China Construction Company v Abdi & 2 others (Environment and Land Appeal E004 of 2025) [2025] KEELC 6425 (KLR) (16 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6425 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E004 OF 2025

JO MBOYA, J

SEPTEMBER 16, 2025

BETWEEN

CHINA CONSTRUCTION COMPANY ..... APPELLANT

AND

HUSSEIN ABDI ..... 1ST RESPONDENT

DAUDU TANO ..... 2ND RESPONDENT

COUNTY GOVERNMENT OF ISIOLO ..... 3RD RESPONDENT

JUDGMENT

1. The Respondents [who were the Plaintiffs in the lower court] approached the court vide Plaint dated 21.2.2023 and wherein the respondents sought various reliefs. The plaint was subsequently amended, resting with the amended plaint dated 1.10.2024. The reliefs sought at the foot of the amended plaint are as hereunder –

    a. A declaration that the parcel of land plot 385 Garba Tulla belongs to the plaintiff and members of Hurr Farmers Self-Help group.

    b. An order of permanent injunction restraining the defendants from entering the plaintiff's parcel plot No 385 Garba Tulla Damages.

    c. cost, interest and any other relief this honorable court deems just and fit to grant (f) Any relief that the court deems fit to grant.

2. The Appellant [who was the defendant in the lower court] duly entered an appearance and filed statement of defense and wherein the appellant denied the claims at the foot of the original plaint. In particular the appellant denied having trespassed onto plot No 385 Garba Tulla [herein after referred to as the suit property.] In addition, the appellant contended that what is claimed by the respondents constitutes part of the community land belonging to Garba Tulla community. Furthermore, the

appellant posited that its entry onto the suit land was premised on an agreement duly entered into with the community representatives who authorized the appellant to enter and excavate murram for purposes of actualizing Garissa- Isiolo road.

3. The suit in the lower court was heard and disposed of vide Judgment rendered on 21.1.2025 and wherein the learned chief magistrate [Hon L. Mutai, CM] found and held that the respondents had duly proved their claim to the suit property. To this end, the learned trial court proceeded to and entered judgment in favor of the respondents.

4. It is the said judgment and the consequential decree which has aggrieved the appellant and thus provoked the appeal. The appellant has approached the court vide memorandum of appeal dated the 17.2.2025 and wherein the appellant has highlighted the following grounds of appeal-:

    a. That the learned magistrate erred in law and fact by finding that the respondent had successfully led evidence that they were allocated plot 385 Garbatulla by the defunct county council of Isiolo

    b. That the learned magistrate erred in law and in fact by finding that the appellant had trespassed on the respondent's parcel of land whilst on technical evidence of the alleged trespass was led by the respondent

    c. The learned magistrate erred in law and in fact by awarding Ksh 5,000,000/= as damages for trespass whilst no evidence of alleged trespass was led the respondents.

    d. That the learned magistrate erred in law and in fact by failing to consider the Garbatula utilization agreement between Garbatulla community and Cale Infrastructure Construction Company duly executed by the deputy county commissioner, Garbatulla subcounty and dated 18.7.2022 which gave the appellant the right to occupy the property

    e. The learned magistrate erred in law and in fact by failing to consider the ground report produced by consent of both parties which shows that the property occupied by the appellant did not belong to the respondent as alleged or at all and if anything is community land.

5. The appeal before hand came up for direction on 3.6.2025; whereupon the advocates for the parties confirmed that the record of appeal had been duly filed and exchanged. Furthermore, it was confirmed that the record of appeal under reference was complete. In addition, the advocates covenanted to canvass the appeal by way of written submissions.

6. The appellant filed two [2] sets of written submissions dated 23.6.2025 and 23.7.2025 and wherein the appellant has raised and highlighted Four [4] key issues for consideration by the court. The issues highlighted by the appellant are namely-; whether the respondents approved allocation and ownership of plot 385 Garba Tulla; whether the appellant unlawfully trespassed upon land allegedly owned by the respondents; whether the trial court erred in awarding damages of Ksh 5,000,000/= Only; and finally that the learned trial court failed to consider exhibit DEXB 3 which demonstrated that the suit property was community land and not otherwise.

7. Regarding the first issue, learned counsel for the appellant has submitted that the learned trial magistrate failed to subject the documentation that was tendered and produced by the respondent to exhaustive scrutiny and failed to discern that the said documents were devoid of authenticity. In particular, it was submitted that the minutes of the county council of Isiolo [now defunct] that were relied upon by the learned trial magistrate were not corroborated by a witness from the council [now defunct]. Furthermore, it was submitted that the learned trial magistrate also failed to take into account that the respondents did not tender or produce an approved part development plan.

