Mohan v Ali & 2 others (Environment and Land Appeal 3 of 2024) [2025] KEELC 4433 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4433 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL 3 OF 2024

JO MBOYA, J

JUNE 5, 2025

BETWEEN

HARISH PREM MOHAN ..... APPELLANT

AND

WATO ALI ..... 1ST RESPONDENT

MISOOMA INVESTMENTS GROUP LTD ..... 2ND RESPONDENT

NICHOLAS ASURAN EYANGAN ..... 3RD RESPONDENT

JUDGMENT

1. The Case/ Appeal beforehand bring[s] to mind the dicta in the case of Nelson Kazungu Chai & 9 others v Pwani University College [2017] KECA 135 (KLR) where the Court of Appeal stated thus;

> " 22 ..... A right can only be protected when it exists in reality and not where it remains an illusion or a mere expectation. Right to property is not one of those rights that inhere to every human being upon birth. They are acquired in different ways after one comes into this world. One cannot acquire property rights over another's property other than in a manner prescribed in law. In this case the appellants' claim to the suit property was in our view merely aspirational or rhetorical. This is so both under our very progressive Constitution and also under International Law. Indeed, other than call in aid International Law, learned counsel Dr. Khaminwa did not cite any specific instrument that the appellants can leverage on to elevate the appellant's right to practice and enjoy their culture on the respondent's property over the respondent's rights under Article 40 of *the Constitution*. In the absence of any right under the doctrine of legitimate expectation and of any other valid colour of right, the trial court could not have arrived at any other finding. Our

conclusion is that the learned Judge arrived at the right decision based on the evidence placed before him, and he cannot be faulted."

2. Suffice it to underscore that property rights can only be acquired in a manner prescribed by section 7 of the *Land Act*, 2012. The provisions of section 7 of the *Land Act* stipulate thus;

> " Title to land may be acquired through—
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> (a) allocation;
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> (b) land adjudication process;
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> (c) compulsory acquisition;
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> (d) prescription;
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> (e) settlement programs;
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> (f) transmissions;
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> (g) transfers;
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> (h) long term leases exceeding twenty-one years created out of private land; or
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> (i) any other manner prescribed in an Act of Parliament."

3. With the foregoing in mind, it is now appropriate to revert to the subject appeal and to discern whether the disputants, namely; the appellant on one hand and the respondents on the other hand acquired any lawful rights to and or in respect of the suit property [sic] capable of being canvassed before a court of law or otherwise.

4. However, before venturing to ascertain the acquisition of rights and interests by the disputants, it is imperative to take cognizance of the background facts. The Appellant herein approached the subordinate court vide Plaint dated 4th January 2019 and which was subsequently amended on 14th January 2014; and wherein same claimed to be the lawful owner and, or proprietor of [sic] Uns Industrial Plot No. "b" Isiolo Township No. 117/97/90. Furthermore, the appellant sought an order of permanent injunction and general damages for trespass.

5. The Respondents duly entered appearance and thereafter filed a statement of defense and counterclaim and which was subsequently amended on 17th April 2019 and wherein the respondents claimed ownership rights as pertains to plot number Uns Residential Plot No. "a" Isiolo Township No. ISL/117/98/105. Moreover, the respondents thereafter sought inter alia an order of permanent injunction to restrain the appellant from interfering with [sic] plot number Uns Residential Plot No. "a" Isiolo Township No. ISL/117/98/105.

6. The suit before the subordinate court was heard and disposed of vide Judgement rendered on 21st December 2023 and wherein the learned trial magistrate found and held that the appellant herein had neither established nor proved his claim to and in respect of plot number Uns Industrial Plot No. "b" Isiolo Township No. 117/97/90. To this end, the learned trial magistrate dismissed the appellant's suit with costs.

7. Conversely, the learned trial magistrate found and held that the Respondents had duly proved and established the claims at the foot of the counterclaim dated 17th April 2019 and thereafter proceeded to and issued orders to inter alia an order of permanent injunction barring the appellant with interfering with [sic] Uns Residential Plot No. "a" Isiolo Township No. ISL/117/98/105. In addition, the trial

magistrate also directed the County Surveyor and the County Physical Planner- Isiolo County to restore the suit property, Industrial Plot B to its rightful registration particulars as Residential Plot Number A and revert it to its rightful owner Nicholas Asuran.

