<sup>nd</sup> Defendant contended that the judgement under reference was impacting upon her plot and yet same had neither been sued nor notified of the suit.
5. Suffice it to state that the application by the 2<sup>nd</sup> Defendant was duly allowed and the judgement was set aside. Furthermore, the court granted liberty to the 2<sup>nd</sup> Defendant to join the suit and to file pleadings within circumscribed timelines. To this end, the 2<sup>nd</sup> Defendant duly entered appearance and filed a Statement of Defence dated 4<sup>th</sup> July 2019 and wherein the 2<sup>nd</sup> Defendant denied the claims by the Plaintiff[s].
6. Furthermore, the 2<sup>nd</sup> Defendant contended that what is being claimed as the suit properties were lawfully allocated unto her vide Letter of Allotment dated 22<sup>nd</sup> June 1998. In addition, the 2<sup>nd</sup> Defendant contended that subsequent to the allotment, same complied with the terms of the Letter of Allotment and thereafter took possession of the disputed property.
7. The instant matter was subjected to the usual case conference and whereupon the advocates for the parties confirmed that same had duly filed and exchanged the List and Bundle of Documents; List of Witnesses; and the Witness statements. In this regard, the court confirmed that the suit was ready for hearing.
8. The Plaintiffs' case revolves around the evidence of one witness namely, Hersi Fungicha. Same testified on his own behalf and on behalf of the rest of the Plaintiffs. In any event, the witness testified as PW1.
9. It was the testimony of the witness [PW1] that same is conversant with the rest of the Plaintiffs. In particular, the witness averred that Jilo Hersi [3<sup>rd</sup> Plaintiff] is his son. Furthermore, the witness averred that Sadia Sora [4<sup>th</sup> Plaintiff] is his wife. The 2<sup>nd</sup> Plaintiff was indicated to be a friend.
10. It was the further testimony of the witness that in 1997 same applied for a plot from Isiolo County Council. The witness further averred that thereafter same was allocated a plot. It was also indicated that a part development plan was prepared. The witness referenced Part Development Plan No. 117132.
11. Additionally, the witness averred that same has since recorded and filed a witness statement. To this end, the witness referenced the witness statement dated 24<sup>th</sup> May 2021 and which witness statement the witness sought to adopt and rely on as his evidence in chief. Suffice it to state that the witness statement was duly adopted and constituted as the evidence in chief of the witness.
12. Moreover, the witness intimated that same had also filed a List and Bundle of Documents dated 24<sup>th</sup> May 2021 and which documents the witness sought to tender and produce before the court. There being no objection to the production of the documents, same were produced as exhibits P1-P7 respectively. However, documents number 8 being a survey report dated 1<sup>st</sup> February 1999 was marked for identification as MFIP-8.
13. On cross-examination by learned counsel for the 1<sup>st</sup> Defendant, the witness averred that the 1<sup>st</sup> Defendant is known as Bishar. Furthermore, the witness testified that he does not know whether the 1<sup>st</sup> Defendant has any other plot in the area. Nevertheless, the witness averred that he sued the 1<sup>st</sup> Defendant because it was the 1<sup>st</sup> Defendant who demolished his house.