8. Additionally, learned counsel for the appellant has also submitted that in the absence of credible documents to prove ownership of the suit property, the findings and conclusions that were reached by the learned trial magistrate are erroneous and legally untenable.

9. To buttress the forgoing submissions, learned counsel for the appellant has cited and referenced the decision in the case of Dina Management Limited vs The county Government of Mombasa & 5 other [2023] KESC; and Frann Investments Limited vs Kenya Anticorruption commission & 6 others [2024]KECA, and in particular; the aspect where the Apex court found and held that a letter of allotment by and of itself does not confer ownership rights to an immovable [Landed] property.

10. Turning to the second issue; learned counsel for the appellant has submitted that the learned chief magistrate erred in law in finding and holding that the appellant had trespassed onto the suit land whereas the respondent did not prove ownership to and in respect of the suit property. Moreover, it was submitted that the respondents did not prove that same were in exclusive possession of the suit property to underpin a claim of trespass.

11. To underscore the submissions that the respondents did not prove exclusive possession and thus failed to lay a basis for trespass, learned counsel for the appellant has cited and referenced inter alia the holding in Wambugu Vs Njuguna [1983] KLR 172 and Sukhdev Singh Laly Vs Magnet Ventures Limited [2022] eKLR, respectively.

12. As concerns the award of general damages in the sum of Ksh 5,000,000/= only; learned counsel for the appellant has submitted that the said award was arrived at without any expert valuation; damage assessment report; or photographs showing the alleged destruction. In this regard, it has been posited that the award of general damages was made in vacuum.

13. While still on the question of general damages, learned counsel for the appellant has also submitted that the award itself was also made without due regard to the settled principles that underpin the award of general damages. To this end, it was posited that the quantum of award was therefore excessive; inordinately high; and astronomical.

14. To underpin the foregoing submissions, learned counsel for the appellant has referenced the holding in Christine Nyanchama Oanda vs Catholic Diocese of Homabay registered trustee [2020] eKLR and Butt vs Khan [1982] KLR, respectively.

15. The other issue that has been highlighted by the learned counsel for the appellant touches on and concerns the contention that the learned chief magistrate disregarded and or ignored the ground report [DEXB 3], which showed that the disputed land was community land. It has been submitted that the ground report was prepared by the county government of Isiolo -Department of Land and Physical Planning and same was admitted by consent. Moreover, it was submitted that the report under reference clearly confirmed that the disputed property forms part of the community land and thus same does not belong to the respondent.

16. It was the further submission by learned counsel for the appellant that had the learned chief magistrate taken into account the said exhibit; same [Learned chief Magistrate] would have come to a contrary position. It was contended that the failure by the learned chief magistrate to take into account the said report constitutes a failure to evaluate all the material evidence placed before the court and thus same constitutes a basis to warrant interference with the impugned judgment. To this end, learned counsel for the appellant has referenced the decision of the court of appeal in IEBC vs Stephene Mutinda Mule & 3 others [2014] eKLR wherein the court stated that a failure to evaluate all the evidence on record amounts to a grave misdirection.

17. Premised on the foregoing submissions, learned counsel for the appellant has invited the court to find and hold that the appeal before hand is meritorious and thus same ought to be allowed.

18. The 1st and 2nd respondents duly filed written submissions dated 14.7.2025; and wherein same have supported the judgment rendered by the learned chief magistrate. Moreover, the said respondents have highlighted and canvassed two [2] key issues namely; the respondents duly tendered and produced before the trial court credible evidence to confirm ownership of the property, and the appellant herein trespassed onto the suit property without the permission of the respondents. In addition, the respondents have also posited that the award of general damages took into account the settled principles underpinning the award of general damages.

19. Regarding the first issue, learned counsel for the 1st and 2nd respondent has submitted that the said respondent tendered and produced before the trial court copy of the minutes of the county council of Isiolo [now defunct], copy of the rates/rent payment receipts; copy of the certificate of registration of the self help group; copy of the part development plan and various correspondence from the county government of Isiolo; which documents duly confirmed that the suit property belonged to the respondents and the self-help group.

20. It was contended that the validity and veracity of the said documents were not impugned. To this end, learned counsel for the named respondents has submitted that the finding and holding of the learned chief magistrate as pertains to ownership of the suit property is sound; solid; and well-grounded.