8. Aggrieved by the judgment and decree of the learned trial magistrate, the appellant has now approached this court vide a Memorandum of Appeal dated 19th January 2024 and wherein same [appellant] has highlighted the following grounds;

   i. That the learned Magistrate erred in law and in fact by making assumption that Uns Industrial Plot No. "b" Isiolo Township No. 117/97/90 and Uns Residential Plot No. "a" Isiolo Township No. ISL/117/98/105 is one and the same property contrary to Section 35 and 107 of the *Evidence Act*.

   ii. That the learned magistrate erred in law and in fact by affirming the Respondents' ownership of suit property Uns Industrial Plot No. "b" Isiolo Township No. 117/97/90 without any documentary evidence to assert the ownership and contrary to section 26 of the *Land Registration Act*.

   iii. That the learned Magistrate erred in law and in fact by making assumption that the Appellant manufactured Evidence when the same was never pleaded or evidence adduced to support the same.

   iv. That the learned magistrate erred in law and in fact in failing to consider the evidence on the face of the record and relied on unsubstantiated evidence to award the property Uns Industrial Plot No. "b" Isiolo Township No. 117/97/90 to the Respondents and contrary to section 107 of the *Evidence Act*.

   v. That the learned magistrate erred in law and in fact in failing to evaluate the law of contract in Reference to the allotment letter issued to the 3rd Appellant [sic] vis-à-vis the evidence adduced in court.

   vi. That the learned magistrate erred in law and fact by legitimatizing the allotment letter issued to Nicholas Asuran without any documentary evidence to support the same and contrary to section 35 of the *Evidence Act*.

   vii. That the learned magistrate erred in law and in fact in failing to consider the Supreme Court precedent that an allotment letter is incapable of conferring interest in land thus allowing the counterclaim by the 1st and 2nd Respondents to stand against the Appellant.

   viii. That the learned magistrate erred in law in fact by declaring the 1st and 2nd Respondents as a Bonafide purchasers and allowing their counterclaim when the 2nd Respondent's own admission in court stated that he was knew there was dispute between the Appellant and 3rd Respondent.

   ix. That the learned magistrate erred in law and in fact and failed to consider that the respondents did not adduced [sic] any evidence to support their claim in the matter.

   x. That the learned Magistrate was based against the appellant for the reasons which greatly prejudiced the determination in this case.

9. The subject Appeal came up for direction[s] on 19th February 2025 whereupon the advocate for the parties covenanted to canvass and dispose of the appeal by way of written submissions. To this end, the court issued direction[s] pertaining to the disposal of the appeal. Furthermore, the court also circumscribed timelines for filing and exchange of written submissions.

10. The Appellant filed written submissions dated 10th March 2025 and wherein the Appellant has canvassed and highlighted four [4] salient issues namely; whether the 1st and 2nd Respondents are bona fide purchasers for value or otherwise; whether the appellant proved and established fraud as against the respondents; who between the appellant and the Respondents is the lawful owner of Plot Number B Isiolo [Confused by the Respondents as Uns Residential Plot A Isiolo Township]; and whether the Appellant proved his claim to the suit property.

11. The 1st and 2nd Respondents filed written submissions dated 25th March 2025; and wherein same have distilled four [4] key issues, namely; whether the learned magistrate erred in affirming the 3rd Respondent's ownership of suit property; whether the learned magistrate declared the 1st and 2nd Respondents as bona fide purchasers; whether the learned magistrate was biased against the appellant, and whether the appeal is meritorious or otherwise.

12. The 3rd Respondent filed written submissions dated 31st March 2025; and wherein same has argued the grounds of appeal sequentially. In particular, the 3rd Respondent supported the findings of the learned trial magistrate and essentially, that the suit property is Uns Residential Plot A Isiolo Township and that same lawfully belongs to the 3rd Respondent [Nicholas Asuran].

