Ntinyari alias Lucy Muthee Ntonyari v Kinoti (Environment and Land Appeal E009 of 2023) [2025] KEELC 3345 (KLR) (23 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3345 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E009 OF 2023

JO MBOYA, J

APRIL 23, 2025

BETWEEN

LUCY MUTHEE NTINYARI ALIAS LUCY MUTHEE NTONYARI APPELLANT

AND

MARION KARIMI KINOTI ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. E. Tsimonjero Senior Resident Magistrate delivered on 27th September 2023 at Isiolo in CM's ELC Case No. 29 of 2014)

JUDGMENT

1. The Respondent herein [who was the Plaintiff in the subordinate court] filed the Plaint dated the 26th April 2014 and wherein the Respondent sought various reliefs pertaining to and concerning plot No. 168 Kiwanjani B-Isiolo. The Plaint under reference was subsequently amended culminating into the amended Plaint dated the 18th October 2019 and wherein the Respondent sought for the following reliefs;

    i. Permanent injunction to restrain the Defendant and/or any person claiming under her from entering or in any other way interfering with Plaintiff's plot number 168 Kiwanjani B-Isiolo aka. Plot No. 168 Kiwanjani B Isiolo also known as plot No. 168 Kiwanjani B -SQ Isiolo.

    ii. General damages for trespass.

    iii. An order for cancelation of the certificate of lease dated the 12th July 2018 in respect of Isiolo Township Block 3/398.

    iv. An order for the Defendant's eviction from plot number 168 Kiwanjani B a.k.a Plot No. 168 Kiwanjani SQ Isiolo.

    v. Costs of the suit and interests.

2. The Appellant herein [who was the Defendant in the subordinate court] duly entered appearance and thereafter filed a statement of defence and counterclaim. The statement of defence and counterclaim is dated the 13th May 2014. Thereafter, the Appellant amended the statement of defence and counterclaim resting with the amended statement of defence and counterclaim dated the 22nd August 2019.

3. Vide the amended statement of defence and counterclaim, the Appellant sought the following reliefs;

    i. Dismissal of the Plaintiff's suit with costs.

    ii. An order of permanent injunction against the Plaintiff, her servants, employees, agents, assignees and/or any body acting on behalf restraining them from trespassing, entering, occupying and/or in any other way interfering with the Defendant quite use, possession and occupation of L.R No. Isiolo Township Block 3/398 [formerly unsurveyed Plot number 168] situated at Kiwanjani Isiolo Township measuring 0.4500HA.

    iii. Costs of the counterclaim.

4. The suit under reference was heard and disposed of vide judgment dated and delivered on the 26th September 2023 whereupon the trial court found and held that the Respondent had duly proved her case on a balance of probabilities. To this end, the trial court proceeded to and granted the reliefs sought at the foot of the amended Plaint. Furthermore, the trial court also awarded to the Respondent punitive damages in the sum of Kes.500, 000/= only.

5. Additionally, the trial court found and held that the Appellant herein had failed to prove her counterclaim. In this regard, the trial court proceeded to and dismissed the Appellant's counterclaim. Moreover, the trial court condemned the Appellant to bear costs of the suit and the counterclaim.

6. Aggrieved by and dissatisfied with the judgment and decree of the trial court, the Appellant has filed the memorandum of appeal dated the 25th October 2023; and wherein the Appellant has highlighted the following grounds of appeal;

    i. That the Learned Trial Magistrate erred in law and facts by failing to find that the Appellant had occupied and owned Plot No. 168 Kiwanjani well before 1995 when the Respondent was purported or was allegedly given a Plot.

    ii. That the Learned trial Magistrate erred in Law and facts by finding that the Respondent was the proper allottee of the disputed Plot, yet the evidence of the Respondent was unreliable because the documents held by the Respondent read Plot No. 168 Kiwanjani, Plot 168 Kiwanjani B and Plot 168 Kiwanjani SQ.

    iii. That the Learned trial Magistrate erred in Law and facts by failing to find that the Appellant was the proper and bona fide allottee of Plot No. 168 Kiwanjani, which had a letter confirming long ownership and occupation,

    iv. That the Learned trial Magistrate erred in Law and facts by failing to find that the Appellant's letter of allotment for Plot No. 168 Kiwanjani was issued on 19/2/1999 before the Respondent was purportedly issued with a letter of allotment on 22/2/1999 and therefore the earlier allotment supersedes any other allotment and as such, Plot No. 168 was not available for allocation to the Respondent.

    v. That the Learned trial Magistrate erred in Law and facts by holding that the Appellant's Certificate of Lease was prepared and issued in contravention to a court order yet the

commencement of lease preparation was done in 2013 and the order was issued in 2017 which order did not bar such issuance of a Lease.

vi. That the Learned trial Magistrate erred in Law and facts by imputing illegal tampering and disappearance of Respondent's documents for Plot No. 168 by virtue of the Appellant's employment with the County Government of Isiolo, yet there was no single iota of evidence that was tabled by the Respondent to warrant such a conclusion by the trial court.

vii. That the Learned trial Magistrate erred in Law and facts by finding that the Respondent was the bona fide allottee of the Plot in question, yet the Respondent has to date never accepted the offer in the said letter of allotment by paying the requisite fees to the Commissioner of Lands.

viii. That the Learned trial Magistrate erred in Law and facts by disbelieving the Appellant's exhibits merely because of their dates and not on their probative value and as such, the trial court occasioned a miscarriage of justice.

ix. That the trial Magistrate erred in law and facts by doubting the credibility and authenticity of the Lease in the name of the appellant yet there was no evidence placed before the court to bring any kind of doubt over the said lease agreement.