21. In respect of the second issue, learned counsel for the named respondents has submitted that the appellant herein entered onto and encroached upon the suit property without consent or permission of the lawful owners thereof. In this regard it was contended that the impugned actions were therefore illegal, unlawful and thus constituted trespass.

22. Turning to the third issue, learned counsel for the respondents has submitted that the respondents tendered and produced before the court assorted photographs showing the nature of activities that were being undertaken by the appellants on the suit property. Furthermore, it was submitted that the photographs demonstrated the extent of the trespass. Thus, the respondents were entitled to general damages.

23. In addition, it was posited that the award of general damages was premised on the settled principles governing the assessment and award of damages. To this end, the named respondents have posited that the award of general damages was neither arbitrary nor excessive. Premised on the foregoing submissions, learned counsel for the 1st and 2nd respondents has implored the court to find and hold that the appeal before hand is devoid of merit[s]. Moreover, it has been contended that the judgment of the chief magistrate is unassailable.

24. The third respondent [who was joined into the proceedings as an interested party] neither filed submissions nor participated in the appeal. For good measure, no submissions were obtainable from the Case Tracking System [CTS].

25. Having reviewed the record of appeal; the pleadings filed by the parties; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed by/ on behalf of the respective parties, I come to the conclusion that the determination of the subject appeal turns on three [3] key issues, namely; whether the 1st and 2nd respondents duly established/proved ownership of the suit property or otherwise; whether the respondents established trespass as against the appellants or otherwise; and whether the award of general damages was arbitrary, excessive and legally tenable in the circumstances.

26. Before addressing the thematic issues, which have been highlighted in the preceding paragraph, it is imperative to highlight that what is before me is a 1st appeal. Being a first appeal, this court is enjoined to undertake exhaustive scrutiny, review, evaluation and analysis of the entirety of the evidence that was tendered before the court of 1st instance [Lower court] and thereafter to discern whether the conclusion/finding[s] arrived at by the lower court accords with the evidence or otherwise.

27. Furthermore, it is important to underscore that in the course of evaluating the evidence on record, this court is called upon to arrive at and form an independent conclusion. Besides, the court is seized of the discretion to depart from the factual findings arrived at by the lower court. Nevertheless, it must be recalled that even though the court is obligated to arrive at an independent conclusion or depart from the factual conclusion[s], such departure can only be taken if and only if; it is demonstrated that the findings of the lower court were based on no evidence; misapprehension of the evidence on record; perverse to the evidence tendered; or better still where it is demonstrate that the judgment was arrived at in contravention of established principle[s] of the law.

28. The scope and jurisdictional remit of the 1st appellate court while handling an appeal has been expounded in a plethora of decisions. In the case of Kenya Urban Roads Authority & another Vs Belgo Holdings Limited [2025]KECA, where the Court of Appeal reviewed various decisions and thereafter stated thus:

> " 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 also have 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 demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not 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 judgment. This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyse 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.
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> 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."

29. Premised on the established principles, details in terms of the decision [supra] I am now well disposed to revert to the issues and to interrogate same with a view to ascertaining whether the conclusions by the learned chief magistrate ought to stand or otherwise.

30. I shall address the issues sequentially.

31. Regarding the first issue, namely; whether the 1st and 2nd respondents duly established and proved ownership of the suit property. It is imperative to recall and reiterate that it is the named respondents who approached court contending that same are the lawful and legitimate owners of the suit property. In particular, the 1st and 2nd respondents averred that same are the legal and bona fide owner of the suit property. [See paragraph 4 of the amended Plaint].

32. It was the further contention by the named respondents that the suit property was lawfully and dully allocated unto them by the county council of Isiolo [now defunct] vide minutes of the 5.8.1997. Moreover, the respondents also referenced a part development plan which was contended to highlight the fact that the suit property belongs to same.

33. Having raised/ generated the suit beforehand, it is common ground that the burden of proof laid on the shoulders of the respondents, to demonstrate that the suit property was duly and lawfully allocated unto them. Furthermore, it was incumbent upon the said respondents to prove that the process of allotment [if at all] was lawful, procedural and in accordance with the legal regime that was obtaining/ governing allotment of land at the point in time.

