Perera v Abdulkadir (Environment and Land Appeal E013 of 2024) [2025] KEELC 6864 (KLR) (9 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6864 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E013 OF 2024

JO MBOYA, J

OCTOBER 9, 2025

BETWEEN

MOHAMED AHMED PERERA .... APPELLANT

AND

ABDULKADIR ADAN ALEW ALIAS ABDULKADIR KHALIF .. RESPONDENT

(Being an appeal against the Judgment and decree of Hon. E. Tsimonjero – SRM delivered on 23rd July 2024 in the chief magistrates' court at Isiolo in ELC case No. 41 of 2020)

JUDGMENT

1. The Appellant herein [who was the Plaintiff in the subordinate court] approached the court vide Plaint dated 14th September 2020 and wherein same sought various reliefs. Subsequently, the Plaint under reference was amended culminating into the amended plaint dated 2nd August 2021.

2. The reliefs sought thereunder were as follows;

   a. A declaration that the parcel of land known as PDP ISL/117/98/2 in Isiolo County within the Republic of Kenya belongs to the plaintiff.

   b. A declaration that the certificate of lease/title to the suit land No. Isiolo Township/Block 4/53 be canceled immediately.

   c. An order of permanent injunction restraining the defendant, his agents, servants or anyone acting on his behalf from entering, cultivating, developing, utilizing, alienating, selling, constructing or in any other way interfering with the plaintiff's parcel of land known as PDP ISL/117/98/2 in Isiolo county within the Republic of Kenya.

   d. Costs, interests and any other relief this honourable court deems just and fit to grant.

3. The Respondent duly entered appearance and thereafter filed a statement of defence dated 24th August 2021; and wherein the respondent denied the claims at the foot of the Plaint. Furthermore, the respondent contended that the property known as Isiolo Township/Block 4/53; lawfully belongs to and is registered in his name. In addition, the respondent contended that the appellant herein has no rights to the named property.

4. The suit in the subordinate court was heard and disposed of vide Judgment dated 23rd July 2024; and delivered on even date. The learned trial court [E. Tsimonjero – SRM] found and held that the appellant had failed to prove his case to the requisite standard. Consequently, the learned trial magistrate dismissed the appellant's suit with costs to the respondent.

5. It is the said Judgment which has aggrieved the appellant and thus provoked the subject appeal. The appellant has approached the court vide memorandum of appeal dated 1st August 2024 and wherein same has highlighted the following grounds;

    i. That the trial court erred in fact and in law by failing to appreciate that the appellant has been in occupation of his parcel of land known as PDP No. ISL/117/98/2 since the year 1997.

    ii. That the trial court erred in fact and in law by failing to appreciate that the appellant lawfully applied for and was procedurally and regularly allocated his parcel of land.

    iii. That the trial court erred in fact and in law by failing to appreciate the appellant's evidence on respondents' ultra vires acts and fraudulent deeds.

    iv. That the trial court erred in fact and in law by failing to appreciate the appellant evidence that the respondent did not adhere to the lawfully set down procedure provided for towards allocation of the alleged parcel of land number Block 4/53

    v. That the trial court erred in fact and in law by failing to appreciate that the respondent did not adduce any evidence to prove payments for stand premium and statutory fee as necessitated.

    vi. That the trial court erred in law and in fact by failing to appreciate the fact that an allotment letter is based on a specific part development plan number and not plot number.

    vii. That the trial court erred in law and in fact by failing to appreciate the appellant's evidence that the plot that was allocated to him was clearly depicted in a part development plan number ISL/117/98/2.

    viii. That the trial court erred in law and in fact by failing to appreciate that it is only after issuance of a letter of allotment that a cadastral survey was to be carried out and land reference number or plot number issued as such the respondent could not have been issued with a land reference number to wit block No. 4/53 prior to cadastral survey being carried out and registry index map (R.I.M) generated.

    ix. That the learned magistrate so misdirected herself on matters of law and fact as to occasion a miscarriage of justice against the appellant.

    x. That in light of the foregoing, the learned magistrate failed to do justice in the case at hand.

