Molu v Bora (Environment and Land Appeal E005 of 2025)
[2025] KEELC 6254 (KLR) (25 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6254 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E005 OF 2025

JO MBOYA, J

SEPTEMBER 25, 2025

BETWEEN

HASSAN GODANA MOLU ..... APPELLANT

AND

MOHAMED NOOR BORA ..... RESPONDENT

JUDGMENT

1. The Respondent [who was the Plaintiff in the subordinate court] approached the court vide Plaint dated 8th September 2020; and wherein same sought the following reliefs.

    a. A declaration that the plaintiff is the Bonafide legal owner of plot No 1294 Chechelesi Bulla Nassie within Isiolo Township.

    b. An order of permanent injunction to issue restraining the defendant by himself, his servant, agents and or employees from invading, trespassing, moving into occupying, alienating or in any other manner whatsoever dealing with or interfering with the plaintiff's possession and ownership of plot No. 1298 Chechelesi Bulla Nassie within Isiolo township.

    c. Cost of the suit plus interest thereon.

    d. Any other remedy and or relief the Honorable court may deem fit to grant.

2. The Appellant who was the defendant duly entered appearance and thereafter filed a statement of defence and counterclaim dated 29th October 2020. The counterclaim under reference highlighted the following reliefs.

    a. An order of eviction against the defendants in the counterclaim and a permanent injunction restraining the defendants in the counterclaim from trespassing, occupying or otherwise interfering with the plaintiffs in the counterclaim properties, namely plot No. C323; C646 and C2 272 Chechelesi area- Isiolo.

b. Cost of the suit and the counterclaim

c. Any other relief as the court deems fit and expedient.

3. The suit in the subordinate court was heard and disposed of vide Judgment delivered on 31st January 2025; and wherein the learned chief magistrate [CM] found and held that the respondent had proved his claim as the bona fide/ legal owner of plot No. Chechelesi 1298. To this end, the learned chief magistrate proceeded to and entered judgment in favor of the respondent. On the contrary, the learned Chief Magistrate held that the appellant had failed to establish his claims at the foot of the counterclaim. In the premises, the counterclaim dated 29th October 2020 was dismissed with cost[s].

4. It is the said Judgment and consequential decree which has provoked the instant appeal. Vide the memorandum of appeal dated 20th February 2025; the appellant has highlighted the following grounds of appeal:-

i. That the learned trial magistrate erred in law and in fact by holding that the respondent had proved ownership of the land Plot No. 1298 Chechelesi Bulla Nassie within Isiolo township on balance of probability despite overwhelming evidence by the appellant including documentary and oral submission conclusively establishing the appellant's ownership of the property.

ii. That the learned trial magistrate erred in law and fact by holding that the respondent has adduced sufficient evidence to prove that he is the legal owner of Plot No. 1298 Chechelesi Bulla Nassie when the respondent failed to produce ownership documents to controvert the documentary evidence of the appellant.

iii. That the learned trial magistrate erred in law and fact by dismissing credible evidence from the appellant, including sale agreement, approved part development plan and supporting documentation demonstrating the appellant ownership of the plot.

iv. That the learned trial magistrate erred in law and fact by relying on the respondent's buildings constructed on the plot , part development plan payment receipts without giving consideration to the valid documents produced by the appellants.

v. That the learned trial magistrate erred in law and fact rendering a decision that went against the weight of evidence.

vi. That trial magistrate erred in law and fact by failing to consider both oral and documentary evidence of the appellant which established that the plots belong to the appellant.

vii. That the decision of the learned trial magistrate was plainly wrong, bad in law and in the eyes of the court of equity and therefore erroneous.

viii. That the judgment delivered by the learned magistrate was against the weight of evidence and resulted in the miscarriage of justice.