34. The principles governing the burden and standard of proof have been elucidated in diverse, albeit numerous decisions. In the case of Dr Samson Gwer & 5 others vs KEMRI 2020 EKLR the supreme court of Kenya[the apex court] stated as here under;

> 49. Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden

> of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person." .This Court in Raila Odinga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....".In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

35. The incidence of burden and standard of proof was also expounded upon in the case of Mucheru vs National Bank of Kenya 2019 EKLR; where the Court of Appeal stated thus;

> " The appellant contended that the trial magistrate shifted the burden to him to prove that indeed he was not the one who signed the application and that he ought to have brought an expert in handwriting to aid his case. On the other hand, it was the respondent's argument that the burden of proving that the signature was not his rested upon the appellant, as he was the one who alleged that the signature was not his.
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> On matters evidence, Madan, JA (as he then was) in CMC Aviation Ltd v. Crusair Ltd (No1) [1987] KLR 103 stated: "...Proof is the foundation of evidence. As stated in the definition of "evidence" in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven...."
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> The *Evidence Act* is clear enough upon whom the burden of proof lies. Section 107 provides as follows:"1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. 2. When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person."
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> Section 109 of the same Act further provides: "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact lie on any particular person."

36. Back to the issue under discussion. The respondents claim to ownership of the suit property is premised on inter alia a copy of the minutes of the full council meeting held on 5.8.1997. The said minutes were tendered and produced before the trial court as exhibit PEXB 1. Furthermore, the said minutes were given due premium and consideration by the chief magistrate in the course of finding that the respondents were duly allocated the suit plot. I have reviewed the minutes which were tendered before the trial court and it is important to point out a few pertinent issues.

37. To start with, it is apparent that the minutes which were tendered and produced before the court; and which form part of the record of the court were never signed by the maker/author thereof. Moreover, the minutes do not demonstrate whether same were confirmed by the chairperson of the council.

38. Simply put, the minutes are devoid of validity in the absence of execution/ signature of the designated persons. It is common ground that every document, whether same be a letter, minutes or any other official instrument must be signed. It is the signature appended thereto that confirms validity and ownership of the document under reference. Absent signature, the impugned document is devoid of probative value and cannot be a source of consideration in the eyes of the law.

39. The second aspect that merits mention is the fact that the minutes of the county council of Isiolo [now defunct] constitute official documents. In this regard, the law requires that such a document must be produced/ tendered before a court of law in compliance with the provisions of section 80 of the *Evidence Act* CAP 80, Laws of Kenya. In particular, the document to be tendered must either be the original or a duly certified copy thereof.

40. The manner of producing and tendering a public document before court of Law was highlighted; illuminated; and expounded by the supreme court of Kenya in the case of Kenya railways cooperation vs Okiya Omutata Okiti & others 2023 KESC; where the Court stated as hereunder;

> The question now before us is whether the superior courts below were correct in expunging the documents relied on by the 1st, 2nd and 3rd respondents in support of their petitions at the High Court. We note from the pleadings filed at the High Court that the 1st, 2nd and 3rd respondents did not disclose their source for the documents. They averred that exposing the source or identity of persons who availed the documents would silence whistle blowers who act in public interest and good faith. They instead asked the court to admit the documents which they believed would give a candid exposition of the issues in dispute and enable the court to determine whether the procurement was lawful.
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> The *Evidence Act* Cap 80 Laws of Kenya applies to all proceedings, including constitutional petitions, save for the exceptions set out therein. Section 2 thereof provides that: Application
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> 1. This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator
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> 2. Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.
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> The *Evidence Act* provides for the admissibility of evidence with section 80 setting out the manner in which public documents may be produced in court. It states: Certified copies of public documents.
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> 1. Every public officer having the custody of a public document which any person has a right to inspect shall give that person, on demand, a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.
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> 2. Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.
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> This procedure ensures the preservation of the authenticity and integrity of the public documents filed and produced in court. Further, section 81 of the *Evidence Act* allows the

production of certified copies of documents in proof of the contents of the documents or parts of the documents of which they purport to be copies.

From the foregoing provisions, public documents can only be produced in court as evidence through the procedure set out above. They can be produced as evidence in court by way of producing the original document or a copy that is duly certified. The documents having been adduced in evidence without adhering to these rather straightforward provisions were thereby outrightly rendered inadmissible.

41. In view of the [dicta] espoused by the Supreme Court [supra] I am afraid that the minutes of the county council of Isiolo [now defunct] which were relied upon and referenced by the learned chief magistrate were not only inadmissible, but also devoid of probative value. Quite clearly, the impugned Minute[s] could not found a basis to find and hold that the Respondents were allocated the Suit property.