x. That Learned trial Magistrate erred in Law by holding that the process of preparation and issuance of a Lease in favour of the Appellant was illegal yet the Government Office in charge of the issuance of such a lease was not summoned or heard on the processing of that Lease.

xi. That Learned trial Magistrate erred in Law and facts by finding that the respondent had proved her case to the required standards yet the Respondent had not proved ownership of Plot No. 168 Kiwanjani, to the required standards.

xii. That the Learned trial Magistrate erred in law by awarding punitive damages of Kshs. 500,000/= when there was no proof of such damage which award was not available because firstly, they were not pleaded and secondary, they are not awardable for want of culpability on the part of the Appellant.

xiii. That the Learned trial Magistrate, erred in Law and facts by holding that Plot No. 168 Kiwanjani, Plot No. 168 Kiwanjani B and Plot No. 168 Kiwanjani B and Plot No. 168 Kiwanjani SQ are one and the same Plot on the ground, in the absence of a professional report by the Physical Planner and surveyor.

xiv. That the Judgment of the trial Court is against the weight of Law and evidence placed before the court by the Appellant.

7. The appeal came up for directions on the 2nd July 2024; whereupon it was confirmed that the Appellant had filed and served the record of appeal. Furthermore, it was confirmed that the record of appeal was complete. In this regard, the court ventured forward and issued directions. For good measure, it was ordered that the appeal be canvassed by way of written submissions. Thereafter, the court circumscribed the timelines for the filing of the written submissions.

8. The Appellant filed written submissions dated the 15th August 2024 and whereas the Respondent filed written submissions dated the 24th June 2024. The two [2] sets of written submissions are on record.

9. The Appellant has raised and canvassed four [4] salient issues at the foot of the written submissions dated the 15th August 2025. The issues raised by the Appellant are namely; whether the Respondent duly established and proved her claim as pertaining to ownership of Plot No. 168 Kiwanjani B – Isiolo or plot No. 168 Kiwanjani SQ or otherwise; whether the Appellant acquired Plot No. 168

Kiwanjani -Isiolo by fraud or otherwise; whether the Respondent was duly and lawfully entitled to the suit property or otherwise; whether the award of Kes.500, 000./= Only on account of Punitive Damages was legitimate.

10. Regarding the first issue, namely; whether the Respondent duly established and proved her claim as pertaining to ownership of Plot No. 168 Kiwanjani B – Isiolo or plot No. 168 Kiwanjani SQ or otherwise, it is contended that the Respondent has posited that same was duly and lawfully allocated plot number 168 Kiwanjani B by the County Council of Isiolo [now defunct]. It was further contended that plot number 168 Kiwanjani B Isiolo is also known as Plot No. 168 Kiwanjani SQ.

11. Be that as it may, learned counsel for the Appellant has submitted that despite making the foregoing averments, the Respondent herein failed to tender and or place before the court any plausible, cogent and credible evidence to prove her claim as pertains to plots number 168 Kwanjani B.

12. It was further submitted that even though the Respondent tendered before the court a copy of the letter dated the 2nd February 1999 in respect of un-surveyed residential plot no 168 -Kiwanjani SQ Isiolo, the Respondent has however failed to place before the court a copy of the PDP relative to the allotment of the suit property. In the absence of the PDP, it was contended that the purported allotment of the suit plot was not only irregular, but same was also incomplete.

13. Furthermore, it was submitted that though the Respondent contended that plot number 168 Kiwanjani SQ is also the same as plot number 168 Kwanjani B, no document was tendered and/or produced to confirm that the two description[s] relate to one and the same plot.

14. Arising from the foregoing, it was submitted that the Respondent had failed to place before the court credible evidence to attest to the fact that the Respondent was the lawful owner of the suit property or at all.

15. In respect of the second issue, namely; whether the Appellant acquired Plot No. 168 Kiwanjani -Isiolo by fraud or otherwise, it was submitted that the Appellant tendered and placed before the trial court evidence to demonstrate that same was in occupation of the property in question from as early as the year 1992. Furthermore, it was submitted that the Appellant also tendered and adduced before the court evidence of an application to the District Commissioner requesting for the recommendation for preparation of a PDP. To this end, the Appellant produced before the court the letter of the district commissioner addressed to the district physical planner and wherein the district physical planner was requested to prepare and generate the PDP.

16. Moreover, it was submitted that the district physical planner thereafter proceeded to and prepared the requisite PDP culminating into the Appellant being issued with a letter of allotment dated the 19th February 199. Besides, it was submitted that the Appellant tendered and produced evidence before the trial court to demonstrate that same duly complied with the terms of the letter of allotment and was subsequently issued with a certificate of lease [certificate of title] over and in respect of plot number 168 Kiwanjani [now known as Isiolo Township Block 3/398].

17. For the foregoing reasons, learned counsel for the Appellant has submitted that the Appellant placed before the court credible evidence to underpin her claim to and in respect of plot number 168 Kiwanjani [now Isiolo Township Block 3/398].

18. Respecting the third issue, namely; whether the Respondent was duly and lawfully entitled to the suit property or otherwise, it was submitted that the Respondent herein had contended that the Appellant had acquired the allotment to and in respect of plot number 168 Kiwanjani by fraud. Nevertheless, learned counsel for the Appellant has submitted that despite making the allegations that the Appellant

had acquired the allotment and subsequent registration of plot number 168 Kiwanjani vide fraud, the Respondent herein neither tendered nor produced any evidence to vindicate her allegations. In this regard, it was posited that the plea of fraud needed to have been proved by credible evidence.

19. It was the further submissions by learned counsel for the Appellant that even though the Respondent had impleaded and particularized fraud, the Respondent failed to tender and produce evidence to support the plea and particulars of fraud that had been adverted to in the body of the amended Plaint.

