Golicha v Sora (Environment and Land Appeal 6 of 2023)
[2025] KEELC 390 (KLR) (5 February 2025) (Judgment)

Neutral citation: [2025] KEELC 390 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL 6 OF 2023

JO MBOYA, J

FEBRUARY 5, 2025

BETWEEN

HUSSEIN KALICHA GOLICHA ..... APPELLANT

AND

DUBA WARIO SORA ..... RESPONDENT

(Being an appeal from the judgment dated 30th August 2023 and the subsequent decree of Hon. E. Tsimonjero -SRM in Isiolo ELC case No. 63 of 2015)

JUDGMENT

Introduction And Background:

1. The Respondent herein filed civil proceedings vide Isiolo CMCC No. 63 of 2015 [hereinafter referred to as the original suit] and which suit was heard and determined vide judgment rendered on 30th August 2023. Pursuant to the judgment under reference the trial court [Hon. Tsimonjero – SRM] found and held that the suit property lawfully belongs to the Respondent.

2. The appellant herein felt aggrieved and dissatisfied and thus filed the memorandum of appeal dated 19th September, 2023 and in respect of which the appellant has raised/highlighted various grounds of appeal. The grounds at the foot of the memorandum of appeal are as hereunder:

    i. That the learned senior resident magistrate erred in law and fact in failing to appreciate and come to a finding that since both parties claimed entitlement to the suit land from the same authority, to wit the former county of Isiolo it was incumbent upon the respondent to join the county council as a party in the suit for recognizing the appellant as alternative owner.

    ii. That the learned senior resident magistrate erred in law and fact in failing to come to the conclusion that the former county council of Isiolo the allocating authority had in fact prior

to the filing of the suit resolved the issue of the ownership of the disputed land in favour of the appellant.

iii. That the learned senior resident magistrate erred and misdirected himself on the law and the facts in failing to appreciate and reach the conclusion that the parcel of land applied for by the respondent was completely different from the suit land in terms of actual location size and user.

iv. That it was a misdirection on the part of the trial magistrate to lay emphasis on the respective histories of the parties which was not really an issue in dispute and which in itself is not a basis for determining entitlement to the disputed land.

v. That the learned senior resident magistrate erred in law and fact in relying heavily on the respondent's documents which were never produced in evidence and which even assuming they were produced would be of doubtful validity and not helpful to the respondent's case.

vi. That the learned senior resident magistrate erred in law and fact in failing to consider and analyze the written submissions tendered for the appellant, which failure occasioned injustice to the appellant

vii. That the learned senior resident magistrate misdirected himself on the law and the facts in coming to the erroneous conclusion that the appellant had no parcel number while the allocating authority had assigned a parcel number in respect of which land rates and rents were charged for and duly paid and part development plan prepared.

viii. That the learned senior resident magistrate misdirected himself on the law and fact by coming to the conclusion that the Respondent as the suing party allegedly proved his case on a balance of probabilities.

3. The appeal beforehand was set down for directions in accordance with the provisions of Order 42 Rule 13 of the Civil Procedure Rules. During the directions, the advocates for the parties covenanted to have the appeal canvassed by way of written submissions. To this end, the court [differently constituted] ventured forward and directed that parties do file and exchange written submissions within circumscribed timelines.

4. The appellant filed written submissions dated 15th February 2024, while the respondent filed written submissions dated 18th March 2024. The two [2] sets of written submissions are on record.

Parties Submissions:

a. Appellants Submissions

5. The Appellants filed written submissions dated 15th February 2024 and wherein the Appellants canvassed a plethora of issues. Firstly, learned counsel for the Appellant contended that the dispute before the trial court touched on and concerned a claim pertaining to ownership of the suit property. Learned Counsel submitted that the Respondent herein had contended that the suit property herein was allocated unto him [Respondent] by the county council of Isiolo. Furthermore, it was contended that subsequently, the Respondent was [sic] issued with a letter of allotment by the commissioner of lands [now defunct].