42. Next is the aspect touching on the prophetic allotment [if at all] of the suit property to the Hurr farmers self-help group, which is being represented by the respondent herein. It is instructive to point out that the allotment is purported to have been made in favor of the self-help group vide minute of 5.8.1997; yet the Self-help group was never conceived and or birthed until the 4.6.199. [See certificate of registration showing date of registration as 4.6.1998- PEXB 11].

43. The question that comes to mind is how [if at all] an allotment could have been made in the name of an organization/association/self-help group long before same was birthed. The scenario beforehand brings to mind an allotment [sic] being made to a child long before birth.

44. I now beg to address the part development plan, which was also relied upon by the respondent. Notably a part development plan must be prepared and thereafter signed; checked and approved in accordance with the provisions of the Physical Planning Act, Chapter 296 Laws of Kenya [Now repealed]. According to law, a part development plan must be duly approved and the date of approval must be evident on the face thereof. Sadly, the part development plan which was produced as PEXB 4 ; does not contain the date ,[if any] same was approved.

45. Moreover, it is evident that the part development plan also does not contain the approval plan number. For good measure, the approval plan number demonstrates that the part development plan being relied upon has gone through the prescribed legal process and same has thereafter been duly noted/ captured in the register of plans. Sadly, the part development plan that was tendered before the trial court was incomplete.

46. Furthermore, the claim of ownership of the suit property by the respondent is also predicated on a letter of allotment dated 27.7.2018. The letter of allotment was tendered as PEXB 5. Curiously, the letter of allotment under reference is said to have been issued by National Land Commission on behalf of [sic] Isiolo county council. Nevertheless, it is common knowledge that Isiolo county council ceased to exist immediately upon the conclusion of the 1st general election following the promulgation of the 2010 Constitution.

47. With that background in mind, can it be said that National Land Commission could purport to issue a letter of allotment in 2018; for and on behalf of a non-existent entity? I am afraid the impugned letter of allotment is a makeup; duly generated to propagate a particular narrative.

48. Even assuming that the letter of allotment is legitimate [which is not the case] there is the question as to whether the land underpinning the letter of allotment falls within the mandate of National Land Commission. I am reminded of the provisions of Article 63 and Article 67 (2) of *the Constitution*; and

in particular, that the aspect that the community land does not fall within the purview of National land commission.

49. Additionally, it is not lost on me that a letter of allotment by and of itself does not confer ownership rights to land. In this regard, the letter of allotment [whose validity is questionable] could not have underpinned the finding by the learned chief magistrate that the respondents lawfully owned the land.

50. Before concluding on this issue, it is instructive to reference the holding of the Supreme Court of Kenya [the Apex Court] in the case of Torino Enterprises Limited Vs AG & others 2023 KESC; where the Court stated thus;

> " 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. In Dr Joseph NK Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others CA 60/1997 [unreported]; and in Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows: "It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offeror and the offeree and does not confer an interest in land at all" [Emphasis added].
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> The pronouncement in Gladys Wanjiru and Dr Joseph NK Arap Ng'ok (supra) has been echoed in various Environment and Land Court decisions post the 2010 Constitution, including; Lilian Wanjeri Njatha v Sabina Wanjiru Kuguru & another, Environment and Land Case No 471 of 2010; [2022] eKLR; John Elias Kirimi v Martin Maina Nderitu & 4 others, Environment and Land Suit No 320 of 2011; [2021] eKLR; and Kadzoyo Chombo Mwero v Ahmed Muhammed Osman & 11 others, Environment and Land Case No 42 of 2021; [2021] eKLR, to mention but a few.
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> 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 fulfillment 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. In Peter Wariire Kanyiri v Chrispus Washumbe & 2 others, Environment and Land Court Case No 603 of 2017; [2022] eKLR, Kemei, J held as follows:"[15].In the case at hand, in the absence of any title registered in the name of the plaintiff, the court is unable to hold that the plaintiff is the registered proprietor of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences" [Emphasis added].
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> .While we agree with the general tenor of the learned Judge's foregoing pronouncement, we remain uncomfortable with his inference that the allotment letter was of no legal consequence solely because it had lapsed after 30 days. 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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> 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.

51. Flowing from the foregoing analysis, I do not share the position of the learned chief magistrate as pertains to ownership of the suit property. To my mind, the learned chief magistrate paid scant attention to critical issues that underpin ownership of land. Consequently, I am constrained to depart from the factual conclusion[s] and finding[s] by the learned Chief Magistrate.