20. As pertains to the last issue, namely; whether the award of Kes.500, 000/= on account of punitive damages was lawful or otherwise, it has been submitted that the trial court proceeded to and awarded the Respondent the sum of kes.500, 000/= only on account of punitive damages when same had neither been pleaded nor proven.

21. Furthermore, it has been submitted that the award on account of punitive damages was also arrived at and made in the absence of evidence to show that the Appellant was culpable for the loss or [sic] misplacement of the Respondent's [sic] letter of allotment or at all.

22. Additionally, it was submitted that the award on account of punitive damages was also arrived at and made in vacuum insofar as the circumstances of the case beforehand did not warrant an award of punitive damages or at all.

23. Flowing from the foregoing submissions, learned counsel for the Appellant has submitted that the findings and holding by the learned trial magistrate were erroneous and contrary to the totality of the evidence on record. To this end, learned counsel for the Appellant has invited the court to find and hold that the appeal beforehand is meritorious. In this regard, the court has been implored to allow the appeal and to set aside the judgment of the trial court.

24. The Respondent filed written submissions dated the 24th June 2024 and wherein same has raised and highlighted five [5] salient issues. The issued raised by the Respondent are namely; whether the finding of the learned trial magistrate that the Respondent was the lawful owner of the suit property is correct or otherwise; whether the Appellant acquired the letter of allotment and the subsequent registration over the suit plot by fraud or otherwise; whether the issuance of the certificate of lease in favour of the Appellant was procured contrary to and in contravention of a lawful court order and whether the award of kes.500, 000/= only on account of punitive damages was lawful or otherwise.

25. In respect of the first issue, namely; whether the finding of the learned trial magistrate that the Respondent was the lawful owner of the suit property is correct or otherwise, it has been submitted that the Respondent herein tendered and placed before the court evidence to show that same [Respondent] was allocated plot number 168 vide letter of the county council of Isiolo dated the 24th October 1995. Furthermore, it was submitted that subsequently, the Respondent was issued with a letter of allotment dated the 22nd February 1999 pertaining to and concerning un-surveyed residential plot number 168 – Kiwanjaini SQ Isiolo.

26. Additionally, it was submitted that the Respondent herein continued to and made various payments to the county council of Isiolo [now defunct] pertaining to the suit plot. Besides, it was contended that the Respondent also procured and obtained the consent from Isiolo county council [now defunct] confirming that same [Respondent] is the owner of plot number 168 Kiwanjani B – Isiolo.

27. Arising from the foregoing, learned counsel for the Respondent has submitted that the totality of the evidence tendered and produced by the Respondent demonstrated that the Respondent was the lawful owner and proprietor of the suit plot, namely; plot number 168 Kiwanjani B – Isiolo [also known as plot number 168 Kiwanjani SQ Isiolo].

28. Regarding the second issue, namely; whether the Appellant acquired the letter of allotment and the subsequent registration over the suit plot by fraud or otherwise, it was submitted that the Appellant herein was unable to tender and proved that her acquisition of the letter of allotment was lawful and procedural. Furthermore, it was submitted that even though the Appellant tendered and produced a letter by the district commissioner dated the 1st July 1998 and wherein the district commissioner recommended the issuance of a PDP, it was contended that the plot in question fell within the jurisdiction of the county council of isiolo and hence the district commissioner had no authority or otherwise to recommend the issuance of a PDP.

29. Moreover, it was submitted that the Appellant herein neither tendered nor produced any evidence to demonstrate that same duly complied with the terms and conditions at the foot of the letter of allotment dated the 19th February 1999 or at all. In the absence of evidence of compliance with the terms and conditions of the letter of allotment, it was contended that the letter of allotment in favour of the Appellant lapsed and therefore same cannot underpin the subsequent issuance of certificate of lease or at all.

30. It was the further submissions by learned counsel for the Respondent that the certificate of lease in favour of the Appellant herein was equally procured and obtained on the face of existing court orders. In this regard, it was contended that the process leading to the issuance of the impugned certificate of lease was therefore illegal and unlawful.

31. Other than the foregoing, it was submitted that it is not enough for the Appellant to wave before the court a certificate of lease and thereafter imagine that holding a certificate of lease would suffice. For good measure, it was submitted that it is the certificate of lease which is being challenged and hence it behoved the Appellant to tender and place before the court credible evidence underpinning the legality of the certificate of lease under reference.

32. In support of the foregoing submissions, learned counsel for the Respondent has cited and referenced the holding in the case of Hubbert L Martin & 3 Others v Magarate J Kamara & 2 Others [2016]eKLR, where the court underscored the necessity to tender and produce the background documents underpinning the issuance of the certificate of lease [certificate of title].

33. The third issue relates to namely; whether the issuance of the certificate of lease in favour of the Appellant was procured contrary to and in contravention of a lawful court order. In this regard, it has been submitted that the court issued an order of temporary injunction which barred the Appellant herein from interfering with the suit property pending the hearing and determination of the suit. It has been submitted that the order of the court under reference barred all transactions and/or dealing[s] touching on and concerning the suit property. Nevertheless, it was contended that despite the existence of the court order, the Appellant herein proceeded and procured a certificate of lease over the suit property.

34. Learned counsel for the Respondent has submitted that to the extent that the certificate of lease under reference was procured during the subsistence of the court order, then the said certificate of lease is therefore irregular and illegal. For good measure, it was posited that the illegality under reference vitiates the certificate of title held by the Appellant herein.

35. Regarding the last issue, namely; whether the award of Kes.500, 000/= only on account of punitive damages was lawful or otherwise, it has been submitted that the Respondent herein tendered and placed before the court evidence that the Appellant had trespassed onto the suit property and thus the Respondent was entitled to recompense for the offensive actions by the Appellant.