6. The subject appeal came up for directions on 24th July 2025; whereupon the counsel for the appellant confirmed the filing and service of the record of appeal. In addition, counsel sought directions pertaining to the hearing and disposal of the appeal. To this end, and with the concurrence of learned counsel for the respondent, the court proceeded to and gave directions pertaining to the hearing and disposal of the appeal. Suffice it to state that the court directed that the appeal be heard and canvassed

by way of written submissions. Furthermore, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

7. The appellant filed written submissions dated 9th September 2025; and wherein the appellant has highlighted two [2] key issues for determination. The issues highlighted by the appellant are namely; the learned trial magistrate misapprehended the totality of the evidence tendered by the appellant and thus arrived at an erroneous conclusion; the learned trial magistrate failed to appreciate that the respondent herein did not procure and obtain the certificate of lease in accordance with the due process of the law.

8. Regarding the first issue, learned counsel for the appellant has submitted that the appellant herein tendered and produced before the trial court assorted documents demonstrating application for allotment of the plot known as ISL/117/98/2; the issuance of the letter of allotment; the payment of land rates and plot registration confirmation from the county government of Isiolo. However, it has been submitted that despite the totality of the evidence tendered, the learned trial magistrate reached a conclusion that the appellant had not proved his claim to the suit property.

9. In addition, it was submitted that the learned trial magistrate failed to properly understand that the appellant herein had also been paying rates and rents in compliance with the terms of the letter of allotment. According to counsel, the payment of rates and rents, and which were duly acknowledged by the County Council of Isiolo [now defunct] and the County Government of Isiolo denotes that the suit property belongs to the appellant.

10. Turning to the second issue, learned counsel for the appellant has submitted that the learned trial magistrate failed to appreciate that the respondent's letter of allotment was issued more than three months after the issuance of the letter of allotment in favour of the appellants. Furthermore, it has been contended that the learned trial magistrate did not take cognizance of the fact that the respondent did not tender and or produce before the court an approved part development plan [PDP] underpinning the allotment of the suit property unto him. In the absence of a part development plan, counsel submitted that the allotment in favour of the respondent was unprocedural, illegal and thus invalid.

11. Additionally, it has been submitted that the respondents also did not avail any letter from the county council of Isiolo [now defunct] demonstrating that same was ever allocated the suit property. Moreover, it has been submitted that the documentation that were tendered and produced by the respondent were procured during the time when the respondent was a Commissioner with the National Land Commission. To this end, it has been posited that the respondent procured the impugned documents by using his office and or portfolio as a Commissioner.

12. Be that as it may, learned counsel for the appellant has submitted that the learned trial magistrate failed to properly appraise and apprehend the tenor of the documents tendered by the respondent and thus the learned trial magistrate arrived at an erroneous conclusion that the respondent was the lawful proprietor of the suit property.

13. Flowing from the foregoing, learned counsel for the appellant has submitted that the Judgment under reference reeks of grave errors and mis-directions; and thus same ought to be set aside. In this regard, the court has been invited to allow the appeal and to set aside the impugned Judgment.

14. The respondent filed written submissions dated 16th September 2025; and wherein same has highlighted four [4] key issues for consideration by the court. The issues raised by the respondent are namely; that the appellant failed to prove and or demonstrate that same is the owner of plot number ISL/117/98/2 [which is claimed]; the letter of allotment relied upon by the appellant does not confer any ownership right upon the appellant; the appellant did not establish/prove the plea of fraud as

against the respondent; the respondent's title to the suit property was lawfully procured/obtained and hence the respondent is entitled to exclusive rights thereto.

15. Regarding the first issue, learned counsel for the respondent has submitted that though the appellant had contended that same is the lawful owner of the plot known as ISL/117/98/2; same however, failed to tender credible evidence to demonstrate ownership of [sic] the plot in question. In the absence of any plausible evidence, it has been contended that the appellant herein could not benefit from any positive orders from the subordinate court.