6. Moreover, learned counsel for the appellant submitted that the same plot which was allegedly allocated to the respondent was allocated to the Appellant. In any event, it was posited that the Appellant was duly issued with a letter of allotment by the commissioner of lands[now defunct].

7. Owing to the fact that both the Appellant and the Respondent were claiming the same land, the trial magistrate was obliged to and indeed visited the locus in quo [the disputed land] and thereafter it transpired that the ground being claimed by the two [2] parties is the same.

8. Having confirmed that the ground being claimed by the parties is one and the same; learned counsel for the Appellant has submitted that it behooved the learned trial magistrate to undertake due investigations with a view to finding out and or ascertaining whether there was double allocation in respect of the disputed plot or otherwise.

9. Furthermore, learned counsel for the Appellant submitted that the learned trial magistrate failed to consider and take into account the decision of the Dispute Resolution committee of the county council of Isiolo [now defunct] which was rendered in the year 2012. In any event, learned counsel posited that had the learned trial magistrate considered and taken into account the said decision, same [trial magistrate] would have come to the conclusion that the disputed ground, which is one and the same, lawfully belongs to the Appellant and not otherwise.

10. Secondly, learned counsel for the Appellant has submitted that in so far as the Respondent had contended that the suit property was allocated unto him by the county council of Isiolo [now defunct], the respondent ought to have joined the County Government of Isiolo, which is the successor of the County Council of Isiolo, as a co-defendant.

11. Nevertheless, learned counsel for the appellant has submitted that the respondent herein failed and neglected to join the county government of Isiolo as a co-defendant. In this regard, it was therefore submitted that the failure to join the county government of Isiolo as a party ought to be utilized[deployed] for purposes of drawing an adverse inference against the respondent.

12. Furthermore, learned counsel for the appellants cited and invoked the provisions of Order 1 Rule 3 of the Civil Procedure Rules,2010; which underpins the persons that ought to be joined and included as Defendants. In this regard, learned counsel has posited that in the absence of the county government of Isiolo, the learned trial magistrate ought not to have come to the conclusion that the respondent had proved his case to the requisite standard or at all.

13. Thirdly, learned counsel for the appellant has submitted that the learned trial magistrate arrived at the final conclusion [read, Judgment], albeit without taking into account that the respondent had not tendered and or produced pertinent documents to underpin his [Respondents] claim of ownership. In particular, it was contended that the Respondent's case was closed before the Respondent could tender certain documents which had been marked for identification.

14. To the extent that various documents which the respondent sought to rely on had not been produced as exhibit[s], it was contended that the finding by the learned trial magistrate was therefore slanted and skewed. In short, learned counsel for the Appellant has contended that the finding by the learned trial magistrate and in particular, the holding that the suit property belongs to the Respondent, was arrived at in vacuum.

15. On the other hand, it was contended that had the learned trial magistrate considered the documents put forth by the appellant, including the Appellants letter of allotment, Part Development Plan [PDP]; and the dispute resolution committee ruling; the court would have arrived at and reached a contrary position.'

16. Fourthly, learned counsel for the appellant has submitted that the learned trial magistrate also did not undertake due interrogation of the historical background pertaining to the claim of ownership by both

the Appellant and the respondent. In particular, it was contended that the Learned Trial Magistrate paid scant attention to the documentation tendered and produced by the Appellant herein.

17. Consequently, and in this regard, it was posited that the learned trial magistrate therefore arrived at a decision that is not only contrary to, but perverse to the weight of evidence on record.

18. Fifthly, learned counsel for the Appellant has submitted that the finding and holding that the suit property belongs to the Respondent was arrived at and reached without due regard to the fact that the Respondent's letter of allotment does not appear to have been accompanied with a valid Part Development Plan [PDP]. In any event, it was posited that the part development plan which was being proper propagated by the Respondents appears to have been made/prepared long after the purported allocation of the suit property to the Respondents.

19. To this end, it was submitted that the impugned Letter of allotment [sic] issued in February 1997; is therefore questionable and thus ought not to have founded the basis of the finding by the court.