5. The subject appeal came up for directions on 2nd July 2025; whereupon learned counsel for the appellant confirmed having filed and served the record of appeal. Furthermore, it was confirmed that the record of appeal was complete. Thereafter, the advocate[s] for the parties covenanted to canvass and dispose of the appeal by way of written submissions. To this end, the court proceeded to and circumscribe the timeline for filing and exchange of the written submissions.

6. The Appellant filed written submissions dated 14th July 2025; and wherein the appellant has raised and canvassed two [2] key issues, namely; the Learned Chief Magistrate erred in law in finding and holding that the respondent had proved his claim as pertains to ownership of Plot No. 1298 Chechelesi [the

suit plot]; and that the learned trial magistrate erred in finding and holding that the appellant had not proved ownership of the various plots claimed on his behalf despite tendering documentary evidence.

7. Regarding the first issue, learned counsel for the appellant has submitted that the learned chief magistrate erred in law and in fact in finding and holding that the respondent had proved ownership of the suit property even though the respondent did not tender and or produce before the court any credible evidence to underpin allotment; ownership; and registration of the suit property.

8. Furthermore, it was submitted that the learned chief magistrate failed to discern the material contradiction[s] that was evident in the testimony/ evidence of the respondent. In particular, it was submitted that the learned chief magistrate failed to appreciate that the receipt that was produced by the respondent related to plot no. 98 and not 1298.

9. Additionally, learned counsel for the appellant has also submitted that the learned chief magistrate also erred in fact and in law in failing to appreciate that the name shown on the receipt [Exhibit P1] was different from the respondent's name in the suit pleadings. Moreover, it was pointed out that the receipt that was being relied upon by the appellant references a plot located at Kambi Garba and not Chechelesi Bulla Nassie.

10. Other than the foregoing, learned counsel for the appellant has also submitted that the learned chief magistrate also failed to appreciate that the letter dated 24th July 2024; did not confirm that the plot in question had been allocated to the respondent. On the contrary, it was submitted that the letter under reference was merely a request by the chief officer- Isiolo county and addressed to the physical planner seeking for comments regarding the existence of Plot captured at the foot of plan No. ISL/117/18/178- Chechelesi.

11. To this end, learned counsel for the appellant has submitted that the Judgment of the learned chief magistrate that awarded the suit property to the respondent was arrived at in vacuum.

12. Further and in addition, learned counsel for the appellant has also submitted that the learned chief magistrate failed to appraise herself of the totality of the evidence on record. In particular, learned counsel has referenced page 86 of the record of appeal and wherein the respondent acknowledged that same did not have/ adduce any evidence to prove ownership of the suit plot.

13. Turning to the second issue, learned counsel for the appellant has submitted that the appellant tendered and produced various documents confirming purchase/ sale transfer and ultimate registration of the various properties and to him and his wife. Moreover, learned counsel has also referenced the various letters that were authored by the designated officers of the County Government of Isiolo including the confirmation letter dated 8th March 2019.

14. Additionally, learned counsel for the appellant has submitted that the documentation that were tendered by and on behalf of the appellant clearly demonstrated that the appellant was the lawful proprietor of plot Nos. C646; and C2 272 Chechelesi- Isiolo. In this regard, it was posited that the judgment of the learned chief magistrate is replete with misdirection and thus same ought to be varied and or set aside.

15. The respondent filed written submissions and wherein same has supported the Judgment of the learned chief magistrate. Furthermore, learned counsel for the respondent has contended that the learned chief magistrate correctly appraised and apprehended the evidence tendered by the respondent and came to the correct conclusion as pertains to ownership of plot No. 1298 Chechelesi- Isiolo.

16. Secondly, learned counsel for the respondent has submitted that though the appellant had raised the plea of fraud, as against the respondent, the appellant failed to tender and place before the court

plausible evidence to prove the plea of fraud. In particular, it was submitted that the plea of fraud required clear and cogent evidence. Additionally, it was submitted that the burden of proving fraud is higher than on a balance of probability [balance of preponderance].