16. In respect of the second issue, learned counsel for the respondent has submitted that the appellants' claim to and in respect of the suit property is pegged on a letter of allotment. For good measure, it was submitted that the appellant neither tendered nor produced any certificate of lease/title, whatsoever.

17. Premised on the foregoing, it has been submitted that a letter of allotment by and of itself cannot confer any ownership rights to the allottee/bearer thereof. Moreover, it has been submitted that a letter of allotment is merely an offer to the allottee, which must be accepted and thereafter the terms thereof be complied with. Nevertheless, it has been submitted that the appellant herein cannot anchor his claim to the suit property on the basis of a letter of allotment.

18. Turning to the third issue, it has been submitted that the appellant failed to establish the plea of fraud as against the respondent. Furthermore, it has been submitted that where the plea of fraud is made, it behooves the claimant to tender credible; plausible; concrete and compelling evidence to prove sale. At any rate, it has been submitted that fraud cannot be proven on the basis of generalized allegations. Simply put, it has been submitted that the appellant did not discharge the burden of proof as pertains to the allegations of fraud.

19. Finally, learned counsel for the respondent has submitted that the respondent herein tendered and produced before the trial court credible evidence to demonstrate that same was duly allocated the suit property. Furthermore, it has been contended that the respondent tendered evidence showing compliance with the terms of the letter of allotment, survey of the suit property, preparation of the survey plan, preparation of the deed plan, and the ultimate issuance of a certificate of lease.

20. Additionally, it was submitted that the documentation that were tendered and produced by the respondent were confirmed to be authentic and genuine. To this end, learned counsel for the respondent has referenced the evidence of DW 2 and DW 3, respectively.

21. Premised on the foregoing, learned counsel for the respondent has submitted that the appeal beforehand is devoid of merits. In this regard, the court has been invited to find and hold that the judgment of the subordinate court is well grounded and thus same ought to be affirmed.

22. Having reviewed the record of appeal, the evidence tendered [both oral and documentary and upon consideration of the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the subject appeal turns on two [2] key issues, namely; whether the appellant herein established/proved his claim to ownership of the suit property or otherwise and whether the appellant proved the plea of fraud as against the respondent or otherwise.

23. Before venturing to interrogate and address the issues highlighted in the preceding paragraph, it is imperative to highlight that what is before me is a first appeal. To this end, it suffices to underscore that this court is seized of the jurisdiction to review the evidence on record and to ascertain whether the factual and legal conclusions arrived at accord with the evidence and the law. Furthermore, it is instructive to observe that this court is at liberty to arrive at an independent conclusion and, where appropriate, to depart from the conclusions and or findings of the trial court.

24. Nevertheless, it is important to underscore that even though the court is seized of the jurisdiction to depart from the factual and legal conclusions arrived at by the trial court, such departure can only be undertaken where it is shown that the findings/conclusions were arrived at on the basis of no evidence; were perverse to the evidence on record; were based on misapprehension of the evidence on record; or where it is shown that the trial court committed an error of principle which vitiates the findings under reference. Simply put, the first appellate court cannot depart from the findings and conclusions of the trial court at will.

25. The jurisdictional remit of the 1st appellate court has been the subject of various pronouncements 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) the court stated thus;

> 37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the 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:
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> > "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 circumstance 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 judgment 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."

26. Back to the issues for consideration. I beg to address the issues sequentially, starting with the first issue, namely; whether the appellant proved his claim to and in respect of the plot known as PDP ISL/117/98/2 or otherwise.

27. It is instructive to recall and reiterate that the appellant is the one who approached the subordinate court, contending that same was duly and lawfully allocated the plot referenced as PDP ISL/117/98/2 in the year 1999. Furthermore, it is the same appellant who contended that same duly complied with the terms of the letter of allotment and consequently same is the lawful owner of the plot referenced as PDP ISL/117/98/2.

