

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ISIOLO**

**ELC CASE NO. 8 OF 2022**

ADANKER EDIN DAYOW .....PLAINTIFF

**VERSUS**

MAMA IBADO CHARITY .....DEFENDANT

**AND**

CHIEF LAND REGISTRAR – ISIOLO.....1<sup>ST</sup> INTERESTED PARTY

DIRECTOR OF SURVEY .....2<sup>ND</sup> INTERESTED PARTY

HON. ATTORNEY GENERAL.....3<sup>RD</sup> INTERESTED PARTY

ESIMIT COMMUNITY

[Through the elected manager JOHN ELEU LOWA] ..4<sup>TH</sup> INTERESTED PARTY

**JUDGMENT**

1. The Plaintiff herein approached the Court *vide* Plaint dated the **13<sup>th</sup> October 2022**; and wherein the Plaintiff has sought various reliefs. The reliefs sought at the foot of the Plaint are as hereunder:

- a) *Declaration that the Plaintiff is the legal owner of the Property known as Land Reference Number 32578, Isiolo Township, Isiolo District.*
- b) *This Honorable Court do confirm the notice and Order MAMA IBADO CHARITY the Defendant herein, its agents, servants, dependents, beneficiaries and/or any other person claiming through them and/or any other person that they have placed therein to vacate and to deliver vacant possession to the*

*Applicant of the Occupied portion of the suit land known as Land Reference Number 32578, Isiolo Township, Isiolo District.*

- c) The Honorable Court do issue an Eviction Order authorizing the Court bailiffs Isiolo Law Courts, Isiolo to remove MAMA IBADO CHARITY the Defendant herein, its agents, servants, dependents, beneficiaries and/or any other person claiming through and/or any other person that they have placed therein from occupation of the portion of land known as Land Reference Number 32578, Isiolo Township, Isiolo District.*
- d) The officer Commanding Station, Isiolo Police Division to provide security and assistance to ensure compliance with the Eviction Order sought in prayer 3 above.*
- e) General Damages for trespass and wrongful occupation.*
- f) Costs of this suit*
- g) Any other relief that this Honorable Court may deem fit to grant.*

2. The Defendant duly entered appearance and thereafter filed a Statement of defence dated the **13<sup>th</sup> December 2022**; and wherein the Defendant denied the claims by the Plaintiff. Moreover, the Defendant contended that the suit property, which is being claimed by the Plaintiff was lawfully allocated to the Defendant *vide* Letter of Allotment reference number **31565/XVI** [un-surveyed].
3. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties entered appearance but did not file any statement of defence and/or pleadings. Nevertheless, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties duly participated in the hearing.
4. The 3<sup>rd</sup> Interested party duly entered appearance and filed a statement of defence and wherein the 3<sup>rd</sup> Interested Party contended that what is being claimed by the Plaintiff falls within the Community Land duly occupied by

the Esimit Community. Furthermore, the 3<sup>rd</sup> Interested Party contended that Esimit Community donated the disputed land measuring **36 Ha** to the Defendant, which is a Charitable Organization. In addition, it was contended that the Plaintiff herein has never been in possession of the suit property.

5. The instant matter came up for Case conference on various dates resting with the **16<sup>th</sup> January 2023**, whereupon the parties confirmed having filed and exchanged the requisite pleadings, list and bundle of documents, Witness statements and the attendant documents. Furthermore, the parties confirmed that the matter was ready for Hearing.
6. The Plaintiff's case is premised on the evidence of one witness, *namely*; Adanker Edin Dayow. Same testified as PW1.
7. It was the testimony of the witness (PW1) that same is the Plaintiff. Furthermore, the witness averred that by virtue of being the Plaintiff, same is thus conversant with the facts of the case. In addition, the witness testified that same has since recorded a witness statement dated the **13<sup>th</sup> October 2022**; and which witness statement the witness sought to adopt and rely on as his evidence in chief. To this end, the witness statement under reference was duly adopted and constituted as the evidence in chief of the witness.
8. Moreover, the witness adverted to the list and bundle of documents dated the **13<sup>th</sup> October 2022**; and thereafter sought to tender and produce the assorted documents as exhibits before the Court. There being no objection to the

production of the documents, same were tendered and admitted as exhibits PW – P7, respectively.