20. In support of the submissions that the Respondent's letters of allotment and the consequential part development plan did not vest any right to and in favour of the Respondent, learned counsel for the appellant has cited and referenced the holding in the case of Nelson Kazungu Chai and 9 others vs Pwani University College (2014) eKLR and Ali Mohammed Dagane vs Hakar Abshir & 3 others (2021) eKLR respectively, where the court elaborated on the process to be followed prior to allocation of land under the Government *Land Act*, Chapter 280, Laws of Kenya; [now repealed].

21. Sixthly, it was the submission by learned counsel for the Appellant that the learned trial magistrate erred in law in finding and holding that the letter of allotment held by the Respondent was sufficient to underpin a claim for ownership of the suit property. In this regard, counsel posited that it is common knowledge that a letter of allotment of and by itself, does not confer any interest in land. For good measure, learned counsel added that a letter of allotment is nothing more than an offer which requires an allottee to perform certain acts before a legally binding contract may arise.

22. In support of the foregoing submissions, learned counsel for the Appellant has cited and referenced various decisions including Gladys Wanjiru Ngacha vs Teresa Chepsaat and 4 others Civil Appeal No. 182 of 1992 at Nyeri {unreported] and Doctor N. K Arap Ngok vs Justice Moijo Ole Keiwua & 4 others (1997) eKLR.

23. Finally, learned counsel for the Appellant has submitted that it is regrettable and pitiable that the learned trial magistrate failed to comment on or analyze the written submissions that were filed on behalf of the respective parties. In this regard, it has been submitted that had the learned trial magistrate analyzed the submissions filed same [learned magistrate] would have appreciated various and diverse perspectives attendant to the claim before the court.

24. Moreover, learned counsel has submitted that the Appellant herein had filed submissions running into five [5] pages and citing several case law, but which submissions appear not to have been considered. To this end, learned counsel has posited that had the magistrate looked at and considered the submissions, the learned magistrate would have arrived at a different conclusion.

25. In a nutshell, learned counsel for the Appellant has implored the court to find and hold that the appeal beforehand is meritorious. In this regard, learned counsel for the Appellant has invited the court to set aside and vary the judgment of the learned trial magistrate; and thereafter to decree that the suit property belongs to the Appellant.

b. Respondent's submissions:

26. The Respondent filed written submissions dated 18th March 2024 and wherein same raised four [4] issues for consideration. The issues that were raised by the Respondent included what is the degree of proof in civil matters; what is the duty of the appellate court in respect of first appeals; is there a good appeal before the court; and what orders should the appellate court issue.

27. In respect of the first issue, learned counsel for the Respondent has submitted that the standard of proof in civil matters is well settled. In this regard, learned counsel for the Respondent submitted that the standard of proof is on a balance of probabilities. To this end, learned counsel cited and referenced the decision in Miller vs Minister for Pensions 1942 All ER 372.

28. Regarding the 2nd issue; learned counsel for the Respondent has submitted that the 1st appellate court is tasked with the mandate to review the entire evidence on record and thereafter analyze same, with a view to arriving at an independent conclusion. In any event, it was submitted that in its endeavor to discharge the mandate under the law, the 1st appellate court is obligated to take into account the pleadings and the document filed by the respective parties.

29. In respect of the 3rd issue; learned counsel for the Respondent has submitted that the learned trial magistrate properly evaluated and analyzed the evidence on the record. In any event, it was submitted that the learned trial magistrate adopted and deployed the correct approach in an endeavor to discern ownership of the disputed land.

30. Arising from the foregoing, it was therefore submitted that the learned trial magistrate indeed reached and arrived at the correct decision. Consequently, this court has been invited to decline to interfere with the findings and decision of the trial court.

31. Finally and as a parting shot, Learned counsel for the Respondent has submitted that the appeal beforehand is devoid of merits and hence same [appeal] ought to be dismissed with costs.