28. In addition, it is the same appellant who contended that the plot under reference was fraudulently numbered as Isiolo Township/Block 4/53 and thereafter transferred to and registered in the name of the respondent.

29. Having made the foregoing assertions, it was incumbent upon the appellant to tender plausible, concrete and compelling evidence to demonstrate allotment of the named plot; compliance with the terms of the letter of allotment; issuance of an approved part development plan; and issuance of the certificate of title/lease [whichever is applicable].

30. The appellant herein tendered before the subordinate court assorted documents whose details have been captured at the foot of pages 31 and 32 of the record of appeal. Nevertheless, it is worth highlighting that even though the appellant tendered a copy of the letter of allotment dated 29th January 1999; same, however, did not produce evidence of a letter of acceptance or the revenue receipt relative to payments of the stand premium/statutory levies highlighted at the foot of the letter of allotment.

31. It is common ground that a letter of allotment is an offer by the Commissioner of lands [now defunct] to the allottee and same being an offer, it behooves the allottee to accept the terms thereof and also to pay the requisite statutory levies within the prescribed timelines. For good measure, the timelines are prescribed to 30 days from the date of the postmark. Moreover, there is no gainsaying that where there is non-compliance with the terms of the letter of allotment, same lapses and stands extinguished. [See the decision of the Supreme Court in Torino Investments Ltd vs the Attorney General (2023) KESC 79 at Paragraphs 57-62 thereof].

32. In the absence of the letter of acceptance and the revenue receipt attesting to payment of the standard premium, it is common ground that the appellants' claim [if at all] lapsed and stood extinguished.

33. Other than the foregoing, it is also worthy to recall that the appellant tendered a part development plan as evidence of proof that the suit property was available for alienation. The part development plan was tendered as exhibit P12. Nevertheless, it is apparent from the face of the part development plan tendered that same was neither signed by the drawer, checked by anyone nor approved by the director of physical planning, nor the commissioner of lands; now defunct. In addition, what has been referenced as a part development plan relate to several properties contained thereunder without any particular property being highlighted/shaded to be the designated plot. Quite clearly, the appellant herein could not have been allocated all the plots highlighted in the body of Exhibit P12.

34. Be that as it may, I beg to point out that a part development plan which is neither signed nor approved is invalid and void. In this regard, the part development plan that has been tendered by the appellant could not support the appellant's claim to the suit property or at all. [See the holding of the Supreme Court in the case of Dina Management Ltd vs the County Government of Mombasa & others (2023) KESC – Paragraph 107 thereof, where the apex court highlighted the importance of an approved part development plan].

35. Additionally, it is imperative to highlight that the part development plan that was relied upon by the appellant was vague for want of specific descriptions. Suffice it to state that the PDP in question lacks clarity as pertains to the plots. In fact, the only plots that are clearly identifiable from the document are public/government utilities.

36. To this end, I agree with the findings and the conclusions of the learned trial magistrate when same stated/remarked thus;

> " A look at the PDP number shows that plan number ISL/117/98/2 talks about an existing commercial plot. It is not clear where the alleged plot shown in red was and what was the specific description thereof. The plan has so many plots without descriptions. The only identified plots and the plan are public or government utilities. It is therefore not possible to single out with precision the plaintiffs' alleged plot. This court takes the view that the plaintiff was not claiming all the plots on plan number ISL 117/98/2. He was interested in a particular plot which as it stands, has no description and is not identified".

37. The foregoing observations hold sway. The conclusions are inevitable. taking into account the nature of the evidence that was tendered by and on behalf of the appellant.

38. Turning to the second issue, it is important to underscore that the appellant is the one who contended that the suit property was fraudulently allocated to and thereafter registered in the name of the respondent. Furthermore, the appellant adverted to the particulars of fraud at the foot of paragraph 3 of the amended Plaint. To this end, it was incumbent upon the appellant to tender and produce evidence to demonstrate fraud.

