



**Kaliuntu v Lemasaria (Environment and Land Appeal E024 of 2024)
[2025] KEELC 7431 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7431 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT AND LAND APPEAL E024 OF 2024**

**JO MBOYA, J
OCTOBER 30, 2025**

BETWEEN

PRISCILLA KALIUNTU APPELLANT

AND

PHILIP KANGETHE LEMASARIA RESPONDENT

*(Being an appeal against the judgment and decree in Isiolo
CMC ELC E032 OF 2020 - Hon L. Mutai CM dated 22.10.2024)*

JUDGMENT

1. The subject appeal arises from the Judgment of the learned chief magistrate [Hon L. Mutai-CM] dated and delivered on 22.10.2024 and wherein the learned chief magistrate found and held that the respondent [who was the plaintiff in the subordinate court] had proved his claim to the requisite standard. To this end, the learned chief magistrate entered Judgment in favor of the respondent.
2. On the contrary, the learned chief magistrate found and held that the appellant had failed to prove her counterclaim to the requisite standard. In this regard, the appellant's counterclaim dated 13.10.2020 was dismissed with costs.
3. It is the said judgment and the consequential decree which has aggrieved the appellant and thus provoked the subject appeal. The appellant has highlighted various grounds of appeal. The grounds of appeal are however, prolix in nature.
4. Be that as it may, it suffices to reproduce the said grounds of appeal. Same are reproduced as here under-
 - i. The learned trial magistrate erred in law and fact by making a finding that the respondent had proved the case to the required standard.
 - ii. The learned magistrate erred in law and fact by finding that the ground position of the disputed land is Plot No. Mwangaza/ISL/117/98/279 belongs to the defendant and not plot No. Block/



Mwangaza/1276 as proved by the appellant, despite there being no evidence by the respondent showing the position of the plot in question, that was contrary to what the appellant produced.

- iii. That the learned trial magistrate erred in law and facts by failing to seriously interrogate and analyze the evidence tendered by the parties herein and therefore reached at a wrong decision.
- iv. That the learned trial magistrate erred in law and facts by finding that the appellant had not proved his case whereas the documents to wit – minutes of allocation, allotment letter, PDP map, receipts and proof of payment of receipts to the count were availed and uncontroverted thus conferring ownership over plot no. Block/Mwangaza/1276.
- v. The learned trial magistrate erred in law and fact by believing that the respondent applied and was allocated plot No. Block/Mwangaza/1276 by Isiolo County Council yet no application nor minutes of allocation was exhibited before court to assist trace ownership of the unregistered plot from the roots of PW 2 father as pleaded.
- vi. That the learned trial magistrate fell into grievous error by believing that the respondent purchased the subject plot No. Block/Mwangaza/1276 from PW 2, yet there was no evidence tabled by PW 2 to prove that he owned any land that he could legally and procedurally sell to the respondent.
- vii. That the learned trial magistrate erred in law by wrongfully awarding the plot in dispute to the defendant yet he failed to find that the respondent did not have any minutes of the town and planning committee allocating PW 2 or his father's plot No. Block/Mwangaza/1276 and also the respondent did not have full council minutes approving the allocation of plot NO. Block/Mwangaza/1276 to PW 2 or his father.
- viii. That the learned Trial magistrate failed to consider the weight of the evidence adduced by the appellant and also the answer given by PW 1 and PW 2 during his cross-examination, which answer proved that the respondent did not own plot NO. Block/Mwangaza/1276.
- ix. That the learned Trial magistrate erred in law by failing to find that the defendant's ownership of plot No. Block/Mwangaza/1276 was hinged on purchase from PW 2 and as such, the defence to counterclaim put forward by the respondent was at variance with the evidence tendered in court, contrary to the settled principle that parties are bound by their pleadings.
- x. The honourable magistrate considered extraneous issues and reached a conclusion not supported by the evidence on record.
- xi. The Honourable magistrate erred both in law and fact by failing to accord the evidence in favour of the appellant the requisite weight.
- xii. The learned magistrate erred in law and inf act by failing to consider that the appellant was in possession of the suit land since allocation despite being undisputed evidence proving the same including DW 2 evidence that in 2013 the appellant won against Trojan who wanted to grant the land in Trojan vide Meru High Court Case 108/2013 when the Honourable court ruled in her favour.
- xiii. The Honourable magistrate erred both in law and fact by failing to find that neither the respondent nor PW 2 or his father were not original owners of any plot including the suitland in mwangaza area as they were not among the petitioners in the high court vide constitutional petition No. 6 of 2011 where original owners sued the county council and the attorney general when they wanted to take away their alienated land.