Issues For Determination:

32. Having reviewed the pleadings filed; the evidence tendered [both oral and documentary]; the proceedings before the trial court; the judgment of the trial court; and upon taking into consideration the written submissions filed by and on behalf of the parties, the following issues crystallize [emerge] and are worthy determination;

    i. Whether the Respondent established and or demonstrated legal rights to and in respect of the suit property or otherwise.

    ii. Whether the Appellant tendered and produced before the trial court documents to demonstrate entitlement to or ownership of the suit property.

    iii. Whether the learned trial magistrate [sic] failed to consider and take into account the submissions by the Appellant; and if so, whether a failure to consider the submissions negates the decision of the court.

Jurisdiction And Posture

33. The Appeal beforehand is a first appeal from the decision of the court of first instance. By virtue of being a first appeal, this honourable court is vested with the requisite jurisdiction to review, re-evaluate and re-analyse the findings of the court of first instance and thereafter to arrive at an independent-conclusions, taking into account the pleading[s] filed; evidence on record and the applicable laws.

34. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to review, re-evaluate and re-analyse the findings and observations of the trial court, this court is however called upon to exercise necessary caution and circumspection. In addition, the court is called upon to defer to the findings of the trial court unless, the findings of the trial court are informed by extraneous factors or better still, are perverse to the evidence on record.

35. The scope and jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, the Court of Appeal for Eastern Africa 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..."

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

We also wish to be guided by the reasoning of this court in the case of Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934 thus:-

> " Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the house of Lords in Sottos Shipping versus Sauviet Sohold, the Times, March 16,1983.
>
> "It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said"

Again, in Peters versus Sunday Post Limited (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, P said at page 429:

> " It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses"

37. Duly guided by the established position [ratio] which underlines the scope and extent of the jurisdiction of the 1st appellate court, I am now disposed to revert to the subject matter and to discern whether the learned trial magistrate correctly applied the law in the course of determining the dispute between the parties.

38. Additionally, I am also well positioned to review and re-evaluate the factual matrix [evidence] presented before the trial court and thereafter endeavor to ascertain whether the factual findings arrived at by the trial magistrate are well grounded.

Analysis And Determination

Issue No. 1

Whether the respondent established and or demonstrated legal rights to and in respect of the suit property or otherwise

39. The Respondent herein is the one who filed and or mounted the suit before the subordinate court and wherein same [Respondent] contended to have been lawfully allocated plot No. Kambi/Gabra/512/ ISL situated within Isiolo town [hereinafter referred to as the suit Plot].

40. According to the Respondent, same [Respondent] made an application to the County Council of Isiolo [now defunct] to be allocated a plot at Garba area, within Isiolo Town.

41. Moreover, the Respondent contended that his application to be allocated a plot within Isiolo and in particular, at Kambi Garba was considered by the town planning and marketing committee of county council of Isiolo [now defunct]; and thereafter the application was duly approved. To this end, the Respondent tendered and produced before the trial court copy of the minutes dated 13th August 1997.

42. Suffice to state that at items 50 and 76 of the said minutes, the Respondent's application for a plot at Kambi Garba and for 1 acre at Kambi Garba, were duly approved.

43. Additionally, the Respondent placed before the trial court a letter of allotment dated 21st February 1997 relating to existing commercial plot number 512 – Isiolo. Instructively the letter of allotment under reference was duly accompanied by a Part Development Plan [PDP] whose plan number is reflected/shown on the face of the letter of allotment.

44. Other than the letter of allotment [details in terms of preceding paragraphs] the Respondent also placed before the trial court a letter dated 1st October 2018 and where in the Director, Land Administration was confirming that the Letter of allotment dated 21st February 1997 is authentic and legitimate. Furthermore, the Director Land Administration confirmed to the Director of Survey that same [Director of Survey] was therefore at liberty to proceed with the process of survey and the consequential processes including preparation of a survey plan [F/R].

45. Other than the documentation which the Respondent tendered and placed before the trial court, it is also worthy to recall that the Respondent stated that upon being allocated the suit property same [Respondent] entered onto and took position of the disputed plot. For coherence, the fact that it is the Respondent in occupation and possession of the disputed plot was not contested.