13. Having appraised the record of appeal; having considered the evidence tendered [both oral and documentary] and having considered the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the appeal beforehand turns on three [3] key issues namely; whether the appellant accrued any lawful right[s] to and in respect of [sic][s] Uns Industrial Plot No. "b" Isiolo Township NO. 117/97/90 or otherwise; whether the 3rd Respondent accrued any lawful right[s] or interest[s] in respect of [sic] Plot Uns Residential Plot A Isiolo Township or otherwise; and whether the 1st and 2nd Respondents are Bonafide purchasers for value in respect of plot [sic] Uns Residential Plot A Isiolo Township or otherwise.

14. Before venturing to interrogate and address the pertinent issues that have been highlighted in the preceding paragraphs, it is imperative to state and observe that this being a first appeal, this court is tasked with the mandate and jurisdiction to undertake exhaustive review, scrutiny, appraisal and analysis of the entirety of the evidence that was placed before the trial court and thereafter to arrive at an independent conclusion.

15. Suffice it to state that the court is not bound by the factual findings and conclusions that were arrived at by the trial court. For good measure, this court is at liberty to depart from the factual findings and conclusions arrived at by the trial court, where it is shown that the conclusions of the trial court were arrived at on no evidence; based on a misapprehension of the evidence tendered; perverse to the evidence on record; or better still where it is demonstrably shown that the trial court has committed an error of principle, which vitiates the judgment.

16. The jurisdictional remit of the first appellate court while entertaining and adjudicating upon an appeal [first Appeal] has been the subject of various court decisions. Recently, the Court of Appeal in the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment) stated thus;

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> "37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of

> seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanor of witnesses. In a nutshell, a first appellate court must proceed with caution in deciding whether to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement.

This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows: "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution.

If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.

Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence.

The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed.

This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be

affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

17. Bearing in mind the dicta captured and highlighted by the Court of Appeal in the decision [supra], I am now disposed to revert to and consider the thematic issues, which had been highlighted elsewhere herein before. Suffice it to state that I shall address the issues sequentially.

18. Regarding the first issue, namely; whether the appellant accrued any lawful right[s] to and in respect of sic UNS INDUSTRIAL PLOT NO. "B" ISIOLO TOWNSHIP NO. 117/97/90 or otherwise; it is imperative to recall and reiterate that the appellant herein was the plaintiff in the subordinate court. Furthermore, it suffices to underscore that the appellant's case was/is anchored on the evidence of two witnesses to wit, Harish Prem Mohan [PW1] and Joshua Rume [PW2].

19. The crux of the appellant's case was to the effect that same was lawfully alloted Plot Number Uns Industrial Plot No. "b" Isiolo Township No. 117/97/90. To this end, the Appellant tendered and produced before the court a copy of letter of allotment dated 11th July 2000.In addition, the Appellant also produced assorted receipts issued by the County Council of Isiolo [now defunct], the consent of lease, approved development plan and application for funds transfer.

20. It was the contention by the Appellant that following the allotment of Uns Industrial Plot No. "b" Isiolo Township No. 117/97/90, same took necessary steps to have the land surveyed and thereafter procured a deed plan. In addition, the appellant contended that upon surveying the land, he was issued with a Survey Plan number 441/20.

21. Additionally, it was the testimony of the appellant that same entered upon and took possession of [sic] Uns Industrial Plot No. "b" Isiolo Township No. 117/97/90 up to and including 2018 when the 3rd Respondent and a group of persons went and evicted him from the said plot.

22. Flowing the foregoing testimony, which was supported by PW2, the Appellant implored the trial court to find and hold that same was the lawful owner and proprietor of the named plot. In addition, the appellant sought inter alia, an order of permanent injunction as well as punitive damages as against the respondents.

23. The foregoing background captures the basis upon which the Appellant lays/ stakes a claim to [sic] Uns Industrial Plot No. "b" Isiolo Township No. 117/97/90.

24. The question that does arise and which this court must grapple with is whether a letter of allotment, like the one espoused by the appellant can confer ownership rights to or interests over a particular property or otherwise.

25. Before endeavoring to answer the question highlighted in the preceding paragraph, it is imperative to pay homage to various decisions which have been rendered by the Court of Appeal and the Supreme Court [the apex court] as concerns the legal implications of a letter of allotment.