9. Additionally, the witness referenced the Supplementary List and bundle of documents dated the **6<sup>th</sup> October 2023**; and thereafter sought to tender and produce the documents as further exhibits. Suffice it to state, that the documents under reference were produced and admitted as Exhibits P8 – P10, respectively.

10. On the other hand, the witness alluded to the Plaint dated the **13<sup>th</sup> October 2022**; and the Verifying Affidavit thereto. Besides, the witness sought to rely on the contents of the Plaint and implored the Court to grant the reliefs sought thereunder.

11. On cross examination by Learned Counsel for the Defendant, the witness [PW1] averred that the Plot in question measures approximately **560 acres**. Moreover, the witness testified that same has been in occupation of the suit property from the year **1979** up to the year **1989**.

12. It was the further testimony of the witness that between the years 1979 – 1989, same [PW1] did not have any Title documents to the suit property. However, the witness averred that in the year **1992** same acquired Minutes relating to the allotment of the suit property. In addition, the witness averred that same got a Letter of Allotment in the year 1998.

13. The witness further testified that the Letter of Allotment in question is in the name of Dayol Meat Company Limited. Besides, the witness averred that the said Company is his [Witness] Company. Nevertheless, the witness testified that same does not have any document to demonstrate that Dayol Meat Company belongs to him.
14. While still under cross-examination by Learned Counsel for the Defendant, the witness averred that the Letter of Allotment dated the **2<sup>nd</sup> April 1998** shows that the Plot which was being allocated measures **48.6 Ha**. However, the witness added that the Certificate of Title which same has tendered and produced before the Court relates to **229.4 Ha**.
15. It was the further testimony of the witness that same does not have any Letter of Allotment for **229.4 Ha**. Furthermore, the witness testified that same used the lawful process towards acquiring the Certificate of Title over and in respect of the suit property.
16. On further cross examination, the witness testified that the Defendant herein have illegally encroached upon and trespassed onto the suit property. Besides, the witness contended that the Defendant does not have any lawful rights and/or interests to the suit property. In this regard, the witness reiterated that the actions and/or activities by the Defendant are illegal and constitute trespass.
17. On re-examination, the witness averred that the land in question falls within the Township of Isiolo. Moreover, the witness reiterated that the suit property lawfully belongs to him.
18. With the foregoing testimony, the Plaintiff's case was closed.

19. The Defendant's case is premised on the evidence of two witnesses, *namely*; Forthosa Ali and Peter Gitonga Nteria. Same testified as DW1 and DW2, respectively.
20. It was the testimony of PW1 that same is the Administrative Manager of the Defendant. By virtue of being the Administrative Manager of the Defendant, the witness [DW1] averred that same is conversant with the facts of the case. Furthermore, the witness testified that same has since recorded a witness statement dated the **26<sup>th</sup> October 2023**; and which witness statement the witness sought to adopt and rely on as her evidence in chief. Instructively, the witness statement under reference was duly adopted and constituted as the evidence in chief of the witness.
21. The witness further referenced the list and bundle of documents dated the **26<sup>th</sup> October 2023**; and thereafter sought to tender and produce the documents as exhibits before the Court. However, an objection was taken as pertains to the production of documents numbers 2, 3 and 11, respectively.
22. Notably, the Objection to the production of the documents no. 2, 3 and 11 was conceded. To this end, the said documents, *namely*; Documents no. 2, 3 and 11 were marked for identification as MFI D2, 3 and 11, respectively. On the other hand, the rest of the documents were duly admitted and marked as Exhibits D1; D4 – D10; D12 – D13, respectively.
23. The witness also referenced the statement of defence dated the **26<sup>th</sup> October 2023**; and thereafter sought to adopt the contents thereof. In addition, the witness invited the court to find and hold that the Plaintiff herein had not established his claim and/or entitlement to the suit property. To this end, the

witness implored the Court to dismiss the Plaintiff's suit with Costs to the Defendant.