36. Furthermore, it was submitted that the award of Kes.500, 000/= only on account of punitive damages does not correspond with the gravity of the actions by the Appellant. To this end, it has been submitted that if the court were to interfere with the award, then the interference should be towards enhancement of the quantum and not otherwise.

37. In a nutshell, learned counsel for the Respondent has submitted that the judgment of the learned trial magistrate was well reasoned and took into account the obtaining evidence and the applicable law. In this regard, it has been posited that the judgment under reference is solid and thus same ought not to be interfered with.

38. Having reviewed the record of appeal; the pleadings that were filed by the parties; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed by the parties, I come to the conclusion that the determination of the instant appeal turns of four salient issues, namely; whether the Respondent duly established and proved lawful allotment of Plot No. 168 Kiwanjani B or otherwise; whether the Respondent proved that the Appellant acquired the letter of allotment in respect of Plot No. 168 Kiwanjani Isiolo and the subsequent certificate of lease vide fraud or otherwise; whether the Appellant herein is the lawful owner and proprietor of plot No. 168 Kiwanjani Isiolo [now L.R No Isiolo Township Block 3/398] and whether the award of Kes.500, 000/= only on account of punitive damages is legal or otherwise.

39. Before venturing to address the issues, which have been highlighted in the preceding paragraphs, it is imperative to appreciate that this being the first appellate court same is tasked with the mandate of undertaking exhaustive review, re-evaluation, re-appraisal and analysis of the evidence that was tendered before the trial court with a view to discerning whether the factual and legal conclusion[s] arrived at by the trial court are well grounded and or otherwise.

40. Moreover, it is common ground that even though the court is at liberty to arrive at an independent conclusion taking into account the totality of the evidence on record, the court is obligated to give due regard to the fact that same neither heard nor saw the witnesses testify. To this end, the court is called upon to exercise due caution and circumspection before departing from the factual conclusion[s] of the trial court.

41. Pertinently, the position of the law is to the effect that the first appellate court is called upon to defer to the factual findings of the trial court unless there exists compelling reasons and/or basis to warrant departure from such findings and/or conclusion. Nevertheless, there is no gainsaying that the court is at liberty to depart from the factual findings and conclusion[s] of the trial court where it is demonstrated that the findings and conclusions are contrary to the weight of evidence on record; perverse to the evidence on record or better still, where there exists an error of principle on record and which vitiates the findings of the trial court.

42. The scope and extent of the jurisdiction of the first appellate court whilst discharging its mandate has been highlighted in a plethora of decisions. In the case of Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, the 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..."

43. 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 v 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 v 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 v Sauviet Sohold, the Times, March 16,1983.
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> "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 v 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".

44. 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.

45. Regarding the first issue, namely; whether the Respondent duly established and proved her entitlement to plot No. 168 Kiwanjani B [AKA Plot No 168 Kiwanjani SQ Isiolo] it is imperative to state and observed that it is the Respondent who approached the court seeking to be declared as being the lawful and legitimate proprietor of plot No. 168 Kiwanjani B, which is also stated to be the same as Plot No. 168 Kiwanjani SQ Isiolo.

46. Furthermore, it is also the Respondent who sought to procure an order of eviction and permanent injunction as against the Appellant herein from [sic] plot No. 168 Kiwanjani B [AKA 168 Kiwanjani SQ -Isiolo].

47. To the extent that it is the Respondent who sought to attract favourable decision from the court as pertains to ownership of the plot in question, it was incumbent upon the Respondent to tender and place before the court plausible, cogent and credible evidence [both oral and documentary] to vindicate her claim to the suit plot. Pertinently, the burden of proof laid on the shoulders of the Respondent and not otherwise [See Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya].

48. The legal position that the burden of proof lays at the doorstep of the claimant, has been highlighted and elaborated in a plethora of decisions. In the case of 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, the Court of Appeal held 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:-
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> "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."
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> See D. T. Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati [2014] eKLR.

49. Furthermore, in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR), the Court of Appeal held thus;

> The next issue for determination is whether even if the appellant ought not have been sued in court by way of petition, and judgment delivered against him, the claims were proved. Proof in claims of a civil nature is by way of evidence. Section 3 of the *Evidence Act* (Cap 80) defines evidence as denoting:
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> "--- the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved, and without prejudice to the foregoing generally, includes statements by accused persons, admissions and observations by the court in its judicial capacity."
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> 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;
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> "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.
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> 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.
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> 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."
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> In these proceedings and particularly the claim that the appellant sold off properties of three companies to the detriment of the 1st respondent, the three provisions reproduced above require that the 1st 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.

50. The Supreme Court of Kenya [the apex court] has also elaborated on the question of burden of proof and on whom same lays. In the case of Dr. Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment), 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;
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> " 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.

51. Bearing the foregoing in mind, it is now imperative to discern whether the Respondent placed before the court plausible and cogent evidence to demonstrate firstly, whether same was lawfully allocated plot number 168 Kiwanjani B Isiolo; and whether the said plot is the same as plot number 168 Kiwanjani SQ Isiolo or otherwise.

52. To start with, it is important to recall that the Respondent herein tendered and produced before the court a letter dated the 24th October 1995 which is said to have been generated by the clerk isiolo county council [now defunct]. Nevertheless, it is worthy to observe that the letter under reference is not bearing the letter head of the county council of isiolo or at all. Furthermore, the impugned letter relates to allotment of plot number 168, which plot number has been inserted by hand [as opposed to the rest of the documents which is typed].