26. In the case of Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] eKLR the Court of Appeal stated and observed as hereunder;

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

27. Similarly, the Court of Appeal in the case of Waterfront Holdings Limited v Kandie & 2 others (Civil Appeal 88 of 2019) [2023] KECA 1223 (KLR) (6 October 2023) (Judgment) stated and held thus;

> " 56. We must, however, point out, based on the case of M'Ikiara M'Rinkanya and Another v Gilbert Kabeere M'Mbijiwe [1982 – 1988] 1 KAR 196, that where the allotment lapses due to the failure by the allottee to meet the conditions in the letter of allotment, the subsequent re-allotment, to be properly valid, must follow the prescribed process of allotment of land and the failure to do so would lead to the resulting title being cancelled as well."

28. The legal implications of a letter of allotment and whether same vests in the allottee any ownership rights [if at all] was aptly elaborated upon by the Supreme Court of Kenya [the apex Court] in the case of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment), where while dealing with the issue, expressed itself as hereunder:

> " (58) So, can an Allotment Letter pass good title? It is settled law that an Allotment Letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein...
>
> 60. Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a Stand Premium and Ground Rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfilment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an Allotment Letter....
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> 61. We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an Allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed.
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> 62. Back to the facts of this case, the Allotment Letter issued to Renton Company Limited was subject to payment of stand premium of Kshs. 2,400,000.00, annual rent of Kshs. 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.
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> 63 While the allotment letter is dated 19th December 1999, Renton Company Limited made the specified payments on 24th April 2001, one hundred and twenty seven (127) days from the date of the offer. It is not in question that Renton had not complied with the terms and conditions of the Allotment Letter. Therefore, the letter ought to have been deemed as lapsed at the time it purported to transfer the same to the appellant. The respondent submitted

> that a Letter of allotment does not confer any property rights unless it is perfected, failure to which it is rendered inoperative and of no legal import. We have already declared that an Allotment Letter, even if perfected, cannot by and in itself confer transferable title to the Allottee, unless the latter completes the process by registration. Therefore, the grim reality is that all transactions between Renton Company Limited and the appellant were a nullity in law."

29. Flowing from the decisions [supra], what becomes apparent is that a letter of allotment by and of itself does not confer any title to or ownership rights in respect of the designated plot. For good measure, a letter of allotment is merely an offer by the government through the commissioner of lands [now defunct] and which offer is subject to acceptance and payment of the requisite standard premiums and the statutory levies. Furthermore, there is no gainsaying that the acceptance and the payment of the levies must be made within the set timelines and not otherwise.

30. Moreover, it is also worth stating that even after complying with the terms of the letter of allotment, no ownership right accrue/vest[s] until and unless certificate of title or certificate of lease [whichever is applicable] is issued. To my mind, this is the import and tenor of the holding in the case of Wreck Motors Enterprises Limited [supra], which decision was affirmed by the Supreme Court in Torino case.

31. Did the appellant accrue any lawful rights to and in respect of the named property or otherwise? Sadly, the appellant herein did not demonstrate that same procured and obtained a certificate of title over and in respect of Uns Industrial Plot No. "b" Isiolo Township No. 117/97/90. In this regard, the Appellant cannot be heard to contend that same is the lawful owner or proprietor of Uns Industrial Plot No. "b" Isiolo Township No. 117/97/90.

32. Other than the fact that a letter of allotment by and of itself cannot be relied upon by the appellant to stake a claim to [sic] Uns Industrial Plot No. "b" Isiolo Township No. 117/97/90, there is yet another perspective that merits consideration. The perspective herein relates to compliance [if at all] with the terms of the impugned letter of Allotment.

33. To start with, it is imperative to highlight that the Letter of Allotment being relied upon by the appellant commanded the appellant to accept the terms thereof within 30 days from the date hereof [being the date of the letter of offer]. Furthermore, the letter of allotment also stipulated that in the event of failure to accept the terms of the allotment and to pay the stand premium, the letter of allotment shall be considered to have lapsed.

34. To my mind, the letter of allotment referenced and relied upon by the appellant was conditional. In addition, it was explicit that a failure to comply with the conditions thereunder shall render the letter of allotment extinguished.

35. The question that then does arise is whether the Appellant complied with the conditions prescribed at the foot of the letter of allotment? In this regard, there is no gainsaying that the burden of proving compliance rested with the Appellant. [See Sections 107, 108, and 109 of the *Evidence Act* Chapter 80 Laws of Kenya].