24. On cross examination by Learned Counsel for the Plaintiff, the witness averred that same is not a Trustee of the Defendant. Nevertheless, the witness testified that same is conversant with the facts of the case. Further and in addition, the witness averred that the Defendant was duly allocated the Land by the Esimit Community.

25. It was the further testimony of the witness that the Defendant made a formal application to be allocated the land by the Community. Moreover, the witness added that Esimit Community is part of the larger Turkana Community and that the land in question is Community land.

26. It was the further testimony of the witness that same has tendered and produced before the Court Minutes confirming the allotment of the land to the Defendant by the Community. Nevertheless, the witness conceded that the Defendant does not have any Certificate of Title/Lease in respect of the suit property.

27. While still under cross examination, the witness averred that same has also availed to the Court a copy of the Part Development Plan pertaining to the land which was allocated to the Defendant. However, the witness admitted and conceded that the Part Development Plan which has been tendered before the Court has neither been signed nor approved by the designated authority. Furthermore, the witness testified that the Part Development Plan is not dated.

28. Additionally, it was the testimony of the witness that exhibit D6 has been altered. Besides, the witness acknowledged that the alteration has not been counter-singed.
29. On cross examination by Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, the witness averred that the land in question forms/falls within Community land. Furthermore, the witness averred that by virtue of being Community land, the Community itself must be involved.
30. On re-examination, the witness testified that it is the Defendant who is in occupation of the land. Moreover, the witness averred that the Defendant has sunk a borehole on the land. To this end, the witness referenced the NEMA Report.
31. It was the further testimony of the witness that the Defendant herein is a Charitable Organization which supports the Turkana Community. Besides, the witness averred that the Esimit Community is the one who donated the land to the Defendant. In this regard, the witness referenced the Minutes which were made during the Community meeting.
32. The second witness who testified on behalf of the Defendant is Peter Gitonga Nteria. Same testified as DW2.
33. It was the testimony of the witness that same is a Physical Planner currently working with the County Government of Isiolo. Furthermore, the witness averred that same has worked with the Department of Physical Planning for approximately 8 years.
34. Additionally, the witness averred that same is conversant with issues/matters pertaining to Physical Planning. Furthermore, the witness added that same

was served with Summons to attend Court and to produce the Part Development Plan which had been marked as MFI D5. To this end, the witness duly identified the document and thereafter produced same as an exhibit.

35. It was the further testimony of the witness that the Part Development Plan [exhibit D5] related to a piece of land at Isiolo. Besides, the witness also adverted to a Letter which was addressed to various persons including the County Revenue Officer; the County Surveyor; and the County Lands Records Officer. In particular, the witness averred that the purpose of the Letter under reference was to seek comments from designated officers.

36. It was the further testimony of the witness that the Letter under reference was generated by the Department of Physical Planning and to this end, the witness sought to tender and produce the Letter dated the **25<sup>th</sup> May 2018**. Suffice it to state that the letter under reference was admitted and marked as Exhibit D3.

37. On cross examination by Learned Counsel for the Plaintiff, the witness averred that the documents before the Court and which have been produced by himself [witness] were not prepared by him. In particular, the witness averred that the report was prepared by one, *namely*; Mr. Cheruiyot.

38. While still under cross-examination, the witness testified that the Advisory Plan which same has tendered and produced before the Court has not been approved.

39. On cross-examination by Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, the witness averred that the land in question falls within the Township. However, the witness added that a portion of the land falls outside the Township. Moreover, the witness testified that the land which falls outside the Township would not be subject to alienation by way of a Part Development Plan.
40. On cross examination by Learned Counsel for the 3<sup>rd</sup> Interested Party, the witness averred that the advisory plan [exhibit D5] has not been objected to by the officers shown thereon.
41. With the foregoing testimony, the Defendant's case was closed.
42. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties did not call any witness. In this regard, the case for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties was closed without any evidence.
43. The 3<sup>rd</sup> Interested Party called three witnesses, *namely*; Christopher Lomwa Mero, Jacob Salim Asaju and Ekitare Ewalom, respectively. same testified as IPW1, IPW2 and IPW3.
44. It was the testimony of IPW1 [Christopher Lomwa Mero] that same is a Pastor. Furthermore, the witness averred that same resides at Esimit area. To this end, the witness testified that same is therefore conversant with the facts of this matter.
45. Furthermore, the witness testified that same has since recorded a witness statement dated the **9<sup>th</sup> January 2023**; and which the witness sought to adopt and rely on as his evidence in chief. Suffice it to state, that the witness

statement dated the **9<sup>th</sup> January 2023**; was duly adopted and constituted as the evidence in chief of the witness.