53. Additionally, it is also important to underscore that the letter under reference also bears the name of the Respondents which has equally been inserted by pen. The fact that the letter under reference is not on the letter of the county council of Isiolo now defunct aside, what is critical is the plot number that has been highlighted or adverted to in the body thereof. For good measure, the impugned letter relates to plot number 168; and not Plot Number 168 Kiwajani B; or SQ.

54. First forward, the Respondent herein tendered a letter of allotment dated the 22nd February 1999. The letter of allotment under reference relates to un-surveyed residential plot number 168-Kiwanjani SQ Isiolo. Notably, the letter of allotment does not relate to plot number 168 Kiwanjani B Isiolo, which is the suit plot.

55. Other than the foregoing, the Respondent tendered and adduced before the court assorted receipts touching on and concerning plot number 168 Kiwanjani; 168 Kiwanjani SQ and 168 Kiwanjani B. Instructively, the receipts under reference were not consistent as pertains to the Respondent's plot.

56. Moreover, the Respondent tendered and produced before the court [sic] a consent generated and signed on behalf of the county treasurer county council of isiolo dated the 31st December 2012. The certificate/consent under reference which is at page 40 of the record of appeal relates to plot number 168 Kiwanjani B – Isiolo. Besides, it is also imperative to take cognizance of the site inspection report and recommendation dated the 13th September 2012 [page 44 of the record of appeal].

57. Suffice it to state that the site inspection report and the recommendation dated the 13th September 2012 relate[s] to and concern[s] plot number 168 Kiwanjani. For the umpteenth time, it is imperative to outline that the said report neither reference plot 168 Kiwanjani B or 168 Kiwanjani SQ.

58. Back to the issue under reference, it is the Respondent who had posited that same was duly allocated plot number 168 Kiwanjani B. To this end, it behoved the Respondent to tender and produce before the court a letter of allotment [if any] attesting to the allotment of plot 168 Kiwanjani B unto herself. However, there is no gainsaying that no such letter of allotment was ever tendered and/or produced. The question that does arise relates to whether the Respondent proved her entitlement to the said plot.

59. Certainly, the answer is in the negative.

60. Moreover, it is the Respondent who had contended that plot number 168 Kiwanjani B is the same as Plot No. 168 Kiwanjani SQ. Having made the said contention, one would have expected the Respondent to tender and adduce any documentary evidence to show the connection [nexus] between the two plots. Nevertheless, no document was ever tendered and/or produced.

61. Can a court of law make an assumption [sic] that plot 168 Kiwanjani B is the same as plot 168 Kiwanjani SQ? To my mind, a court of law does not make decisions on the basis of speculation, anticipation, hypothesis or imagination. To the contrary, a court of law is enjoined to base its findings on proven and established facts and not otherwise.

62. Respecting the contention that the Respondent was allocated plot number 168 Kiwanjani SQ, it is imperative to take cognizance of the letter of allotment dated the 22nd February 1999. For good measure, there is a curious insertion of the plan number, which indicates and indeed appears to have been inserted by a different typing. Evidently, the insertion relative to the plan number is different from the insertion in the body of the impugned letter of allotment.

63. However, the curious aspect of the impugned letter of allotment is discernible from the evidence that was tendered by the Respondent. For good measure, the Respondent herein testified as PW1.

64. Whilst under cross examination, by learned counsel for the Appellant, PW1 conceded that the previous letter of allotment which same PW1 had utilized before the court did not have a plan number inserted thereon.

65. The witness stated thus;

> " I filde an application in court on the 28th April 2014. I attached the letter of allotment to the application. The place of the attached plan is blank".

66. Furthermore, the witness stated as hereunder;

> " The one in court [P2] has the reference [plan number]. It had the plan. The plot does not have any reference number".

67. My understanding of the testimony tendered by the Respondent is to the effect that the previous letter of allotment which same had tendered and utilized before the court did not reference the plan number. However, the witness concedes that the one [letter of allotment] which was eventually tendered before the court as an exhibit now has a plan number inserted thereunder.

68. Surely, the Respondent must have committed some fraud and forgery touching on and concerning the insertion of the plan number on exhibit P2. How else would one explain the dichotomy between the said Letter of allotment, namely; the one that was annexed to the interlocutory application; and the one which was ultimately produced before the Court as an Exhibit.

69. No wonder the ink inserting the plan number in exhibit P2; differs from the one relating to the rest of the writings [contents] thereon.

70. On the other hand, it is also important to observe that the Respondent herein neither tendered nor produced the PDP relating to plot number 168 Kiwanjani SQ. In the absence of a PDP; questions do arise pertaining to and concerning [sic] the validity of the letter of allotment.

71. When the Respondent was questioned as pertains to the PDP, same is on record stating thus;

> " The letter of allotment refers to un-surveyed residential plot number 168- SQ Isiolo. The letter is dated the 22nd February 1999. The letter does not refer to plot number 168 Kiwanjani B. The reference is number 31560/515. The allotment refers to plan number 117/98/87 I do not have the plan in court. I was not supplied with any plan as there was none".

72. It is common knowledge that the PDP is a critical document in the process of allotment and or alienation of land. For good measure, the importance of a PDP was highlighted vide Section 3 of the Physical Planning Act, Chapter 286 Laws of Kenya [now repealed].

73. The provisions of Section 3 of the said Act [supra] stipulates thus;

> (d) a part development plan indicating precise sites for immediate implementation of specific projects or for alienation purposes;

74. The centrality of a PDP in the alienation or allocation of land was re-emphasized by 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

> 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 allotees.
>
> 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.

75. In the absence of a PDP [if any] that was ever issued to underpin the allocation of [sic] plot 168 Kiwanjani SQ Isiolo in favour of the Respondent, I am afraid that the said allocation was irregular, illegal and unlawful.