39. It suffices to highlight that fraud is a quasi-criminal matter and thus whosoever pleads fraud is called upon to tender credible; and concrete evidence and to prove same on a standard which is slightly above the balance of probabilities. For good measure, fraud must be proved to the intermediate standard [namely, the standard that lies between balance of probabilities and beyond a reasonable doubt].

40. Did the appellant prove fraud as against the respondent? To answer the question, it is imperative to recall that the appellant was the single witness on behalf of the plaintiff. The appellant did not summon and or call any witness from the Department of Lands, National Land Commission, or any state agency

to impugn the veracity of the documents tendered by the respondent. Instructively, if the appellant was contending that the respondent's documents were not genuine, then same bore the burden to impugn the said document[s].

41. In my humble view, it behooved the appellant to summon and or call a witness from the Department of Land or the National Land Commission, to testify and demonstrate that the process leading to the issuance of the documents in favour of the respondent was faulty, irregular, and illegal. [See the decision of the Court of Appeal in the case of Philemon L. Wambia v Gaitano Lusitsa Mukofu & 2 others [2019] KECA 157 (KLR),

42. On the contrary, it is not lost on me that the respondents herein summoned and called witnesses from the National Land Commission [DW2] and a witness from the Department of Lands [DW3]. Suffice it to state that the said witnesses confirmed that the documentation[s] held by the respondent were genuine and authentic.

43. Moreover, DW 3 confirmed that the certificate of lease in favour of the respondent was issued in accordance with the due process of the law. In this regard, the validity of the Title was affirmed.

44. I beg to point out that the evidence of DW2 and DW3 were neither challenged nor impugned. For good measure, DW3 highlighted that the documentation held by the respondent proves that the process was followed.

45. What I hear DW2 and DW3 to be saying is that the respondent lawfully acquired title to the suit property. In addition, the said witnesses have authenticated the validity of the respondents' documents. I am afraid that the plea of fraud that was adverted to by the appellant was not proven.

46. In view of the foregoing, I similarly come to the conclusion that the finding by the learned trial magistrate that no fraud was proven is sound and solid. For good measure, the appellant herein could not have procured a finding on fraud on the basis of the generalized and opaque allegations which were never substantiated. [See the holding of the Court of Appeal in the case of Damutila Nanyama Puyumu vs Salim Mohamed Salim (2021) eKLR; Kinyanjui Kamau vs George Kamau (2015) eKLR, Kuria Kiarie vs Sammy Magera (2018) eKLR and Virjay Morjaria vs Nansigh Madhusing Darbar & another (2000) eKLR, respectively].

47. Flowing from the foregoing analysis, and taking into account the principles enunciated in the case of Mwanasokoni vs Kenya Bus Services (1985) ekLR and Jabane vs Olenja (1986) eKLR, I come to the conclusion that no basis has been laid to warrant departure from the findings/conclusions of the trial court. On the contrary, I come to the same conclusion as the trial court. Moreover, it suffices to underscore that the trial court correctly interrogated the totality of the evidence that was tendered before same and indeed apprehended the tenor thereof.

Final Disposition.

48. For the reasons which have been highlighted in the body of the Judgment, it must have become apparent that the impugned Judgment was/is sound and solid. Furthermore, it is common ground that the appellant did not establish any right or interest over the suit property.

49. In the upshot, the final orders that commend themselves to the court are as hereunder;

    i. The Appeal be and is hereby dismissed.

    ii. The Judgment of the subordinate court dated 23rd July 2024 and the consequential decree arising therefrom be and are hereby affirmed.

iii. Costs of the Appeal be and are hereby awarded to the respondent.

iv. The Costs in terms of clause (iii) shall be agreed upon and in default be taxed in the conventional manner.

50. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 9TH DAY OF OCTOBER 2025

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

JUDGE

In the presence of:

Hussein -Court Assistance

Mr. Caleb Mwiti for the Appellant

Mr. J.M Mwangi for the Respondent.