46. On cross-examination by Learned Counsel for the Plaintiff, the witness averred that Esimit Community has not been registered. Nevertheless, the witness averred that same [Esimit Community] is in the process of registration. Nevertheless, the witness conceded that same has not tendered and/or produced any document to show that Esimit Community is in the process of registration.

47. The witness further testified that it is the community who gave out/donated the land to the Defendant. Moreover, the witness averred that the Community had the right to donate/Lease the land to the Defendant.

48. While still under cross examination, the witness testified that the land in question is Community land. At any rate, it was the testimony of the witness that the Community involved the County Government before giving out the land. Nevertheless, the witness conceded that same has not brought any document to show that the County Government was involved in the Leasing/Donation of the land.

49. On cross examination by Learned Counsel for the Defendant, the witness averred that the Defendant is a Charitable Organization which assists the marginalized Communities. Furthermore, the witness testified that the Community is the one that donated the land to the Defendant.

50. On re-examination, the witness testified that the land in question is a big land. In any event, the witness averred that it is the Esimit Community who have been residing/living on the land.

51.The second witness who testified on behalf of the 3<sup>rd</sup> Interested Party is Jacob Salim Asaju. Same testified as IPW2.

52.It was the testimony of the witness that same is a member of the Esimit Community. Moreover, the witness averred that same has since recorded a witness statement dated the **9<sup>th</sup> January 2023**; and which witness statement the witness sought to adopt and rely on as his evidence in chief. To this end, the witness statement under reference was duly adopted and constituted as the evidence in chief of the witness.

53.On cross-examination by Learned Counsel for the Plaintiff, the witness testified that same is the Secretary for the Esimit Community. Nevertheless, the witness conceded that Esimit community has not been registered. Furthermore, the witness also conceded that the land in question has not been registered under the Community Land Act.

54.On further cross examination, the witness testified that the land in question belongs to the Esimit Community. In this regard, the witness averred that the Esimit Community had rights over and in respect of the land in question.

55.On cross examination by Learned Counsel for the Defendant, the witness testified that it is the Community who donated the land to the Defendant. Furthermore, the witness averred that the meeting underpinning the donation of the land was attended by more than **50 members** of the Community.

56. The 3<sup>rd</sup> Witness who testified on behalf of the 3<sup>rd</sup> Interested Party is Ekitare Ewalon. Same testified as IPW3.
57. It was the testimony of the witness that same [IPW3] is a village elder and leader of the Esimit Community. To this end, the witness averred that same is therefore conversant with the facts of the matter. In addition, the witness testified that same has equally recorded a witness statement dated the **9<sup>th</sup> January 2023**; and which witness statement the witness sought to adopt and rely on as his evidence in chief. Suffice it to say, that the witness statement under reference was duly adopted and constituted as the evidence in chief of the witness.
58. On cross examination by Learned Counsel for the Plaintiff, the witness averred that same is not only a member of the Esimit Council of Elders, but also the Chairman of the Turkana Council of Elders. Nevertheless, the witness conceded that same has not produced any document to demonstrate that he is the Chairman of the Turkana Council of Elders.
59. On cross examination by Learned Counsel for the Defendant, the witness averred that the area in question is known as Esimit. In addition, the witness testified that the land under reference was donated to the Defendant by the Community. Furthermore, the witness testified that the land measures approximately **36 acres**.
60. While still under cross examination, the witness averred that it is the Defendant who is on the land. On the contrary, the witness averred that the land in question does not belong to the Plaintiff. moreover, the witness clarified that the Plaintiff does not occupy the land under reference.
61. On re-examination, the witness averred that same [witness] was involved in the meeting culminating into the land being given to the Defendant.