36. In an endeavor to prove and demonstrate compliance with the terms of the letter of allotment, the appellant was called upon to place before the trial court a copy of letter of acceptance [if any] and a copy of revenue receipt issued by the commissioner of lands [if any] acknowledging receipt of the stand premium. Suffice it to posit that the acceptance and payment of standard premium were time bound.

37. Despite the obligation of the appellant to tender and place before the court the critical evidence relating to acceptance and payment of standard premium, it is imperative to observe that the appellant did not

adduce such evidence before the court. The failure to adduce a copy of the acceptance and the revenue receipt relative to payments of the standard premiums denotes that same were never made or at all. In any event, if the acceptance was issued and the payment made, nothing would have been easier than same being tendered before the court.

38. Absent copy of the acceptance and revenue receipt on account of payment of standard premium, this court is entitled to invoke and deploy adverse inference by inferring that same are non-existent.

39. To the extent that the letter of allotment dated 1st July 2000; was not accepted within the prescribed timelines, same lapsed and became extinguished. Such a letter thus became void for all intent and purposes. It is immaterial that the appellant purported to have made payments of rates etc etc to the County Council of Isiolo. It is also immaterial that the appellant purported to pursue the survey of the said plot and the preparation of the Deed Plan. For good measure, the actions alluded to by the Appellant were in vanity.

40. To buttress the foregoing legal position, it suffices to reference the holding of this court in the case of Joseph Kamau Muhoro v Attorney General & another [2021] KEELC 1457 (KLR) where this court observed as hereunder;

> " 33. In my humble view, by the time the Plaintiff/Applicant herein, was purporting to pay the stand premium and the annual rent, which were mandatory conditions to the letter of Allotment, the allotment in question was already extinguished and was thus incapable of attracting any payment and/or being activated whatsoever.
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> 34. Besides, I also hold the humble opinion that having not formally accepted the Letter of Allotment, [in writing as required], the Letter of Allotment, on which the Plaintiff/Applicant has premised his claim, was rendered void and non-existent.
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> 35. In support of the foregoing holdings, it is important to take cognizance of the Decision in the case of Dr. Syedna Mohammed Burhannuddin Saheb & 2 others vs Benja Properties & 2 others [2007] eKLR;
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> "In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for Defendant's argument, that the expired letter, when acted upon, had been "revived" through conduct. The letter had expired. It was dead. There was nothing to "revive"."

41. Suffice it to reiterate that I still hold the same view todate. In any event, it is imperative to underscore that the Supreme Court of Kenya has affirmed the same position in the case of Torino Enterprises Limited [supra].

42. In my humble albeit considered view, the foundation upon which the Appellant laid claim to Uns Industrial Plot No. "b" Isiolo Township No. 117/97/90, is legally untenable. To this end, the appellant cannot be heard to contend that same owns the said property.

43. Similarly, the appellant herein without being the lawful owner and proprietor of Uns Industrial Plot No. "b" Isiolo Township No. 117/97/90 cannot purport to seek an order of permanent injunction and general damages for trespass. Instructively, an order of permanent injunction and payment of general damages for trespass can only accrue where the claimant has proven title to or ownership of the designated property. Absent title to or ownership rights over the designated property, the claim

for general damages dissipates into thin air [See M'Ikiara M'Rinkanya & Another v Gilbert Kabeere M'Mbijiwe [2007] KECA 115 (KLR); Municipal Council of Eldoret v Titus Gatitu Njau [2020] KECA 782 (KLR); David Ogutu Onda v Walter Ndede Owino [2016] eKLR; Church Commissioners for Kenya of the Anglican Church of Kenya v Wayuga (Civil Appeal 111 of 2018) [2024] KECA 1048 (KLR) (16 August 2024) (Judgment); and Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment).]

44. My answer to issue number one is three-fold. Firstly, the letter of allotment dated 1st July 2000 and upon which the appellant lays a claim to the named property was/is incapable of conferring any title in favor of the appellant.

45. Secondly, the appellant did not prove and establish that same accepted the purported letter of allotment [offer] either within the prescribed timeline[s] or at all. In this regard, the letter of allotment under reference lapsed and became invalid.