14. While still under cross-examination, the witness averred that he reported the incidence of demolition of his house to the police. However, the witness stated that the police advised same to lodge a suit before the court.
15. It was the further testimony of the witness that Jilo Hersi [3<sup>rd</sup> Plaintiff] is now twenty-four years old. The witness averred that the 3<sup>rd</sup> Plaintiff was born in 1994. In addition, the witness testified that in the year 1997, the 3<sup>rd</sup> Plaintiff was three years old. However, the witness averred that it is him [witness] who applied for the plot on behalf of the 3<sup>rd</sup> Plaintiff as his father.
16. It was the further testimony of the witness that when same applied to be allotted the plot there were minutes which were issued. However, the witness conceded that the minutes have neither been produced nor tendered before the court. Furthermore, the witness averred that same has not been issued with a letter of allotment to date.
17. Be that as it may, the witness averred that same has been paying land rate[s] to the County Council of Isiolo [now defunct] and now to the County Government of Isiolo.
18. On cross-examination by learned counsel for the 2<sup>nd</sup> Defendant, the witness averred that same has since tendered and produced the Part Development Plan. However, the witness acknowledged that the PDP which same has produced before the court does not have an approval signature. Furthermore, the witness averred that the PDP is dated 9<sup>th</sup> June 1998.
19. It was the further testimony of the witness that same paid for the approval of the PDP. The witness averred that the payment receipt is dated 12<sup>th</sup> February 1999 and the PDP No. is shown as 98/132.
20. While still under cross-examination, the witness averred that the instant suit was filed in the year 2009. Besides, the witness added that by the time same filed the suit, the 3<sup>rd</sup> Plaintiff had not reached eighteen years old.
21. It was the further testimony of the witness that the Plaintiffs were allocated four plots. In particular, the witness averred that same were allocated four plots because they were four people. In any event, the witness averred that no one opposed the application for allotment.
22. Additionally, the witness averred that the plots which were allocated were abbreviated as A, B, C & D. Besides, the witness stated that the plots were subsequently surveyed and a survey report was prepared. To this end, the witness referenced MFIP8.
23. On re-examination, the witness averred that the plots in question lawfully belong to him and the rest of the Plaintiffs.
24. Thereafter, the Plaintiffs sought and obtained an adjournment. Furthermore, the Plaintiffs also procured witness summons in favour of the County Surveyor Isiolo County who is the one who authored MFIP8.
25. Be that as it may, when the matter came up for hearing on 7<sup>th</sup> November 2023, the Plaintiffs' advocate intimated to the court that same had not procured the attendance of the County Surveyor. In this regard, the Plaintiffs' case was closed.
26. The 1<sup>st</sup> Defendant's case is premised on the evidence of one witness, namely, Bishar Musa. Same testified as DW4.



27. It was the testimony of the witness [DW4] that same is a business person at Isiolo. Furthermore, the witness averred that same is married to the 2<sup>nd</sup> Defendant. In addition, the witness averred that the plots in question were gifted to the 2<sup>nd</sup> Defendant by her uncle.
28. It was the further testimony of the witness that he, [witness], does not lay any claim to the plots in question. Nevertheless, the witness averred that he occasionally visits the suit plots whenever he is sent by the 2<sup>nd</sup> Defendant.
29. Additionally, the witness averred that same has since recorded a witness statement dated 8<sup>th</sup> November 2022 and which witness statement the witness sought to adopt as his evidence in chief. To this end, the witness statement was duly adopted and constituted as the evidence in chief of the witness.
30. On cross-examination by learned counsel for the Plaintiff, the witness averred that the plot in dispute is owned by Sadia Ali Huka [2<sup>nd</sup> Defendant]. Furthermore, the witness averred that the plot is not a family property. For good measure, the witness averred that the plot was gifted to the 2<sup>nd</sup> Defendant by her [2<sup>nd</sup> Defendant's] father.
31. While still under cross-examination, the witness averred that the plot in question is developed. In particular, it was stated that the 2<sup>nd</sup> Defendant has built a house and erected a water tank and a fence. In addition, it was averred that the plot lawfully belongs to the 2<sup>nd</sup> Defendant.
32. With the foregoing testimony, the 1<sup>st</sup> Defendant's case was closed.
33. The 2<sup>nd</sup> Defendant's case is premised on the evidence of three witnesses, namely, Sadia Ali Huka, Mohammed Isak Ibrahim and Ture Tepo. Same testified as DW1, DW2 and DW3, respectively.
34. It was the testimony of DW1 [Sadia Ali Huka] that same is the 2<sup>nd</sup> Defendant. Moreover, the witness averred that by virtue of being the 2<sup>nd</sup> Defendant, same is conversant with the facts of the case. It was the further testimony of the witness that same has recorded a witness statement dated 20<sup>th</sup> May 2021 and which witness statement the witness sought to adopt and rely as her evidence in-chief. There being no objection to the reliance on the witness statement, same was duly adopted and constituted as the evidence in chief of the witness.
35. The witness further adverted to the List and Bundle of Documents dated 20<sup>th</sup> May 2021 and thereafter sought to tender and produce same as exhibits. There being no objection to the production of the documents, same were produced as exhibits D1 – D12 respectively on behalf of the 2<sup>nd</sup> Defendant.
36. On cross-examination by learned counsel for the Plaintiff, the witness averred that her statement is elaborate and comprehensive. Furthermore, the witness stated that the plot in dispute was previously allocated to Mohammed Isak. Besides, the witness testified that Mohammed Isak is her uncle.
37. It was the further testimony of the witness that Mohammed Isak was the 1<sup>st</sup> allottee. In addition, it was averred that Mohammed Isak is the one who gifted the suit plot unto the witness.
38. While still under cross-examination, the witness averred that following the gifting of the plot by Mohammed Isak, same [witness] was subsequently issued with a Letter of Allotment. To this end, the witness referenced the Letter of Allotment dated 22<sup>nd</sup> June 1998.
39. Moreover, it was the testimony of the witness that same was also issued with a Part Development Plan. In this regard the witness referenced the PDP which has been tendered and produced as DEXH2.