76. Taking the foregoing perspective[s] into account, I am unable to positively state that the Respondent was lawfully allocated plot number 168 Kiwanjani B Isiolo. Furthermore, I am also unable to positively state that the Respondent was lawfully allocated plot number 168 Kiwanjani SQ-Isiolo.

77. Moreover, I am unable to confirm that plot number[s] 168 Kiwanjani B – Isiolo is synonymous with plot number 168 Kiwanjani SQ Isiolo. Remembering that it is the Respondent who had contended that the two descriptions refer to one and the same plot; it was incumbent upon the Respondent to prove the said affirmation.

78. Sadly, the Respondent failed to tender and produce any evidence or at all. In this regard, I am at a loss as to how the trial court came to the conclusion that the Respondent had established and proved her claims to and/or entitlement over plot number 168 Kiwanjani B Isiolo.

79. Similarly, I am at a loss as to how the learned trial magistrate came into conclusion that plot number 168 Kiwanjani B is also known as 168 Kiwanjani SQ Isiolo. Suffice it to posit that a court of law must not make findings on the basis of conjecture and hypothesis.

80. Regarding the second issue, namely; whether the Respondent proved that the Appellant acquired the letter of allotment in respect of Plot No. 168 Kiwanjani Isiolo and the subsequent certificate of lease vide fraud or otherwise. Other than claiming that same [Respondent] was the lawful allottee of plot number 168 Kiwanjani B Isiolo, which has been addressed elsewhere herein before, the Respondent also contended that the Appellant procured the letter of allotment in her favour vide fraud.

81. Moreover, the Respondent had also contended that the Appellant proceeded to and procured the certificate of lease in respect of L.R No. Township Block 3/398 during the existence of lawful court orders which were issued by the court on the 16th February 2016.

82. To this end, the Respondent posited that the issuance of the certificate of lease was therefore contrary to lawful court orders and thus illegal.

83. It is important to recall and reiterate that claims based on fraud must not only be pleaded and particularized but same must be strictly proved. Suffice it to posit that the standard of proof as pertains to fraud is beyond the balance of probability but below beyond reasonable doubt.

84. For ease of appreciation, the standard of proof in matters pertaining to fraud [which are quasi criminal] has been described to be the intermediate standard. To this end, it suffices to reference the decision in the case of Kuria Kiarie v Sammy Magera [2018]eKLR, where the Court of Appeal stated thus

> 25. The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:
>
> > " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." [Emphasis added].
>
> The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.
>
> 26. As regards the standard of proof, this Court in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows;-
>
> > " ...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof

upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

27. We have examined the appellants' amended defence for any pleading on particulars of fraud or illegality but there is none. The claims were therefore stillborn and no evidence could be tendered. Even if it was open to tender evidence on fraud and illegality, the mere allegation that a sale agreement and a Consent for transfer cannot be obtained on the same day is well below the standard of proof set under the authorities cited. We need not belabour this issue as we are satisfied that it was neither properly pleaded nor strictly proved. That ground of appeal fails too.

85. With the foregoing in mind, I must now return to the pleadings that were filed on behalf of the Respondent. For good measure, the Respondent's case is predicated on the amended Plaint dated the 18th October 2019. In addition, the particular of fraud are highlighted at the foot of paragraph *4*[B] thereof.

86. The Respondent herein had posited that the Appellant procured the letter of allotment, PDP, beacon certificate, consent, survey plan and the filed notes for purposes of obtaining a lease in respect of obtaining a plot fraudulently. Furthermore, the Respondent also contended that the Appellant used her position in the county of Isiolo to obtain documents fraudulently. Finally, it was contended that the Appellant procured the certificate of lease dated 12th July 2018 during the existence of a lawful court order.

87. I beg to deal with the averments by the Respondents in a sequence. Firstly, it was incumbent upon the Respondent to demonstrate and prove how the letter of allotment and the incidental documents were procured by fraud. Did the Respondent tender any credible evidence to this end?

88. The answer to the foregoing question obtains in the evidence of the Respondents whilst under cross examination by learned counsel for the Appellant.

89. The Respondent [who testified as PW1] stated thus;

> " The Defendant was a senior officer in the council. I raised the complaint verbally and I was always advised. Council officers accompanied me to the plot. I came to court after the council could not help me. I did not raise any complaint of fraud to the plot. I do no know if the Defendant had any influence on allocation of plot. I do not know of her documents or contents".

90. Where is the evidence of fraud? Certainly, the Respondent did not tender and/or produce any. In any event, what has been reproduced herein before does not bespeak fraud or at all.

91. I now wish to venture forward and address whether the certificate of lease in favour of the Appellant was procured on the face of an existing court order, in the manner that was adverted to by the trial court [the Learned Magistrate].

92. I beg to deal with this aspect in a two-pronged manner. Firstly, there is no gainsaying that the Respondent procured and obtained an order of temporary injunction which was issued on the 16th February 2016.

93. The order of temporary injunction stated thus;

> " Court hereby issued an order for injunction restraining the Defendants and/or any person claiming under her from entering or in any way interfering with the Plaintiff's plot number 168 Kiwanjani B Isiolo pending the hearing and determination of this suit".

94. The foregoing are the clear terms of the court order. Did the said court order restrain the issuance of a certificate of title [lease] arising from plot number 168 Kiwanjani? The answer is certainly in the negative. For good measure, the order under reference did not by any stretch of imagination relate to plot number 168 Kiwanjani or the issuance of certificate of lease or at all.

95. Secondly, assuming for the sake of arguments only that the orders under reference barred the issuance of certificate of lease [which is not the case], the second question that does arise is whether the said orders remained in existence by the time the certificate of lease was being issued?