46. Furthermore, the Respondent's occupation and possession of the suit plot was confirmed by the Learned trial Magistrate when same [Trial Magistrate] visited the Locus in Quo.

47. On the contrary, evidence abound that the Appellant herein was never and has never been in occupation of the disputed ground. In any event, the Appellant conceded that his endeavour to take possession of the land was averted by the issuance of orders of temporary injunction and thus same [appellant] is not in possession.

48. Having reproduced the foregoing background and evidence, it is now apposite to consider whether the Respondent duly established his claim to and in respect of the suit plot. In this regard, I beg to posit that what constitutes the suit property was hitherto Trust land under the management and administration of the Local authorities pursuant to the provisions of the Trust Land *Land Act*, now repealed.

49. Notably and by virtue of the Provisions of the Trust *Land Act* [supra] and pursuant to the provisions of Sections 114,115,116 and 117 of the retired Constitution; the Land under reference was under the management and administration of the County Council of Isiolo [now defunct].

50. To the extent that what constitutes the suit property was under the administration of the County Council of Isiolo [now defunct]; it is important to state and underscore that any process intended to allocate and or alienate a portion of the said trust land, the suit property not excepted, could only be undertaken with the approval and sanction of the County Council of Isiolo [now defunct]. [See sections 115, 116 and 117 of *the Constitution*, now repealed].

51. Arising from the foregoing, there is no gainsaying that for one, the Respondent not excepted, to be allocated a portion of the trust land; same had to apply to the County Council of Isiolo [now defunct].

52. In this regard, it suffices to state that the Respondent indeed placed before the trial court the requisite application for allotment of a plot and the consequential approval. Pertinently, the Respondent demonstrated evidence of compliance with the provisions of Sections 115 – 117 of the retired Constitution.

53. The importance of making the application before the County Council of Isiolo [now defunct] was to enable the county council to ascertain and authenticate the availability of the land being applied for. In any event, it was the approval and sanction of the County Council of Isiolo [now defunct] that would allow the commissioner of land [now defunct] to alienate the designated land on behalf of the County Council of Isiolo. In the absence of the authority, resolution and/ or sanction of the County Council of Isiolo [now defunct], the Commissioner of Lands [now defunct] would be divested of the mandate to act.

54. Furthermore, there is no gainsaying that if the Commissioner of Lands [now defunct] purported to alienate any portion of the Trust Land without the sanction of the concerned Local authority, then such an act would be ultra-vires and thus void.

55. To buttress the foregoing legal position, it suffices to take cognizance of the decision of the Court of Appeal in the case of Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others [2014] eKLR; where the court considered the legal processes attendant to the allotment/ alienation of Trust land.

56. For coherence, the Court [per Maraga, JA,as he then was] stated thus;

> Applying the above principle to the contentious issues in this appeal, I think the starting point in the determination of this appeal is to be clear on the definition of trust land. Section 114 of the repealed Kenya Constitution had an exhaustive definition of trust land. It stated:
>
> "114(1) Subject to this Chapter, the following descriptions of land are Trust land-
>
> land which is in the Special Areas (meaning the areas of land the boundaries of which were specified in the First Schedule to the Trust *Land Act* as in force on 31st May, 1963), and which was on 31st May, 1963 vested in the Trust Land Board by virtue of any law or registered in the name of the Trust Land Board; the area of land that were known before 1st June, 1963 as Special Reserves, Temporary Special Reserves, Special Leasehold Areas and Special Settlement Areas and the boundaries of which were described respectively in the Fourth, Fifth, Sixth and Seventh Schedules to the Crown Lands Ordinance as in force on 31st May, 1963, the areas of land that were on 31st May, 1963 communal reserves by virtue of a declaration under section 58 of that Ordinance, the areas of land referred to in section

59 of that Ordinance as in force on 31st May, 1963 and the areas of land in respect of which a permit to occupy was in force on 31st May, 1963 under section 62 of that Ordinance; and land situated outside the Nairobi Area (as it was on 12th December, 1964) the freehold title to which is registered in the name of a county council or the freehold title to which is vested in a county council by virtue of an escheat:

Provided that Trust land does not include any estates, interests or rights in or over land situated in the Nairobi Area (as it was on 12th December, 1964) that on 31st May, 1963 were registered in the name of the Trust Land Board under the former Land Registration (Special Areas) Ordinance.