40. It was the further testimony of the witness that the plot which is being claimed by the Plaintiffs relates to the ground which same [witness] is occupying. In particular, the witness averred that the Plaintiffs are indeed claiming the plot belonging to her.
41. While still under cross-examination, the witness averred that same duly entered upon and took possession of the disputed plot. Besides, the witness testified that she is the one who is in occupation of the disputed plot.
42. On further cross-examination, the witness averred that same has developed the plot in question. In this regard, the witness averred that same has constructed a timber building as well as a pit latrine. Besides, the witness averred that same has also planted trees which have since matured.
43. Additionally, it was the testimony of the witness that the timber house in question was developed by Mohammed Isak. Nevertheless, it was stated that the presence of the timber house suggests occupation and possession by the 2<sup>nd</sup> Defendant.
44. On cross-examination by learned counsel for the 1<sup>st</sup> Defendant, the witness averred that same has been in occupation of the disputed plots since 1997. In any event, the witness has averred that same has since connected water to the plot in question.
45. It was the further testimony of the witness that the County Council of Isiolo approved the allotment of the suit property. In this case, it was stated that the suit property lawfully belongs to the witness.
46. The second witness who testified on behalf of the 2<sup>nd</sup> Defendant was Mohammed Isak Ibrahim. Same testified as DW2. It was the testimony of the witness that same is conversant with the 2<sup>nd</sup> Defendant. In particular, the witness averred that the 2<sup>nd</sup> Defendant is her niece.
47. It was the further testimony of the witness that same has since recorded a witness statement. To this end, the witness referenced the witness statement dated 10<sup>th</sup> November 2020 and which witness statement the witness sought to adopt and rely on as his evidence in chief. In this regard, the witness statement was duly adopted and constituted as the evidence in chief of the witness.
48. On cross-examination by learned counsel for the Plaintiff, the witness averred that the plot in question was previously allocated unto him [witness]. Furthermore, the witness averred that the plot was allocated unto him in 1992.
49. Additionally, the witness averred that the Council generated minutes relative to the allotment of the plot. Nevertheless, the witness averred that same is not aware whether the minutes have been tendered and produced by the 2<sup>nd</sup> Defendant. In addition, the witness averred that it is him who gifted the plot to Sadia [2<sup>nd</sup> Defendant].
50. While still under cross-examination, the witness averred that the transfer documents were given to Sadia. In this regard, the witness testified that it is Sadia [2<sup>nd</sup> Defendant] who has the documents in question. Moreover, the witness stated that it is Sadia who is on the plot.
51. On cross examination by learned counsel for the 1<sup>st</sup> Defendant, the witness averred that he applied for the plot in the year 1980s. Nevertheless, the witness averred that the plot was allocated to him in 1992. Besides, the witness averred that upon being allocated the plot, same [witness] built a house thereon. In any event, the witness testified that there was no one else on the land when same was given the land.
52. Furthermore, the witness testified that when he gifted the land to Sadia [2<sup>nd</sup> Defendant] there was no one else on the land.