96. The answer to the foregoing question is obtainable from the provisions of Order 40 Rule 6 of the Civil Procedure Rules, 2010.

97. Same stated as hereunder

> 6. Lapse of injunction [Order 40, rule 6]
>
> Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

98. In my humble view, by the time certificate of lease in respect of plot number Township Block 3/398 [formerly 168 Kiwanjani Isiolo] was being issued, the orders of temporary injunction which was issued on the 16th February 2016 had long lapsed and stood extinguished by operation of the law. It was dead.

99. Before departing from this issue, it is imperative to revert to the judgment of the learned trial magistrate and wherein the learned trial magistrate sought to impugn the lease instrument [erroneously referenced as the lease agreement] and the certificate of lease on the basis that the lease instrument was prepared, signed and executed more than five months before same was presented for registration. According to learned trial magistrate, it was not possible for [sic] the lease instrument to have been prepared before it was paid for.

100. To this end, it is appropriate to reproduce the observations of the trial court.

101. Same are reproduced as hereunder;

> The Lease Document is dated 16th February 2018. The Registration fees for the same was paid on 3rd July 2018 and it was received for registration on 12th July 2018. The dates on the Lease Agreement are not in line with common sense. The question is, could the Lease Agreement have been prepared before it was paid for? Could it have been dated and signed even before it was presented for registration? These questions raise doubt as to the authenticity and credibility of the Lease Agreement which in turn gave rise to the Certificate of Lease dated 12th July 2018. The Lease Agreement was prepared, executed and dated five (5) months before the registration fees was paid and the same presented for registration. To my mind that is fraudulent. The defendant seems to have been so sure of her scheme that she did not realize the glaring anomaly while seeking to rely on the said document.

102. Two things do arise. Firstly, in the ordinary practice of conveyance, every instrument, be it a transfer instrument or a lease instrument must be dated, signed and engrossed before presentation for registration. Where such a legal instrument is not dated, signed and engrossed beforehand, same cannot be presented for registration.

103. To my mind, the question that was posed by the learned trial magistrate is quite elementary. However, the answer obtains in the *Land Registration Act*, 2012 [2016].

104. Secondly, there is nothing illegal in an instrument being presented for registration more than five months from the date of execution. For good measure, the provisions of the *Land Registration Act* provide for necessary surcharge in the event of delay.

105. In my humble view, the delay in the presentation and or lodgement of the lease instrument [not lease agreement] does not by and of itself connote fraud.

106. Finally, it is worth recalling that ours is a common law jurisdiction. One of the salient tenets of the common law jurisdiction is that same is adversarial in nature. In this regard, parties are bound by their pleadings. Furthermore, the courts are equally bound by the pleadings placed before the court by the parties. [See IEBC v Stephen Mutinda Mule [2013]eKLR; Dakianga Distributors v Kenya Seed Company Ltd [2015]eKLR; and Raila Odinga & Others v IEBC & Others [2017]eKLR, respectively].

107. Arising from the foregoing, the findings and holding by the trial court based on the lease instrument and more particularly concerning whether it could have been dated and signed even before it was presented for registration, have been made in vacuum and are contrary to the doctrine of departure [See Order 2 Rule 6 of the Civil Procedure Rules 2010].

108. My answer to issue number two [2] is to the effect that the Respondent neither proved nor established the plea of fraud as against the Appellant. For good measure, it was incumbent upon the Respondent to prove fraud and not to throw omnibus and generalised allegations on the face of the court.

109. Regarding the third issue, namely; whether the Appellant herein is the lawful owner and proprietor of plot No. 168 Kiwanjani Isiolo [now L.R No Isiolo Township Block 3/398], it is imperative to observe that the Appellant herein tendered and placed before the court a copy of the letter of allotment issued in her favour as pertains to un-surveyed residential plot 168 Kiwanjani- Isiolo. The letter of allotment is dated the 19th February 1999.

110. Additionally, the Appellant herein tendered and produced before the court a copy of the PDP underpinning the allocation of the suit plot. Notably, the letter of allotment tendered and produced on behalf of the Appellant bears the plan number on the face thereof. Moreover, the plan number contained on the face of the Appellant's letter of allotment corresponds with the plan number in the body of the PDP.

111. First forward, the Appellant also tendered before the court the consent that was issued by and on behalf of the County Government of Isiolo confirming that the Appellant was the lawful owner of plot number 168 Kiwanjani Isiolo. In addition, it is also important to underscore that the Appellant also tendered various documents including the letter by the county surveyor dated the 16th July 2016 which forwarded various documents to the directorate of survey for purposes of preparation of the Deed Plan. Notably, the preparation of a Deed Plan is a crucial step towards the issuance of the Certificate of Lease [Certificate of Title].

112. Moreover, the Appellant tendered and produced the letter from the chief land registrar which forwarded the lease instrument for purposes of execution by the Appellant and thereafter for

registration. It must be noted that the lease instrument is generated by and on behalf of the chief land registrar and thereafter cascaded to the designated land registrar [in this case the district land registrar Isiolo].

113. Finally, the Appellant tendered and produced the certificate of lease which was issued on the 12th July 2018. Suffice it to note that the documentation [read, the transaction documents] that have been tendered and produced by the Appellant demonstrate a clear chain/track pertaining to the manner in which the Appellant procured the letter of allotment up to and including the issuance of the certificate of lease.

114. No evidence was tendered by and on behalf of the Respondent to impugn the entirety of the process that was followed by the Appellant to procure and obtain the certificate of lease. In any event, in the absence of evidence of irregularity, fraud and illegality, the court is obligated to presume that the documentation issued in the course of official duties are legitimate.[See the decision of the Court of Appeal in the case of Chief Land Registrar & Another v Nathan Tirop Koech & 4 Others [2018]eKLR].