2. In this Chapter, references to a county council shall, in relation to land within the areas of jurisdiction of the Taveta Area Council, the Pokot Area Council, the Mosop Area Council, the Tinderet Area Council, the Elgeyo Area Council, the Marakwet Area Council, the Baringo Area Council the Olenguruone Local Council, the Mukogodo Area Council, the Elgon Local Council, and the Kuria Local Council, be construed as references to those councils respectively"

Section 115 of the same Constitution vested all Trust Lands, as defined above in the county councils within whose areas of jurisdiction they were situate save for any body of water and any mineral oils. Section 117 authorized county councils to set apart any trust land vested in them for use and occupation by, inter alia, "any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area..." [Emphasis supplied].

57. Likewise, the process attendant to allocating or alienating Trust Land was elaborated upon in the case of Ethics and Anti-Corruption vs Eunice N. Mogalia and another Civil Appeal No. 39 of 2019 [court of appeal at Kisumu] [unreported] where the Court of Appeal stated at paragraph thus;

" 32. The first respondent was purportedly allocated government land under the government lands act and was to be issued with a certificate of lease in the form of a grant under the registration of titles act. How a government grant that was issued and accepted by the 1st respondent under the government lands act pursuant to which the government was to be the lessor changed to be the lease under the registered *land act* under which the municipal council of Kakamega became the lessee is a mystery.

As we have already stated, the government *land act* vested in the president and the commissioner of lands power to alienate government land as long as the procedure laid out in the act was followed. Trust *land act* on the other hand vested in the county council the power to alienate the land in their respective counties and the commissioner of lands had no power to alienate the same save as directed by the county council through a resolution. In the circumstances, we do not see how the letter of allotment dated 31st July 1998 under which the commissioner of lands offered to the 1st respondent a grant of the government land could have given rise to the lease dated 2nd June 2000 of trust land that was vested in the municipal council of Kakamega. So under what regime of the law was the commissioner of lands acting when he alienated the suit property? We ask this question because the two legal regimes, that is the government lands act and the trust *land act* have different processes as regards to alienation of land". [Underlining Supplied].

58. Bearing the dictum espoused in the two decisions [supra], there is no gainsaying that the Respondent herein placed before the court credible material to underpin his interest in the suit property. Moreover,

it is not lost on this court that the Respondent was thereafter issued with a letter of allotment duly accompanied by a Dart development Plan.

59. For good measure, the allotment of the land in favour of the Respondent was premised and predicated on the previous application and approval by the County Council of Isiolo [now defunct].

60. Additionally, it is also worthy to recall that the letter of allotment issued in favour of the Respondent was also confirmed and verified as authentic by the Director Land Administration. [See letter dated 1st October 2018].

61. From the totality of the evidence that was tendered by and on behalf of the Respondent, there is no gainsaying that the Respondent duly accounted for the manner [process] in which same acquired the suit property.

62. In this regard, it suffices to underscore that the Respondent met and satisfied the threshold highlighted in the case of Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] eKLR where the court highlighted the process as hereunder;

> 31. A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.

63. Before departing from this issue, it is also worthy to recall that the Respondent tendered evidence that same [Respondent] entered upon and has been in occupation of the suit property. In this regard, it suffices to posit that even on the basis of possession, the Respondent was and is entitled to stake a claim to the suit property in comparison to the Appellant, who has never been in possession of the Suit plot.

64. To this end, it is imperative to reference the doctrine of seisin. The import and tenor of the doctrine under reference was highlighted and elaborated upon by the Court of Appeal in the case of Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR where the court stated as hereunder;

> 26. In its pleadings, the 1st, 2nd and 3rd respondents aver that they have always been in possession of the suit land. It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in Ghana of Wuta-Ofei -v- Danquah [1961] All ER 596 at 600, the slightest amount of possession would be sufficient.