62. With the foregoing testimony, the 3<sup>rd</sup> Interested Party's case was closed.

63. Following the closure of the 3<sup>rd</sup> Interested Party's case, the Advocates for the parties sought for time to file and exchange written submissions. To this end, the Court proceeded to and granted liberty to the parties to file and exchange written submissions. In addition, the Court also circumscribed the timelines for the filing and exchange of the written submissions.

64. The Plaintiff filed written submissions dated the **20<sup>th</sup> May 2025**; and wherein same [Plaintiff] has highlighted three [3] key issues, *namely*; that the Plaintiff has tendered and produced plausible evidence to demonstrate ownership of the property; the Plaintiff is entitled to the reliefs sought at the foot of the Plaint; and the Defendant has no rights and/or interests over the suit property or at all.

65. The Defendant filed written submissions and wherein same has highlighted two [2] key issues, *namely*; that the Plaintiff herein has neither established not demonstrated lawful ownership of the suit property and the Defendant has established lawful rights to the disputed portion of land, which is contended to have been donated by the Esimit Community. Furthermore, the Defendant has posited that the Certificate of Title/Lease being relied upon by the Plaintiff is vitiated by illegality and hence same cannot be deployed to under pin the Plaintiff's entitlement to the suit property or otherwise.

66. The 3<sup>rd</sup> Interested Party filed written submissions dated the **3<sup>rd</sup> July 2025**; and wherein same has highlighted three key issues, *namely*; the Plaintiff's Certificate of Lease is vitiated by inconsistencies and illegalities; the Esimit

Community had legitimate rights to or interests over the suit land and the Plaintiff herein is not entitled to the reliefs sought or at all.

67. For the sake of completeness, it is imperative to state that the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties did not file any submissions. For good measures, no submissions a traceable on the Court tracking system [CTS].

68. Having reviewed the pleadings filed by and on behalf of the parties; the evidence tendered [*both oral and documentary*] and upon taking into consideration the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the subject dispute turns on three [3] key issues, *namely*; whether the Plaintiff has proven or demonstrated that same is the lawful proprietor of the suit property or otherwise; whether the Plaintiff has established trespass onto the suit property by the Defendant or otherwise; and whether the Plaintiff is entitled to the reliefs sought or otherwise.

69. Regarding the first issue, *namely*; whether the Plaintiff has established and proved lawful ownership to the suit property, it is imperative to recall and reiterate that the Plaintiff herein contended that the suit property [or what now constitutes the suit property] was lawfully allocated unto him and thereafter same entered upon and took possession of the suit property. Furthermore, the Plaintiff contended that thereafter same pursued the registration of the suit property in his name culminating into the issuance of the Certificate of Title on the **19<sup>th</sup> February 2021**.

70. From the contents of paragraph 3 of the Plaint dated the **13<sup>th</sup> October 2022**, it is the Plaintiff's contention that same was lawfully allocated what now constitutes the suit property. To this end, there is no gain saying that the Plaintiff bore the obligation of producing and tendering before the Court evidence of the Letter of Allotment [if any] that was issued in his favor.

71. On the other hand, it is important to recall that the land in question [the suit property] hitherto formed part of what was Trust land in terms of the provisions of the Trust Land Act, Chapter 288 Laws of Kenya [now repealed]. To this end, it is instructive to underscore that the allotment of any portion of what was Trust land could not be undertaken without the approval and sanction of the designated Local Authorities. [See **Section 53 of the Trust Land Act Chapter 288 Laws of Kenya [now repealed]** [see also **Section 114, 116 and 117 of the Retired Constitution of Kenya**].
72. Moreover, the procedure that was to be deployed in the course of allocating land that was forming part of Trust land was highlighted in the case of *Rinya Hospital Limited –vs- The Town Council of Awendo [2010] eKLR*. In addition, the Court of Appeal also addressed the procedural steps that informed alienation of Trust land in the case of *Ethics and Anti-Corruption Commission v. Eunice N. Mugalia & Sammy Silas Komen Mwaita, Kisumu Court of Appeal, Civil Appeal No. 39 of 2019*, [unreported].
73. Given that what constituted part of Trust land could not have been allocated without the sanction and/or approval of the designated local authorities, in this case, the County Council of Isiolo, [now defunct] it was incumbent upon the Plaintiff to also tender and produce before the Court Minutes [if any] of the County Council of Isiolo recommending allocation of what is now the suit property; and a copy of the Letter of no Objection addressed to the Commissioner of Lands [now defunct].
74. It is critical to highlight that the Minutes of the County Council of Isiolo [now defunct], if any, are official records or better still Public documents. To this end, whosoever seeks to rely on such minutes must tender and produce before the Court Certified copies thereof. [See **Section 80 of the Evidence**