53. The third witness who testified on behalf of the 2<sup>nd</sup> Defendant was Ture Tepo. Same testified as DW3. It was the testimony of the witness that same is currently employed by the County Government of Isiolo. Furthermore, the witness averred that same had hitherto been employed by the County Council of Isiolo [now defunct].
54. It was the testimony of the witness that the same is the custodian of the County Government Documents. In this regard, the witness averred that by virtue of being the custodian of the various documents same is therefore privy to various documents listed at the foot of the 2<sup>nd</sup> Defendant's List of Documents dated 20<sup>th</sup> May 2021.
55. Additionally, the witness averred that same is privy to the Letter of Allotment dated 22<sup>nd</sup> June 1998. For good measure, the witness added that the said letter of allotment is part of the records of the County Government.
56. Furthermore, the witness referenced the PDP dated 6<sup>th</sup> May 1997 and thereafter same confirmed that the PDP is also part of the records of the County Government. In addition, the witness averred that there is also a payment receipt which was issued to the 2<sup>nd</sup> Defendant relative to the PDP.
57. Moreover, the witness averred that the 2<sup>nd</sup> Defendant has also been granted approval by the County Government of Isiolo. In short, the witness confirmed that the disputed plot lawfully belongs to the 2<sup>nd</sup> Defendant.
58. On cross-examination by learned counsel for the Plaintiff, the witness averred that same is the one tasked with custody of various records at the County. Furthermore, the witness averred that the documents bearing the name of the 2<sup>nd</sup> Defendant form[s] part of the record of the County Government.
59. While still under cross-examination, the witness averred that the 2<sup>nd</sup> Defendant was lawfully issued with a letter of allotment. Nevertheless, the witness conceded that he has not come across the letter of approval in respect of the letter of allotment. In any event, the witness added that the letters of allotment emanate from the Commissioner of Lands in Nairobi. In this regard, the witness averred that if there is any approval, it can only be procured from Nairobi.
60. Additionally, it was the testimony of the witness that the 2<sup>nd</sup> Defendant's Plot bears a PDP. However, the witness stated that the PDP which has been produced is not stamped. Be that as it may, the witness clarified that the PDP has been approved.
61. With the foregoing testimony, the 2<sup>nd</sup> Defendant's case was duly closed.
62. Following the closure of the hearing, the advocates for the parties covenanted to file and exchange written submissions. The request by the advocates was approved by the court and thereafter timelines were circumscribed.
63. The Plaintiffs filed written submissions dated 17<sup>th</sup> May 2024 and wherein same have highlighted two [2] salient issues, namely; that the suit plots lawfully belong to the Plaintiffs and not otherwise; and that the Defendants have trespassed onto and encroached upon the suit plots without any colour of rights or at all.
64. The 1<sup>st</sup> Defendant filed written submissions dated 30<sup>th</sup> May 2024 and wherein same has highlighted two issues for determination. The issues raised on behalf of the 1<sup>st</sup> Defendant are namely; the suit plot belongs to the 2<sup>nd</sup> Defendant and thus the 2<sup>nd</sup> Defendant has lawful rights to the suit plot; and that the Plaintiffs herein have no lawful rights to and in respect of the suit plots.



65. The 2<sup>nd</sup> Defendant filed written submissions dated 31<sup>st</sup> May 2024 and wherein same [same] has equally highlighted two issues for determination, namely, that the suit plot was lawfully allocated to and in favour of the 2<sup>nd</sup> Defendant; and the 2<sup>nd</sup> Defendant has exclusive rights to occupy and possess the suit property.
66. Having reviewed the pleadings filed by the parties; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the dispute beforehand turns on two salient issues, namely; whether the Plaintiffs have established and demonstrated entitlement to (sic) the suit plots or at all; and whether the Defendants have trespassed onto the suit plots or otherwise.
67. Regarding the first issues, namely; whether the Plaintiffs have established and demonstrated entitlement to (sic) the suit plots or at all, it is imperative to underscore that it is the Plaintiffs who have approached the court contending that same are the lawful proprietors and/or owners of the suit plots. To this end, it is therefore incumbent upon the Plaintiffs to place before the court plausible, cogent and credible evidence to prove their entitlement [ if at all] to the suit plots.
68. Put differently, the burden of proving the claims before the court lay at the door step of the Plaintiffs. In this regard, it is imperative to take cognisance of the provisions of Sections 108 and 109 of the [Evidence Act](#) Cap 80 Laws of Kenya.
69. Moreover, the legal position that the burden of proof lays at the door step of the claimant has received various judicial pronouncements. In this regard, it suffices to take cognisance of the decision of the Court of Appeal in the case Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR; where the Court stated thus:

The burden of proving the existence of any fact lies with the person who makes the assertion. That much is clear from Sections 107 and 109 of the [Evidence Act](#). The standard of proof is on a balance of probabilities which Lord Denning in the case of *Miller v. Minister of Pensions* (1947) explained as follows:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

70. In the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] KECA 642 (KLR) the court of appeal elaborated on the incidence of burden and standard of proof and on whom same lays.
71. For coherence, the Court of Appeal stated thus:

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.”

72. Bearing in mind the foregoing legal principle, it is now apposite to revert to the subject matter and to discern whether the Plaintiffs have placed before the court any plausible or cogent evidence to prove that same were duly allocated the suit plots or otherwise.