17. Flowing from the foregoing, learned counsel for the respondent has invited the court to find and hold that the appeal before hand is devoid of merits and same ought to be dismissed. On the contrary, the court has been invited to affirm the Judgment of the learned Chief Magistrate and the consequential decree arising therefrom.

18. Having reviewed the record of appeal; the pleadings filed on behalf of the parties; the evidence tendered[both oral and documentary] and upon taking into account the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the instant appeal turns on two [2] key issues, namely; whether the respondent established and proved entitlement to plot No. 1298 Chechelesi Bulla Nassie- Isiolo or otherwise; whether the appellant herein proved ownership of plots No. C646; and C2 272 Chechelesi - Isiolo or otherwise.

19. Before venturing forward to analyse the issue[s] that have been highlighted, it is imperative to observe that the Appeal beforehand is a first appeal from the decision of the court of first instance, namely, the Subordinate Court. By virtue of being a first appeal, this honourable court is vested with the requisite jurisdiction to review, re-evaluate and re-analyse the findings of the court of first instance and thereafter to arrive at independent conclusions; taking into account the pleadings filed, evidence on record and the applicable laws. [See the provisions of Section 78 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya].

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

21. The jurisdictional remit of the 1st appellate court was recently revisited and expounded upon by 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)

> 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 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 judgement. 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. 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."

22. Taking into account the succinct and apt holding in the decision [supra], I am now well disposed to revert to the subject matter and to discern whether the factual conclusions and findings that were reached by the learned chief magistrate accord with the totality of the evidence on record and with the applicable law.

23. I beg to address the issues sequentially.

24. Regarding the first issue, namely; whether the respondent established and proved his claim/ entitlement to Plot No. 1298 Chechelesi [the suit plot]. It is imperative to underscore that the respondent bore the burden of proving the assertions at the foot of his claims. [See Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR; James Muniu Mucheru

v National Bank of Kenya Limited [2019] KECA 1058 (KLR) and Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment)], respectively.

25. Did the respondent prove his claim on a balance of probabilities? To start with, the respondent's case in the subordinate court was to the effect that same was allocated plot No. 1298 Chechelesi Bulla Nassie-Isiolo by the county council of Isiolo in the year 2010. Moreover, the respondent posited that same was and is still the owner of the suit plot. [See paragraph 3 of the Plaint]. [see also paragraph 3 of the witness statement dated 8th September 2020 which was adopted as part of the evidence in chief of the respondent].

26. Having contended that same was duly and lawfully allocated plot No. 1298 Chechelesi Isiolo[the suit plot]; it was incumbent upon the respondent to tender and produce before the subordinate court a copy of an application letter addressed to the County Council of Isiolo[now defunct]; certified copies of the minutes of the County Council of Isiolo[now defunct] recommending allotment of the suit plot; duly approved part development plan; letter of allotment by the commissioner of lands[now defunct] and revenue receipts relative to payment of the standard premium/ statutory levy[if any] highlighted at the foot of the letter of allotment.

27. It is instructive to highlight that whenever a person, the respondent herein not excepted, contends to have been allocated a plot by the county council of Isiolo [now defunct] then it behooves the person to demonstrate due compliance with the law. It is not enough to pick and throw the word allocation, albeit without placing before the court documentation to that effect.

28. I wish to observe that in respect of the instant matter, the respondent did not tender and or place before the court any evidence to document/ establish allotment/ allocation of the suit plot by the County council of Isiolo [now defunct].

29. To this end, I find it difficult to comprehend the holding/ finding of the learned chief magistrate wherein same emphatically holds that the suit land was allocated to the plaintiff. [See lines 24 and 25 at page 8 of the impugned judgment.]. In my humble view, the deployment of the terminology in question is a misnomer. Allotment entails issuance of a Letter of allotment; or its equivalent.