65. Having reviewed and analysed the evidence that was placed before the trial court and having taken into account the import and tenure of the doctrine of seisin, I am persuaded that the learned trial magistrate [who undertook historical analysis] reached and arrived at the correct decision in finding and holding that the suit property belongs to the Respondent.

Issue No. 2

Whether the Appellant tendered and produced before the trial court documents to demonstrate entitlement to or ownership of the suit property.

66. The Appellant herein also laid a claim to and in respect of the suit property. In particular, the Appellant's claim was premised and predicated on the basis of a letter of allotment dated 12th March 1999; issued by the commissioner of lands [nowdefunct] and attached to a Part Development Plan No. 117/98/83.

67. According to the Appellant, same was lawfully issued with the letter of allotment and thereafter same [Appellant] complied with the terms thereof. Nevertheless, the Appellant contended that the plot which was allocated unto to him was unsurveyed and therefore same [plot] did not have any plot number assigned thereto.

68. It was the testimony of the Appellant before the trial court that in so far as the allocated plot had not been surveyed same [plot] was therefore being identified on the basis of the Plan number contained at the foot of the Part Development Plan [PDP].

69. Be that as it may, it is imperative to recall that the plot that the Appellant is claiming to have been allocated unto to him [Appellant] falls and or fell within the area of County Council of Isiolo [now defunct].

70. Despite the fact that the plot under reference fell within the jurisdiction of county council of Isiolo [now defunct]; the Appellant herein did not find it expedient to tender and produce before the trial court any minute[s] of the County Council of Isiolo [now defunct], if any; underpinning the allotment of the plot in his favour.

71. Suffice it to underscore that the commissioner of lands [now defunct] could not purport to issue any letter of allotment touching on and or concerning a portion of trust land without the sanction and/or authority of the designated local authority, in this case the county council of isiolo For good measure, if the Commissioner of Land purported to do so, the act/ allotment [if any] would be void. [See Ethics and Anti-Corruption vs Eunice N. Mugalia and another Civil Appeal No. 39 of 2019 [court of appeal at Kisumu] [unreported].

72. In the absence of any minutes by the County Council of Isiolo [now defunct] approving the allotment of [sic] the plot to the appellant herein, I am afraid that the letter of allotment which is being propagated by the Appellant was issued/granted in vacuum. Same is annulity ab initio and thus incapable of founding a basis to stake a claim to and in respect of the Suit plot.

73. Moreover, it is imperative to underscore that even though the Appellant herein is staking a claim to the suit property; namely, plot no. Kambi/Garba/512/ISL, the Appellant herein neither tendered nor produced any document referencing the suit plot. Instructively, the documentation that were tendered and relied upon by the Appellant relates to [sic] Plot no. – PDP No. ISL/117/98/83. That is the plot referenced in the documents by the Appellants.

74. However, it suffices to recall that the Appellant did not tender and or place before the trial court any evidence to link and or connect his documentation to the suit plot. To my mind, there is no way that

the Appellant can deploy the documents referencing Part Development Plan No. ISL/117/98/83; to claim the suit plot.

75. Simply put, there is a serious disconnect between the Appellants documents and the suit plot. In any event, it is worthy to recall that Plot no. 512-Isiolo- is underpinned by a separate and distinct Part Development Plan Number ISL/117/97/44.

76. Other than the foregoing, there is another issue that merits mention and a short discussion. The issue herein relates to the validity/legality of the part development plan being relied upon by the appellant.

77. According to the PDP by the Appellant same is indicated to have been prepared on 19th August 1998 and thereafter approved on 4th September 1998. However, it is curious that even before the Part Development Plan under reference was prepared, same [PDP] was being referenced in letters dated 28th April 1998 and 13th May 1998.

78. I am at a loss as to how the part development plan number which had not been generated could be the subject of correspondence long before it was birthed. It appears that there was a premeditated scheme put in place and which was thereafter actualized vide the part development plan prepared on 19th August 1998 and [sic] approved on 4th September 1998.