73. To start with, it is worthy to underscore that the Plaintiffs’ case rested on the basis of the evidence of Hersi Fungicha. Besides, it is worth recalling that the said witness only tendered and produced seven [7] documents, which were thereafter marked as exhibits P1-P7, respectively.

74. Moreover, it is pertinent to underscore that even though PW1 contended that same applied to be allocated the suit plots on his own behalf and on behalf of the rest of the Plaintiffs no letter of allotment was ever tendered or produced before the court. For good measure, PW1 conceded that up to and including the point of his testimony neither himself nor the rest of the Plaintiffs had been issued with a letter of allotment.

75. The question that does arise and which merits interrogation is whether the Plaintiffs herein can be heard to contend that the suit plots were duly and lawfully allocated unto them. Quite clearly, the answer to the question is obviously in the negative.

76. To my mind, the Plaintiffs herein cannot purport to be the lawful and legitimate allottees of the suit plots in the absence of the requisite letter of allotment duly issued by the Commissioner of Lands [now defunct]. For good measure, it is the Letter of allotment, which signifies allotment [if at all].

77. Secondly, it is not lost on this court that the plots which are being claimed by the Plaintiffs formed part of what was hitherto trust land. In this regard, it is common ground that any applicant, the Plaintiffs not excepted, who was desirous to be allocated any portion of the trust land was obligated to make a formal application to the designated local authority. In this regard, the application by the Plaintiffs, if any, ought to have been made to the County Council of Isiolo [now defunct].

78. Moreover, upon receipt of the formal application, the County Council of Isiolo [now defunct] would be obliged to convene a meeting for purposes of discussing the application for allotment of land. To this end, the County Council will thereafter come up with minutes relative to the meeting in question indicating whether the application if any has been approved or otherwise. [See Section 53 of the Trust *Land Act* Cap 288 [now repealed]].

79. If the Plaintiffs herein ever applied to be allocated land in the manner posited by PW1, then it was incumbent upon the Plaintiffs to tender and produce before the court a copy of the certified minutes of the County Council of Isiolo, if any. However, there is no gainsaying that no such minutes were tendered before the court.



80. Thirdly, it is worthy to recall that the Plaintiffs tendered and produced before the court a copy of a Part Development Plan which was contended to be the basis of the allotment of the suit plots to the Plaintiffs. Nevertheless, it is important to point out that the part development plan which was tendered and produced on behalf of the Plaintiffs is neither signed on behalf of the Directorate of Physical Planning nor is same approved (sic) on behalf of the Commissioner of Lands. Furthermore, the PDP in question does not bear the approved development plan number.
81. Quite clearly the part development plan which has been deployed as a basis by the Plaintiffs to lay a claim to ownership of the suit plots is incomplete, deficient and thus invalid.
82. Moreover, even assuming that the PDP was signed and duly approved [which is not the case], a question would still arise as to whether a PDP can underpin a claim for ownership of land. In my humble view a PDP is a preliminary process towards allocation and/or alienation of a designated piece of land and/or plot. For good measure, a PDP is a precursor to the allocation of land insofar as same is the one that confirms whether the designated plot is available for allocation or otherwise.
83. To understand the import and tenor of a part development plan, it suffices to reference the provisions of Section 3 of the Physical Planning Act Cap 286 Laws of Kenya [now repealed]. For good measure, it is the said act which was in place at the time when the Plaintiffs purport to have been allocated the land in question.
84. Section 3 of the Physical Planning Act [supra] states as hereunder:
- “short-term plan” means a local physical development plan which elaborates in detail policies and proposals in relation to precise areas of land, and which provides the basis for both positive and regulatory planning to be realised within a specified period of time not exceeding 10 years and includes—
- (a) an action plan for comprehensive planning of areas selected for intensive change, which is to commence within a specified period, by improvement, re-development or new development, restoration and re-use of derelict land;
  - (b) an advisory plan indicating permitted subdivision and use of land specified in such plan;
  - (c) a subject plan for detailed treatment of a particular aspect of planning in relation to a part or the whole of a local physical development plan;
  - (d) a part development plan indicating precise sites for immediate implementation of specific projects or for alienation purposes;
85. The significance of a part development plan in the process of allocation and/or alienation of land was elaborated upon by the Supreme Court in the case of *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) where the Court stated as hereunder:
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 2nd to 6th 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.
86. Fourthly, the Plaintiffs’ claim to the suit plots is also premised on various correspondence namely, letter dated 25<sup>th</sup> February 1999 from the Clerk County Council of Isiolo [No Objection Letter]; letter dated 11<sup>th</sup> March 1999 by the District Commissioner Isiolo [ No Objection]; Letter dated 3<sup>rd</sup> October 1997 by the acting clerk Isiolo County Council [Asking the Physical Planner to identify a suitable site for allotment to the Plaintiffs] and letter dated 12<sup>th</sup> June 1998 from District Physical Planner relating to (sic) the identification of plots A, B, C and D for purposes of the intended allocation.
87. It is important to underscore that the letters which have been referenced by and of themselves cannot constitute a basis to lay a claim to ownership of land. Barring repetition, the impugned letters relate to the preliminary steps pertaining to the identification [if any] of plots for intended allocation and/or alienation. No more.
88. At any rate, there is no gainsaying that title to land can only come into existence upon the issuance of the letter of allotment, if any, compliance with the terms thereof and ultimately upon issuance of the certificate of title and not otherwise.