52. I respectfully depart.

53. Turning to the second issue, namely; whether the respondents proved trespass as against the appellant, it is important to underscore that trespass entails unlawful and illegal entry onto the land of another by an adverse party. To underpin trespass, the claimant must demonstrate ownership of or title to the suit property. In addition, the claimant may also be called upon to demonstrate that same has an immediate right to exclusive possession of the suit property.

54. The ingredients that constitute trespass were highlighted; expounded; and elucidated by the Court of Appeal in the case of Municipal council of Eldoret Vs Titus Gatitu Njau 2020 eKLR where the court stated as hereunder;

> " In M'Mukanya v M'Mbijiwe (1984) KLR 761, the ingredients of the tort of trespass were revisited by this Court and restated as follows: "trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See Thomson v Ward, (1953) 2QB 153."
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> Further, in Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition at page 428 states as follows: "Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land." [Emphasis supplied].

55. Recently, the Court of Appeal re-visited the law as pertains to trespass in the case of Doshi vs Justice Charles Chemutut & 6 others 2025 KECA; where the court stated this;

> " Ttrespass, as stated by this Court in the case of Charles Ogejo Ochieng v Geoffrey Okumu [1995] KECA 169 (KLR), is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. As for the ingredients of trespass, the Court in William Kamunge Gakui v Eustace Gitonga Gakui (Civil Appeal 16 of 2013) [2014] KECA 39 (KLR) stated that trespass is a violation of the right to possession, and that a plaintiff must prove that he has the right to immediate and exclusive possession of the land. Justice Chemutut did not name Mr. Doshi as a defendant in the suit.

56. While discussing issue number one [1]; I have found and held that the 1st and 2nd respondents did not establish ownership of or title to the suit property. For good measure, I found and held that the documentation that were tendered by the respondents were incapable of confirming ownership.

57. I beg to underscore that in the absence of title to or proof of entitlement over the suit land, the respondents herein cannot be heard to propagate a claim of trespass. Absent title, the plea of trespass falls to the ground.

58. Another aspect that merits mention and a short discussion relates to the import and legal implications of the ground report that was prepared by the physical planner [Isiolo county government]. The report under reference demonstrated that what is claimed by the respondents constitutes community land. To this end, there is no gainsaying that the 1st and 2nd respondents cannot be heard to lay exclusive ownership to the suit property. [See sections 6,7 and 8 of The *Community Land Act*, 2016].

59. Turning to the contention that the award of General damage was excessive and arbitrary, I beg to state that an award of general damages is an exercise of discretion. In this regard, the 1st appellate court can only interfere with the discretion of the trial court only where it is demonstrated that the trial court acted on wrong principles, or the award is inordinately low or high. Moreover, the 1st appellate court must exercise deference. The principles to be taken into account before the 1st appellate court can interfere with the discretion of trial court were enunciated in the case of Mbogo Vs Shah 1968 EA 23. [See also the case of Gitobu Imanyara versus Honourable Attorney General [2016] eklr].

60. Bearing in mind the principles espoused in the decision [Supra] and taking into account the manner in which the learned chief magistrate exercised her discretion, I am of the opinion that the assessment and award of general damages was based on the established principles. For good measure, the learned chief magistrate took into account various decisions underpinning the assessment and award of damages.

61. In the premises, I find and hold that the appellant has not proven any injudicious or improper exercise of discretion by the learned chief magistrate. In view of the foregoing, if I had found and held that the respondents were the lawful owners of the suit property [which is not the case], I would have affirmed the award of general damages. However, in light of the findings elsewhere herein before, it is apparent that the assessment and award of general damages was arrived at in vacuum.

Final Disposition.

62. Flowing from the discussion highlighted in the body of the Judgment, I come to the conclusion that the appeal before hand is merited. To this end, the appeal is hereby allowed.

63. In the premises, the final orders that commend themselves to me are as hereunder:

    a. The Appeal be and is hereby allowed

    b. The Judgment of the learned Chief Magistrate dated 21.1.2025; and the consequential decree arising therefrom be and is hereby set aside.

    c. In lieu hereof, the 1st and 2nd Respondents' suit in the lower court be and is hereby dismissed.

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

    e. The Appellant shall also have costs of the proceedings of the subordinate court.

64. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF SEPTEMBER 2025.

OGUTTU MBOYA, FCIArb; CPM[MTI-EA].

JUDGE.

In the presence of:

Hussein – Court Assistant

Mr. Caleb Mwiti holding brief for Mr. Abdullahi for the 1st & 2nd Respondents

No appearance for the Appellant.

No appearance for the 3rd Respondent