**Act, Chapter 80 Laws of Kenya**]. [ See also the holding of the Supreme court in the case of *Kenya Railways Corporation & 2 others v Okiiti & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated)) [2023] KESC 38 (KLR) (16 June 2023) (Judgment), paragraphs 79, 80, 81 and 82 thereof*].

75. Back to the issue under interrogation. Has the Plaintiff tendered and produced evidence to demonstrate lawful allocation of what constitutes the suit property or otherwise? To start with, it is not lost on me that the two sets of Minutes which were tendered and produced on behalf of the Plaintiff herein, *namely*; the Minutes dated the **9<sup>th</sup> September 1992 and 23<sup>rd</sup> September 1997** were neither confirmed by the Chairperson of the Committee nor were same certified as being the true copies of the minutes of the Council. In the absence of confirmation of the minutes by the Chairperson, the Minutes under reference are divested of the requisite authenticity.

76. Moreover, there is no gainsaying that the Minutes of the Town Planning and Marketing Committee of the County Council of Isiolo [now defunct] and/or any other County Council were required to be escalated to the full Council for adoption and ratification. It is upon the adoption and ratification by the full Council that such minutes would become authentic and binding. However, in respect of the instant matter, no evidence was tendered to demonstrate adoption and ratification by the full Council.

77. Other than the facts that the impugned minutes were neither escalated to the full Council nor even confirmed by the Chairman of the Committee, it is

important to underscore that in the absence of Certification, the authenticity of the Minutes comes into question. In this regard, I am afraid that the Minutes though tendered and produced in evidence attract no weight and no probative value. For good measure, it suffices to highlight that there is a distinction between production and admissibility; and probative value and weight [if any] to be accorded to a document. [See *Kenneth Mwiye Nyaga – vs- Austine Kiguta [2015] eKLR*].

78. Secondly, it is also important to recall that the minutes which were tendered and produced by the Plaintiff also do not show that there was any application for allotment of land by the Plaintiff herein. Notably, the name of the Plaintiff is not reflected in the impugned minutes.

79. Thirdly, the Plaintiff herein tendered and produced before the Court a bundle of Letters of Allotment [sic] to demonstrate that what constitutes the suit property was allocated unto him. However, it suffices to highlight that the impugned Letters of Allotment are in respect of **nocrem; dayol royal meat Company; and Daud Issack**, respectively. None of the impugned Letters of allotment is in the name of the Plaintiff.

80. To the extent that none of the Letters of Allotment is in the name of the Plaintiff, one wonders how and on what basis the Plaintiff herein contends that same was lawfully allocated [sic] the suit property.

81. Fourthly, even assuming that the persons who were allocated the impugned Plot[s] were related to and/or affiliated to the Plaintiff herein, it is imperative to underscore that no evidence was tendered and/or produced before the court to demonstrate any such affinity, affiliation and/or nexus.

82. Furthermore, it is imperative to state that a Letter of Allotment by and of itself does not constitute Title. In addition, it behooves the Allottee, [bearer of a letter of allotment] to comply with and/or adhere to the terms of the Letter of Allotment. Moreover, it is common ground that a Letter of allotment whose terms are not complied with timeously, stands extinguished by effluxion of time. [See the holding of the Supreme Court in the case of *Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment) at paragraphs 57, 58, 61 and 62 thereof.*]

83. It was incumbent upon the Plaintiff to place before the Court evidence of compliance with the terms of the impugned Letters of Allotment. However, I wish to observe that no evidence was tendered and/or placed before the Court.