115. I am duly persuaded that the Appellant herein has justified the process leading to the issuance of the letter of allotment and the consequential certificate of lease in her favour. To this end, I find and hold that the certificate of lease in favour of the Appellant is lawful and legitimate.

116. As pertains to the last issue, namely; whether the award of Kes.500, 000/= only, on account of punitive damages is lawful, it is pertinent to state and observe that the Respondent herein did not plead any claim for punitive damage[s]. Having not pleaded a claim for punitive damages [which is distinct from general damages] the court had no basis to award punitive damages.

117. Moreover, it is worth recalling that punitive damages can only arise and be awarded in circumscribed instances. Nevertheless, prior to and or before a court of law can make an award on account of punitive, aggravated or exemplary damages [whichever is the case], the claimant must place before the court plausible evidence to underpin such an award.

118. In the case of Municipal Council of Eldoret v Titus Gatitu Njau [2020] KECA 782 (KLR), the Court of Appeal highlighted the circumstances under which an award for aggravated, exemplary and punitive damage can issue.

119. For coherence, the court stated thus;

> 25. The respondent prayed for exemplary damages. As stated by this Court in Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR:
>
> > " Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rookes v Barnard [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:
> >
> > i. in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
> >
> > ii. cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and

iii. where exemplary damages are expressly authorized by statute".

26. In his judgment the learned Judge in awarding the exemplary damages relied on the authority of Rookes v Barnard (1964) 1 All ER 367, which espouses principles already set out above. The case has been cited with approval in our jurisdiction in Obongo v Kisumu Council [1971] EA 91; C A M v Royal Media Services Limited [2013] eKLR, Ken Odondi & 2 Others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR.

27. The learned Judge awarded the respondent exemplary damages and justified the award as follows:

"Exemplary damages are at the discretion of the court and the amount to be awarded must depend on the surrounding circumstances of each case. In our case, the defendant flagrantly disobeyed an order stopping them from demolishing a building...They may have thought that since such damages may not be awarded, then they will walk away without paying a cent. If they thought so, then they are very wrong. The court cannot allow the defendant to benefit from its conduct. In my opinion, a sum of Kshs. 15 Million in exemplary damages will be fair in the circumstances. In arriving at this figure, I have taken note of the need to deliver a message to all, that court orders must be obeyed, and I have further taken into consideration the value of the property that was demolished and the general conduct of the defendant, who never at any one time, attempted to make amends or apologize to the plaintiff for its deplorable conduct."

28. This Court, in Nation Media Group v Gideon Mose Onchwati & Kenya Oil Company Limited [2019] eKLR stated as follows:

> " The bulk of the learned Judge's award fell under the head of exemplary damages for which she granted some Kshs. 12,000,000. Now, exemplary damages are awardable in very rare instances where the conduct of the defendant is deserving of punishment, and they are meant to vindicate the law. They have nothing o do with compensating the plaintiff. This Court in The Nairobi Star Publication Limited V Elizabeth Atieno Oyoo [2018] addressed this issue as follows, and we agree;
>
> "As regards exemplary damages, the same are only to be awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, in paragraph 243 of Halsbury's Laws of England, as follows:-
>
> 1. Oppressive, arbitrary or unconstitutional actions by servants of government;
> 2. Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or
> 3. Cases in which the payment of exemplary damages is authorized by statute."
>
> See also John v MGN Limited (supra).
>
> " We are not satisfied from our perusal of the record, and from the submissions made before us, that there is anything in the conduct of NMG (the appellant), far from laudable though it was, that was so callous, reprehensible, steeped in impunity or actuated by mercenary considerations, that it called for the extreme measure of punishing it by

way of exemplary damages. The same did not lie and we would set aside that head and the sum of Kshs. 12,000,000 in entirety."

120. Bearing the foregoing in mind, I am in total agreement with learned counsel for the Appellant that the award of Kes.500, 000/= only, on account of punitive damages was not only erroneous, but same was made in vacuum.

121. The award in question was/ is not well grounded.

Final Disposition:

122. From the foregoing analysis, it must have become crystal clear that the appeal beforehand is meritorious. The learned trial magistrate, committed several errors both of commission and omission which vitiates the entirety of the Judgment that was rendered.

123. Consequently, and in the premises, the final orders of the court are as hereunder;

i. The Appeal be and is hereby allowed.

ii. The Judgment of trial court dated the 26th September 2023 be and is hereby set aside in its entirety.

iii. The Judgment of the trial court is hereby substituted with an order dismissing the Respondent's suit.

iv. The Appellant's counterclaim dated the 22nd August 2019 be and is hereby allowed.

v. For good measure, the Appellant be and is hereby declared as the lawful and legitimate proprietor of L.R No. Isiolo Township Block 3/398 [Formerly un-surveyed Plot No. 168 Kiwanjani Isiolo].

vi. There be and is hereby granted an order of permanent injunction to restrain the Respondent either herself, agents, servants, employees and/or anyone claiming under the Respondent from entering upon, trespassing onto and/or otherwise interfering with the Appellant's rights to and in respect of L.R No. Isiolo Township Block 3/398 [Formerly un-surveyed Plot No. 168 Kiwanjani Isiolo].

vii. Costs of the Appeal be and are hereby awarded to the Appellant.

viii. The Appellant is similarly awarded costs incurred in the subordinate court.

124. It is so ordered

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 23RD DAY OF APRIL 2025.

OGUTTU MBOYA, FCIArb.

JUDGE.

In the presence of

Mukami/Mustafa Court Assistant.

Mr. Mwirigi Kaburu for the Appellant.

Mr. Kariuki for the Respondent.