30. Other than the fact that the respondent did not tender and produce evidence of [sic] allotment of the suit property, it is also important to recall that the documentation that were tendered and produced by and on behalf of the respondent did not reference and or highlight plot number 1298 Chechelesi [the suit plot]. Firstly, the document which was tendered as PEx1 and which was purported to be a receipt, relates to plot number 98 Chechelesi. Nevertheless, it is instructive to observe that the document referenced as a receipt is indeed a demand note for payment of rate [invoice] and not a receipt.

31. Secondly, the letter dated 24th July 2018, and the part development plan which were produced as exhibits P2 and P3 respectively, do not reference plot No. 1298 Chechelesi. Indeed, there is no document to connect exhibit P2 and P3 to the suit plot.

32. In this regard, it is difficult to comprehend how the learned chief magistrate came to the conclusion that exhibits P2 and P3 can underpin ownership rights of the sui plot, despite there being no nexus between the named Document[s] and the Suit Plot.

33. Turning to exhibit P4 and P5, I beg to underscore that a surveyor's report by and of itself cannot constitute an authority to establish ownership of a landed property. For good measure, a surveyor is an expert and technical person whose mandate concerns determination of the boundaries of immovable properties; ascertainment of encroachment [if any] onto a neighbouring plot; preparation of the

mutation forms; Preparation of Sub-division plan[s]; and incidental responsibilities as provided for under the *Survey Act* Chapter 299 laws of Kenya.

34. On the contrary, the ascertainment of ownership rights of immovable properties is based on the documents held under the custody of the land registrar in accordance with the provisions of section 9 of the *land registration act* 2012[2016].

35. However, in instances where the immovable property has not been registered, the authoritative documents to underpin ownership would no doubt be domiciled in the county government. In this case, one would have expected the respondent to procure and obtain records from the County Government of Isiolo; and more particularly, from the county executive committee member in charge of lands.

36. I am afraid that a surveyor's report like the one that was tendered and produced before the trial court [Exhibit P4] cannot be utilized as a basis of finding and holding that the respondent was the lawful owner of plot No. 1298 Chechelesi- Isiolo. Further and in any event, it is instructive to highlight that a surveyor's report can only make a comment on ownership if same is referencing authentic documents availed during survey; and not out of the blues.

37. Next is the physical planner's report which was also given undue premium by the chief magistrate. It is important to posit that a part development plan which emanates from the directorate of physical planning, is merely a planning tool. Same is a preliminary document whose purpose is to merely confirm the availability [if any] of the property to be allocated.

38. Simply put, one cannot rely on a part development plan [development plan] by and of itself to underpin ownership of a property. [See the decision in 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)- paragraph 104-108].

39. Flowing from the foregoing discussion, I am afraid that the learned chief magistrate did not properly address her judicial mind to the documentation that were tendered by the respondent. In this regard, it is my finding that the learned chief magistrate misapprehended the import and tenor of the documents tendered by and on behalf of the respondent and thereafter arrived at an erroneous conclusion.

40. Moreover, it is my humble view that the learned chief magistrate [respectfully] adopted a slanted and skewed approach in evaluating the documentary evidence that were tendered before the court and thus failed to discern the material discrepancies attended thereto. In addition, there was also the mis-characterization of the documents and which negates the crux of the Judgment rendered by the learned chief magistrate.

41. Turning to the second issue, it is imperative to recall that the appellant herein contended that same had purchased and acquired plot No. C646 and C2 272 cheques from the previous owners. To this end, the appellant tendered and produced copies of the sale/purchase agreement. In addition, the appellant also tendered and produce correspondent from the County Government of Isiolo confirming plot No. C646 an Dc2 272 Chechelesi- Isiolo were duly transferred to and registered in the name of the appellant.

42. The contents of the letters date 8th march 2019, and 8th January, 2019; respectively, were neither controverted nor impeached by the respondent. To my mind, the appellant herein demonstrated the root of the two properties, namely; Plot No. C646 and C2 272 Chechelesi Isiolo, respectively. [See the dictum in the case of Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School (Civil Appeal 64 of 2014) [2023] KECA 371 (KLR) (31 March 2023) (Judgment)].