84. Fifthly, it was also incumbent upon the Plaintiff to show the nexus between the impugned Letters of Allotment [which referenced and un-surveyed Agricultural plots] to the suit property. In this regard, one would have expected the Plaintiff to tender and produce before the Court a copy of the indent by the Directorate of Survey; copy of the Registry Index Map duly amended and copy of the Deed Plan [if any] that was deployed in the registration and ultimate registration of the suit property. Sadly, no such document has been tendered before the Court.

85. Finally, I beg to highlight the fact that the Certificate of Title which has been relied upon by the Plaintiff herein appears to have been issued in vacuum. The requisite documentation underpinning same were neither tendered nor produced before the Court. Suffice it to observe, that a Certificate of title or Lease, [whichever is applicable] is an end product and its validity depends

on the process that birthed same. For good measure, the Certificate of Title or Lease is as good as the process and hence it behooved the Plaintiff to justify the issuance of the Certificate of Title. [See the decision of the Supreme Court in the case of *Dina Management Ltd v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment) at paragraph 109 and 110.*]

86. It was the obligation of the Plaintiff herein to tender and produce before the Court plausible, cogent, believable and compelling evidence to demonstrate that the Certificate of Title being relied upon to underpin the claim beforehand was lawfully and procedurally acquired. However, I have found and held that the Plaintiff herein did not tender and/or produce the requisite documentation. Absent the requisite documentation, it is difficult to authenticate the validity of the impugned Certificate of Title.

87. Before concluding on this issue, it is important to take cognizance of the holding of the Court of Appeal in the case of *Mas Construction Limited v Sheikh & 6 others (Civil Appeal E789 of 2023) [2025] KECA 349 (KLR) (28 February 2025) (Judgment)*, where the Court stated as hereunder:

*“This Court in Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School (Civil Appeal 64 of 2014) [2023] KECA 371 (KLR) (31 March 2023) (Judgment) stated as follows regarding a claim over the existence of two titles in respect of the same parcel land:*

*“The best evidence of ownership of immovable property is the title deed to it and that is why the question of the root of title is important. Root of title is the deed to which title to a property is*

*ultimately traced to prove that the owner has good title. Accordingly, when there are competing interests as in this case, the parties are required to give evidence of title, starting with a "good root of title." A good root of title and an unbroken chain of ownership is required. To be a good root of title, a document must satisfy each of the following requirements:*

*(a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question;*

*(b) it must contain a recognizable description of the property;*

*(c) it must not contain anything that casts any doubt on the title.”*

*69. In the same vein, this Court in Munyu Maina vs Hiram Gathiha Maina [2013] eKLR held that: “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.”*

88. Flowing from the discussions enumerated in the preceding paragraphs, it is my finding and holding that the Plaintiff herein has failed to demonstrate that same is the lawful and legitimate proprietor of the suit property. For good measures, the legitimacy of Title is not dependent on the mere holding of a Certificate of Title but on the validity of the process that birthed same. Simply put, the Plaintiff herein cannot wave the Certificate of Title over and

in respect of the suit property on the face of the Court and believe that such a title which is not anchored on valid transactional documents would suffice.

89. Turning to the second issue, *namely*; whether the Plaintiff has placed before the Court any evidence of trespass by the Defendant, it is imperative to posit that before one, the Plaintiff not excepted can propagate a claim for trespass same [claimant] must demonstrate Title or ownership of the suit property. In this regard, the starting point was for the Plaintiff to prove lawful entitlement to the suit property.

90. The ingredients to be proven before a claimant can propagate a case for trespass were captured and expounded by the Court of Appeal in the case of *Municipal Council of Eldoret v Titus Gatitu Njau [2020] KECA 782 (KLR)* where the Court stated thus:

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

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

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

*“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant*

*should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.” [Emphasis supplied].*

91. More recently, In the case of *Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment)* the Court of Appeal stated and held thus:

*“Trespass, 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.”*

92. In my humble view, the Plaintiff’s plea for trespass, [if at all], could only proceed after proof of a legitimate Title or proof of ownership of the suit property. Sadly, I have found and held that the Plaintiff has failed to demonstrate that same holds a lawful and valid Title to the suit property.