89. In the case of *Wreck Motor Enterprises v Commissioner of Lands & 3 others* [1997] eKLR the Court of Appeal stated as hereunder:

Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.

90. Flowing from the foregoing analysis, my answer to issue number one is to the effect that the Plaintiffs have neither demonstrated nor proven that same are the lawful owners and/or proprietors of the suit properties. In the absence of the requisite title documents, the Plaintiffs' claim to the suit plots is premature, misconceived and built on quick sand.

91. Next is the issue whether the Defendants have trespassed onto the suit plots or otherwise. To start with, it is import to underscore that before a claimant can espouse and propagate a claim for trespass, such a claimant must prove that same is the title holder [leasehold or freehold] of the designated property.

92. Pertinently, no one, the Plaintiffs not excepted, can propagate a claim for trespass as pertains to a property for which same has no demonstrable/ actionable title and/or rights to.

93. Moreover, there is no gainsaying that a claim for trespass can only be raised and canvassed by one, the Plaintiffs not excepted, who is able to prove the right to immediate possession and exclusive entitlement to the designated land. Absent title or right to exclusive entitlement to the designated land, the claim for trespass becomes untenable.

94. What constitutes trespass was elaborated upon in the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] KECA 782 (KLR) where the Court of Appeal state thus:

34. The trial judge's award for damages on trespass has also been challenged. Section 5 of the *Trespass Act* provides as follows:

“Trespass with intent to commit an offence or to intimidate, insult or annoy (1) Any person who-(a) enters into or upon property in the possession or occupation of another with intent to commit an offence or to intimidate, insult or annoy any person lawfully in possession or occupation of such property;...”

35. In *M'Mukanya v M'Mbijiwe* (1984) KLR 761, the ingredients of the tort of trespass were revisited by this Court and restated as follows:

“Trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See *Thomson v Ward*, (1953) 2QB 153.”

36. Further, in *Winfield & Jolowicz on Tort*, Sweet & Maxwell, 19<sup>th</sup> Edition at page 428 states as follows:

“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.” [Emphasis supplied].



95. Likewise, the ingredients that underpin a claim for trespass were highlighted in the case of Church Commissioners for Kenya of the Anglican Church of Kenya v Wayuga [2024] KECA 1048 (KLR); where the Court of Appeal 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.”

96. Having failed to establish and/or demonstrate any iota of entitlement to the suit plot, there is no gainsaying that the Plaintiffs have not satisfied the prerequisite conditions that underpin a claim for trespass.

#### **Final Disposition:**

97. Flowing from the analysis [captured in the body of the judgement] it must have become crystal clear that the Plaintiffs herein have neither proved nor demonstrated any scintilla of rights to the suit plot.

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

- i. The Plaintiffs’ suit be and is hereby dismissed.
- ii. Costs of the suit be and are hereby awarded to the Defendants.
- iii. The costs in terms of clause 2 shall be agreed upon and in default, same shall be taxed in the conventional manner.

99. It is so ordered.

**DATED SIGNED AND DELIVERED AT ISIOLO ON THE 23<sup>RD</sup> DAY OF APRIL, 2025.**

**OGUTTU MBOYA, FCI Arb**

**JUDGE.**

In the presence of:

Mukami/Mutuma – Court Assistant.

Mr. Ayub Anampiu for the Plaintiffs.

Mr. Kaumbi for the 1<sup>st</sup> Defendant.



Mr. Ken Muriuki for the 2<sup>nd</sup> Defendant.