43. Before concluding on this issue, there is one more question that merits mention and a short discussion. The question relates to the competence of the counterclaim that was mounted on behalf of Kamila Gollo Dima [the 2nd plaintiff to the counterclaim] in the subordinate court. I beg to address the issue in a two-pronged manner.

44. Firstly, it is common ground that the respondent herein had only impleaded the appellant as the sole defendant in the subordinate court. Having been impleaded as the sole defendant, the appellant herein is the only one who could lodge/ mount a counterclaim.

45. For good measure, a person who had not been impleaded as a defendant is divested of the capacity to bring forth a counterclaim. [see Order 7 Rule 3 of the civil procedure rules 2010]. [See the holding of the Court of Appeal in the case of County Government of Kilifi v Mombasa Cement Limited [2017] KECA 633 (KLR) and the Supreme Court decision in the Speaker of the Senate & 3 others v Speaker of the National Assembly & 10 others (Petition 19 (E027) of 2021) [2025] KESC 11 (KLR) (21 March 2025) (Judgment)

46. Secondly, having being improperly joined as a 2nd plaintiff to the counterclaim, despite the clear provisions of Order 7 Rule 3 of the Civil Procedure Rules 2010, the said Kamila Gollo Dima remained a party to the suit.

47. In this regard, there is also no gainsaying that same ought to have been one of the appellants or, better still a respondent [whichever way the current appellant] deemed apposite. However, it is instructive to observe that her name has been omitted completely from the current proceedings.

48. I beg to underscore that time is nigh [ripe] for practitioners to have a second look [re-look] at the Civil Procedure Rules 2010; and to ensure due compliance. For good measure, it is difficult to fathom how and in what manner a litigant who was a party in the lower court is being excluded from the appeal proceedings when the said party was never struck off by a lawful court order.

49. I have must said enough as pertains the legal implications of Order 7 Rule 3 of the Civil Procedure Rules, 2010. I do not wish to be-labour the point any further.

Final Disposition.

50. Flowing from the discussion in the body of the Judgment, it is crystal clear that the appeal beforehand is meritorious. Furthermore, it is also evident that the impugned Judgment by the learned chief magistrate is wrought and fraught with error[s] and grave mis-directions. Same courts setting aside.

51. In the upshot, the final orders that commend themselves to this court are as hereunder:

    i. The Appeal be and is hereby allowed.

    ii. The Judgment of the learned chief magistrate dated 31ST January 2025 and the consequential decree arising therefrom be and is hereby set aside in it entirety.

    iii. In lieu thereof, an order be and is hereby made dismissing the respondent's suit in the subordinate court vide Plaint dated 8th September 2020.

    iv. In addition, an order be and is hereby made that the Appellants counterclaim dated 29th October 2020; be and is hereby allowed as pertains to Plot Nos. C646 and C2 272 Chechelesi Isiolo.

v. For the avoidance of doubt, the respondent herein be and is hereby ordered and or directed to vacate and hand over vacant possession in respect of C646 and C2 272 within 90 days from the date hereof.

vi. In default by the respondent to comply with clause (v) above, the Appellant shall be at liberty to levy eviction and in this regard, an Eviction order shall issue.

vii. In the event of the respondent being evicted in accordance with clause (vi), the cost/ expenses incurred shall be certified by the Deputy Registrar and thereafter be borne by the respondent.

viii. There be and is hereby granted an order of permanent injunction restraining the respondent from entering upon, interfering with and or in any other manner dealing with plot Nos. C646 and C2 272 belonging to the appellant.

ix. Cost of the Appeal shall be borne by the respondent.

x. The Appellant is also awarded the cost of the suit and the counterclaim in the subordinate court.

52. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 25TH DAY OF SEPTEMBER 2025.

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

JUDGE

In the presence of:

Hussein/Mukami – Court Assistant

Mr. Lekoona for the Appellant

Mr Muchiri holding brief for Mr, Ouma for the Respondent