93. On the other hand, it is also worthy to recall that the Defendant herein contended that same was authorized to enter upon and take possession of the

disputed portion of the land by the Esimit community. To this end, there is no gainsaying that the Defendant's entry upon, occupation and use of the disputed portion of the suit property is underpinned by the belief that same [Defendant] have equitable rights thereto.

94.As to whether or not Esimit Community had the capacity to donate the land to the Defendant or otherwise, does not fall for determination before me. Moreover, the determination of the said issue has been rendered moot and pointless based on the findings pertaining to issue number one [1] herein.

95.*In a nutshell*, I am afraid that the Plaintiff herein has neither demonstrated and/or proven the claim based on trespass. To this end, the contention based on trespass falls to the ground or better still, dissipates into thin air.

96.Next is the issue as pertains to whether the Plaintiff is entitled to the reliefs sought at the foot of the plaint. Suffice it to highlight that the Plaintiff herein had sought various reliefs, including declaration that same [Plaintiff] is the legal owner of the property known as LR NO. 32578-ISIOLO TOWNSHIP.

97.Be that as it may, I have addressed the question pertaining to the legality and validity of the Certificate of Title held by the Plaintiff. For good measures, I have found and held that the Certificate of Title under reference suffers several legal infirmities. In this regard, it is difficult to return a declaratory Order in favour of the Plaintiff.

98.The other relief that has been sought for by the Plaintiff is an Orders of Eviction. Suffice it to state, that an Eviction Order will no doubt issue in

favour of the lawful and legitimate proprietor of a landed property. However, before such an Order can issue, the claimant must prove lawful Title and entitlement. [See *Moya Drift Farm Limited –vs- Theuri*[1973]EA; *See also Mohanson k[Limited] –vs- the Registrar of Titles*[2017]Eklr.]

99. Nevertheless, I have found and held that the Plaintiff herein is not the legitimate proprietor of the suit land. To this end, I am afraid that the Plaintiff has neither established nor proven the requisite basis to warrant the issuance of the Orders of Eviction, either as sought or at all.

100. Finally, the Plaintiff sought for General Damages for trespass and wrongful occupation. It is common ground that general damages for trespass are issued to remedy the loss; injury; or harm suffered by the lawful owners or proprietor of the suit property. Nevertheless, there is no gainsaying that proof of ownership and/or entitlement to the property in question is a prelude to such an Order. In respect of the instant matter, the Plaintiff has not established the requisite basis to warrant the grant of such damages.

101. Be that as it may, if the Plaintiff herein had established and proven lawful Title to the suit property [which is not the case], I would have been obliged to decree and award of General Damages for trespass in the sum of **Kshs. 15,000,000/= only**, considering the size of the land claimed to have been trespassed upon and the duration of trespass. For good measure, the factors that were expounded by the Court of Appeal in the case of *Kenya Power & Lighting Company Ltd v Ringera & 2 others. (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104*, are instructive.

**FINAL DISPOSITION.**

102. Having analyzed the thematic issues that were highlighted in the body of the Judgment, it must have become apparent that the Plaintiff herein has failed to prove his claim to the requisite standard. [See Sections 107, 108 and 109 of the Evidence Act, Chapter 80, Laws of Kenya].

103. Flowing from the foregoing, the final Orders that commend themselves to the court are as hereunder:

- i) The Plaintiff's suit be and is hereby dismissed.*
- ii) Costs of the suit be and hereby awarded to the Defendant only.*
- iii) The Interested Parties sought to be joined into the suit and in this regard, same are not entitled to any Costs.*

104. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 16<sup>TH</sup> DAY OF SEPTEMBER 2025**

**OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].**

**JUDGE**

**In the presence of:**

Mukami/Mutuma – Court Assistants

Mr. Caleb Mwiti for the Plaintiff

Ms. Mumbi for the Defendant.

Mr. Benjamin Kimathi [Principal Litigation Counsel] for the 1<sup>st</sup> and 2<sup>nd</sup>  
Interested Parties.

Ms. Githinji for the 3<sup>rd</sup> Interested Party