46. Thirdly, absent title to and in respect of the named property, the appellant's claim of ownership as well as orders for permanent injunction becomes legally untenable.

47. In the premises, I conclude that the dismissal of the appellant's suit stands, even though the learned trial magistrate deployed a different approach in arriving at his conclusion. Nevertheless, it is imperative that judicial officers and judges alike do appraise themselves of the latest jurisprudential position emanating from the apex court and the Court of Appeal, respectively.

48. Regarding the second issue, namely; whether the 3rd Respondent accrued any lawful right[s] or interest[s] in respect of sic Plot Uns Residential Plot A Isiolo Township or otherwise; it is again worthy to take a journey through the position postulated by the 3rd Respondent. Suffice it to highlight that the third respondent contended that same was issued with a letter of allotment dated 20th August 1998 as pertains to Uns Residential Plot A Isiolo Township. To this end, the 3rd Respondent tendered and produced a copy of the said letter.

49. It was the further testimony of the 3rd Respondent that upon being allocated the said plot, same accrued lawful rights thereto.

50. Additionally, it was the evidence of the 3rd Respondent that on or about the 12th August 2014 same [3rd respondent] entered into a sale agreement with the appellant in respect of Uns Residential Plot A Isiolo Township. To this end, the 3rd Respondent tendered and produced the sale agreement as exhibit D3. Furthermore, the 3rd Respondent posited that though the appellant paid the initial deposit of Kshs. 800,000 only, the appellant failed to pay the balance of Kshs. 2,200,000 only. In this regard, the third respondent contended that same mounted a complaint with the chief of Tuluroba who thereafter summoned the appellant for mediation over the sale agreement.

51. Furthermore, it was the testimony of the 3rd Respondent that later on an agreement was reached between himself and the appellant culminating into refund of Kshs. 2,400,000 only to the Appellant. Suffice it to posit that the 3rd Respondent testified that the said monies were indeed paid to and acknowledged by the Appellant. To this end, the 3rd Respondent referenced and produced exhibit D7.

52. What becomes apparent is that the 3rd Respondent's case is also predicated and premised on a letter of allotment. I have stated and underscored that a letter of allotment by and itself does not confer any property rights to the allottee thereof. In this regard, there is no gainsaying that the 3rd Respondent also accrued no rights to and in respect of [sic] Uns Residential Plot A Isiolo Township.

53. Similarly, it is also imperative to observe that the 3rd Respondent herein also did not tender and or produce before the court any evidence to demonstrate that same accepted the conditions at the foot of

the letter of allotment including payments of the standard premium. Suffice it to posit that acceptance of the letter of allotment and payment of the stand premium within the prescribed timeline is a prerequisite condition and failure to do so invalidates the letter of allotment. [See Joseph Kamau Muhoro v Attorney General & another [2021] KEELC 1457 (KLR); see also Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others [2014] KEHC 4946 (KLR)].

54. By parity of reasoning, the 3rd Respondent herein also acquired no lawful rights to and in respect of sic Uns Residential Plot A Isiolo Township. In this regard, it is therefore my finding and holding that the learned trial magistrate erred in law in purporting to find and hold that Uns Residential Plot A Isiolo Township rightfully belonged to the 3rd Respondent. Simply put, the said finding is contrary to the obtaining jurisprudence.

55. Before concluding on this issue, there is yet one more aspect that merits mention and a short discussion. The aspect relates to the limb of the Order that the land namely; Uns Residential Plot A Isiolo Township reverts to the rightful owner [Nicholas Asuran] yet elsewhere evidence was tendered that the purported property had been sold to the 2nd Respondent [See Sale Agreement dated 18th October 2018].

56. Assuming for the sake of arguments only that the property had been sold to the 2nd Respondent [which is debatable based on doctrine of Nemo Dat Quod Non Habet] would the magistrate be right in sic decreeing that the 3rd Respondent is the rightful owner? In my humble view, the import of the sale agreement would be to divest the 3rd Respondent of [sic] ownership rights.

57. Regarding the third issue, namely; whether the 1st and 2nd Respondents are Bonafide purchasers for value in respect of plot sic Uns Residential Plot A Isiolo Township or otherwise, it is important to highlight that the 2nd Respondent is said to have entered into a sale agreement with the 3rd Respondent as pertains to Uns Residential Plot A Isiolo Township. [see exhibit D5 dated 18th October 2018].