79. To my mind something does not add up between the letters under reference and the part development plan [PDP] that is being relied upon by the Appellant herein.

80. Finally, it is also worthy to recall that even though the Appellant contends that same was allocated the suit property, it is evident that there was already in place a letter of allotment relative to the disputed ground. In this regard, there is no gainsaying that the disputed ground which stood alienated, ceased to be available for subsequent allotment or re-allotment, unless the previous Letter of allotment was revoked and/ or cancelled subject to compliance with the due process of the Law.

81. Without belabouring the point, I beg to adopt and reiterate the decision in the case of Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR; where the Court of Appeal stated thus;

> In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5th respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.

82. In my humble, albeit considered view, the letter of allotment propagated by the Appellant herein constitutes [sic] a paper transaction. Same did not attach to and relate to any existing or available plot, whatsoever.

83. In the circumstances I come to the same conclusion as the learned trial magistrate. Simply put, the Appellant herein did not vindicate the root of his letter of allotment. Instructively, the Appellant imagined that waving the letter of allotment on the face of the trial court; and by extension on the face of this court, would suffice to accrue a favourable decision.

84. Unfortunately, a person [the Appellant herein] who seeks to procure positive orders of the court is called upon to do much more. Much more than merely waving the Letter of allotment or the Certificate of Title, whichever is applicable on the face of the Court.

85. To this end, it suffices to reiterate the dictum of the Court of Appeal in the case of Munyu Maina vs Hiram Gathiha Maina (2013) eKLR where the court stated and held thus;

> " We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony. We find that a trust exists in relation to the suit property".

Issue No. 3

Whether the learned trial magistrate [sic] failed to consider and take into account the submissions by the Appellant; and if so, whether a failure to consider the submissions negates the decision of the court.

86. The Learned counsel for the Appellant contended that even though the Appellant [who was the Defendant] in the lower court filed an elaborate and comprehensive written submissions, the learned magistrate [sic] neither referenced nor analyzed same.

87. According to learned counsel for the Appellant, if the learned magistrate had considered and analyzed the said written submissions same [magistrate] would have arrived at a different conclusion, probably a finding that the suit plot belong[s] to the Appellant.

88. To start with, the learned trial magistrate has posited and indicated that same has read and appraised the written submissions that were filed by both parties. In any event, it is not lost on this court, that the learned trial magistrate was neither bound by nor beholden to the written submissions filed by the Parties.

89. Pertinently, the determination of cases, the one beforehand not excepted, is premised/predicated on the pleadings filed by the parties; the evidence tendered and the Law. Once a court of law has appraised the pleadings and the evidence tendered then the duty of the court is to apply the law to the settled facts/evidence. For good measure, there are a plethora of cases which are heard and determined without submissions.

90. In the premises, my short answer to the complaint by Learned counsel by the Appellant pertaining to [sic] the failure by the learned trial magistrate to analyze the lengthy submissions running into five [5] pages is found in the decision in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR; where the Court of Appeal stated thus;

> Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented. In

any event, all the 1st Respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of the companies. And even that he did not do.

91. The ratio [dictum]spoused in the decision [supra] constitutes adequate and sufficient answer to the complaints by the learned counsel for the Appellant. Barring repetition, cases are determined on the basis of pleadings, evidence and the applicable law.

Final Disposition:

92. Flowing from the analysis [details highlighted in the body of the judgment] it must have become apparent and evident that the Appeal beforehand is devoid of merits and thus a suitable candidate for Dismissal.

93. In the circumstances, the final orders that commend themselves to the court are as hereunder:

    i. The Appeal be and is hereby dismissed.

    ii. Costs of the Appeal be and are hereby awarded to the Respondent.

    iii. The Decision/ Judgment of the Trial Court be and hereby affirmed.

94. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 5TH DAY OF FEBRUARY 2025

OGUTTU MBOYA,

JUDGE.

In the presence of:

Mutuma – Court Assistant.

Mr. Mwirigi Mbaya for the Appellant.

Mr. Ondari for the Respondent.