58. To my mind, the 3rd Respondent could only sell and dispose of [sic] Uns Residential Plot A Isiolo Township upon acquiring title to same. [see; Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR, see Wreck Motors Enterprises vs The Commissioner of Lands & 4 Others [1997] KECA 284 (KLR) and see Torino Enterprises Limted vs Attorney General [supra]].

59. Nevertheless, in respect of the instant matter, evidence abound that the 3rd Respondent did not acquire any title to and in respect of the named property. In this regard, it then means that the 3rd Respondent had no right capable of being sold to and in favor of the 2nd Respondent at all. [see Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)].

60. To the extent that the 2nd Respondent acquired no legal rights to and in respect of the named property, can the 2nd Respondent and its director [1st Respondent] purport to be bona fide purchasers for value?

61. Suffice it to state that prior to and before a person, the 2nd Respondent not excepted, can lay a claim based on being a Bonafide purchaser, the claimant must demonstrate inter alia that its predecessors had a valid title and that the claimant acquired and has a certificate of title. However, there is no gainsaying that the 2nd Respondent herein did not acquire any certificate of title. For good measure, none was espoused and or adduced before the court.

62. What constitutes a Bonafide purchaser for value has been elaborated in a plethora of decisions. Nevertheless, it is imperative to reference three [3] notable decisions. 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) the Supreme Court stated thus;

> " 90. The Black's Law Dictionary 9th Edition defines a bona fide purchaser as:
>
> "One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."
>
> 91. The Court of Appeal in Uganda in Katende v Haridar & Company Ltd [2008] 2 EA 173, defined a bona fide purchaser for value as follows:
>
> "For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:
>
> 1. he holds a certificate of title;
> 2. he purchased the property in good faith;
> 3. he had no knowledge of the fraud;
> 4. he purchased for valuable consideration;
> 5. the vendors had apparent valid title;
> 6. he purchased without notice of any fraud; and
> 7. he was not party to the fraud."
>
> 92. On the same issue, the Court of Appeal in Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR stated as follows:
>
> "...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property..."

63. Recently, the Supreme Court re-visited the doctrine of bona fide purchaser for value in the case of Sehmi & another v Tarabana Company Limited & 5 others (Petition E033 of 2023) [2025] KESC 21 (KLR) (11 April 2025) (Judgment), where it stated as hereunder;

> " 58. It is a fundamental principle of the law of property in land that a purchase of a legal estate for value without notice is an absolute, unqualified and unanswerable defence against the claims of any prior equitable owner or encumbrancer. The onus of proof however lies upon the person claiming to be a bona fide purchaser. Three main ingredients must be present for a claimant to mount a successful defence based on the doctrine. These are, innocence, purchase for value, and a legal estate.

59. The element of innocence means that the purchaser must act in good faith. His conduct must not raise any doubt as to whether indeed, he did not have any notice or knowledge as to the existence of a rival interest in the suit land. If for example, it comes to light that during the process of purchase, the claimant engaged in conduct that was unconscionable in the eyes of equity, such conduct would weaken his claim of innocence as to the existence of a rival interest. The element of innocence also connotes the exercise of diligence expected of any reasonable purchaser. The claimant must demonstrate that he acted diligently and conducted a reasonable inquiry into the status of the estate or land that he sought to purchase."

64. Comparatively, the Supreme Court of Uganda [UGSC] has also weighed in on the scope and tenor of the doctrine of Bonafide purchaser for value. In the case of Lwanga vs Mubiru and Others (Civil Appeal 18 of 2022) [2024] UGSC 7, the court held:

> " The principle of bona fide purchaser for value without notice is a general defence in any transaction of sale or purchase of any property particularly land. The definition of bona fide purchaser for value without notice is "that buyer who has paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest". Bona fide is a Latin word meaning good faith, without fraud, sincere, genuine. See (Black's Law Dictionary 9th Edn Page 199). A bona fide purchaser is a buyer who buys without constructive or actual notice of any defects or infirmities against the seller's title. See (page 1355 Black's Law Dictionary 9th Edn. It is trite law that a person who relies on the defence of bona fide purchaser for value without notice has the burden to prove that he or she acted in good faith. The purchaser must have given due consideration and purchased the land without notice of the fraud.
>
> Such notice cover both actual and constructive notice of fraud.
>
> In the case of Jones v. Smith [1841] I Hare 43, the Chancery Court held: "a purchaser has constructive notice of fraud if he had actual notice, that there was some encumbrance and a proper inquiry would have revealed what it was (but if) it abstained either deliberately, carelessly from making those inquiries which a prudent purchaser would have made... then the defence cannot be available to him or her" See Yakobo M. N Senkungu & Others v. Cresencio Mukasa Civil Appeal No 17 of 2014."

65. Bearing in mind the apt and succinct exposition of the law espoused by the esteemed Supreme Court of Kenya and Uganda, I conclude that the 2nd Respondent herein cannot invoke and rely on the doctrine of Bonafide purchaser for value. Suffice it to posit that the peremptory ingredients that underpin the invocation of the said doctrine have not been established.

66. Flowing from the foregoing, my answer to issue number three is three-fold. Firstly, the 3rd Respondent accrued and or acquired no right over [sic] Uns Residential Plot A Isiolo Township, capable of being conveyed to and in favor of the 2nd Respondent.

67. Secondly, the 2nd Respondent did not acquire any rights. To this end, the Sale Agreement dated 18th October 2018, was an act in futility and vanity. In any event, the doctrine of ex-nihilo-nihil-fit [out of nothing comes nothing] suffices.

68. Thirdly, the 2nd Respondent cannot invoke and deploy the doctrine of Bonafide purchaser for value. In this regard, any endeavor to reference the said doctrine would be in vacuum.

69. Flowing from the foregoing analysis and considering the [dicta] in the case of Mwanasokoni V Kenya Bus Services Ltd [1985] EKLR, I conclude that the decision of the learned trial magistrate is vitiated by several errors of commission and omission. Furthermore, the decision of the Learned trial Magistrate is also in contravention of the decision[s] of the Supreme Court and thus violate[s] the import of the doctrine Stare-decisis [precedents] and in particular Article 163[7] of *the Constitution*, 2010.

70. To this end, the impugned judgement is manifestly illegal and legally untenable.

Final Disposition:

71. Having appraised and analyzed the thematic issues that were highlighted in the body of the Judgement, it must have become crystal clear that the appeal beforehand is devoid of merits.

72. Nevertheless, it is also worth to observe that while addressing issues number 2 and 3, it became apparent that the suit property, whatever its description, or by whatever name it is referenced; is indeed public land [See Article 62 of *the Constitution*].

73. In the premises, the Final orders that commend themselves to the court are as hereunder;

    i. The Appeal be and is hereby dismissed.

    ii. Each party shall bear own costs of the appeal considering the peculiar legal issue[s] surrounding the appeal.

    iii. That nevertheless and considering the decision in Torino Enterprises [supra], the judgement of the Subordinate court is hereby set aside in its entirety.

    iv. The Appellant's suit in the subordinate court be and is hereby dismissed.

    v. The Respondent's counterclaim in the subordinate court be and is hereby dismissed.

    vi. Each party shall bear own costs of the proceedings in the subordinate court.

    vii. For the avoidance of doubt and considering section 13(7) of the *Environment and Land Court Act*, the court finds that the suit property is public land in terms of Article 62 of *the Constitution* and thus can only be disposed of in line with Article 67(2) of *the Constitution*.

74. Back to the preamble of the judgement. There is no gainsaying that the disputants herein engaged themselves in a bloody fight and legal contest over land that certainly belonged to none of them.

75. It was a futile contest and hence the invocation of the observation of the Court of Appeal in the case of Nelson Kazungu [Supra].

76. Other than the said observation[s], the Order[s] of the Court are captured at the foot of paragraph *73* hereof.

77. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 5TH DAY OF JUNE 2025.

OGUTTU MBOYA, FCIArb, CPM [MTI].

JUDGE.

In the presence of:

Mutuma/Mukami – Court Assistant.

Mr. Gikunda Ariithi for the Appellant.

N/A for the 1ST and 2ND Respondent[s].

Mr. Muriungi for the 3rd Respondent