- xiv. The honourable trial magistrate failed to critically scrutinize and analyze the evidence on record as a result whereof she offhandedly dismissed the defendant's counterclaim.
- xv. The judgment on record is untenable, unconscionable and the same amounts to a miscarriage of justice.
5. The subject appeal came up for direction[s] on 3.6.2025; whereupon learned counsel for the appellant confirmed that the same had filed and served the record of appeal. Additionally, learned counsel for the appellant also intimated that the record of appeal was complete and thus the appeal was ready for hearing. To this end, learned counsel sought directions on the hearing and disposal of the appeal.
6. With the concurrence of the learned counsel for the respondent, the court proceeded to issue directions as pertains to hearing and disposal of the appeal. In particular, it was directed that the appeal be canvassed by way of written submissions. Moreover, the court proceeded to and circumscribed the timelines for filing and exchange of the written submissions.'
7. The appellant filed written submissions dated 30.7.2025; and wherein the appellant has highlighted three [3] key issues for consideration by the court. Firstly, learned counsel for the appellant has submitted that the appellant tendered and produced assorted documents demonstrating application for allotment of land; the minutes of the works, town planning and marketing committee approving the application for allotment; letter of allotment; and the requisite PDP.
8. Furthermore, it has been submitted that the documents under reference were duly tendered and produced before the court without any objection by the learned counsel for the respondent. To the extent that the documents were produced without any objection, it has been submitted that the respondent cannot now be heard to challenge the production and admissibility thereof.
9. Secondly, it has been submitted that the letter of allotment, which was tendered and produced by the appellant, referenced plot No Mwangaza / 1276 and not 1246 as purported by learned counsel for the respondent. Moreover, it has been submitted that the introduction of plot No 1246 is an attempt by the respondent to mislead the court as pertains to the exact detail[s] of the appellant's plot.
10. Thirdly, it was submitted that the documentation that were tendered and produced on behalf of the appellant were neither challenged or impeached. In this regard, it has been submitted that it behooves the court to adopt and rely on the said document[s], taking into account that the court has a duty to uphold the sanctity of the records at the lands office.
11. To buttress the foregoing submissions, learned counsel for the appellant has cited and referenced the decision in the case of Solomon Omwenga Omache & Another vs Zachary O Ayieko & 2 others 2016 eKLR]
12. The respondent has filed written submission dated 18.7.2025; and wherein same has highlighted three [3] key issues for consideration. Firstly, learned counsel for the respondent has submitted that though the appellant contends that same was duly and lawfully allocate plot No 1276, it has been submitted that the minutes of the council being relied upon are invalid for want of confirmation by the chairperson of the committee.
13. Secondly, learned counsel for the respondent has also submitted that the letter of allotment which was tendered and produced by the appellant, did not reference the attached plan number. In this regard, it has been contended that the failure to reference/ highlight the attached plan number negates the authenticity/ validity of letter of allotment. Furthermore, it has been submitted that the letter of allotment relates to plots 1246 and not 1276 which is being claimed by the appellant.



14. In view of the forgoing, it has been submitted that the appellant herein did not place before the court credible evidence to warrant a finding that same is the lawful owner of plot No Mwangaza 1276. To this end, it has been posited that the learned chief magistrate was right in finding and holding that the appellant had failed to prove her counterclaim to the requisite standard.
15. The other issues that have been raised by learned counsel for the respondent are to the effect that the respondent duly proved his claim pertaining to the suit property. In particular, it has been submitted that the respondent placed before the court a copy of the sale agreement dated 19.3.2018 showing the purchase of the suit property from George Kobia Nguthari.
16. Additionally, it was submitted that the respondent also tendered evidence pertaining to the letter of allotment that had been issued in favor of the vendor; the part development plan; and a letter from the county council of Isiolo dated 12.5.2004; which are contended to demonstrate that the suit property was lawfully allocated to the respondent predecessor.
17. Based on the foregoing, learned counsel for the respondent has submitted that the respondent duly proved his entitlement to and claim over the suit property.
18. To buttress the foregoing submissions, learned counsel for the respondent has cited and referenced various decisions, including *Caroline Awinja Ochieng vs Jane Ann Mbithi Gitau & 2 others* 2015 Eklr; *Moses Oketch Owuor & Another vs AG & Anor* 2017 eKLR and *Nelson Kazunngu Chai & 9 Others vs Pwani University* (2014) eKLR.
19. Flowing from the foregoing, learned counsel for the respondent has therefore submitted that the learned chief magistrate properly appraised the evidence that was tendered before her and thereafter arrived at the correct decision. In this regard, it has been submitted that the appeal beforehand is meritless and ought to be dismissed with costs to the respondent.
20. I have reviewed the record of appeal; pleadings filed by the parties; the evidence on record; and the rival submissions by / and on behalf of the parties, and I come to the conclusion that the determination of this appeal turns on two [2] issues. The issues that crystallize for determination are; whether the respondent duly established and proved his claim before the subordinate court or other wise; and whether the appellant established her entitlement to Plot No Mwangaza 1276 as pleaded at the foot of the counterclaim.
21. What is before me is a first appeal. By virtue of being a first appeal, I have the mandate or jurisdiction to subject the evidence on record to fresh and exhaustive scrutiny, review, evaluation and analysis in an endeavor to discern whether the findings and conclusion arrived at by the trial court are sound and well grounded. Moreover, it is instructive to underscore that this court is at liberty to arrive at an independent conclusion and to depart from the findings and conclusions of the trial court, where apposite.
22. Nevertheless, it is instructive to underscore that even though this court is seized of the authority to depart from the findings and conclusion of the trial court, it suffices to state that such departure can only be undertaken where it is proven/established that the conclusions of the trial court are based on no evidence; based on misapprehension of the evidence on record; are perverse to the evidence on record or where it is demonstrably shown that there is an error of principle which vitiates the finding[s]/ conclusion[s] arrived at. Absent proof of the said element[s], the 1st appellate court is called upon to defer to the factual finding[s] and conclusion[s] of the trial court.



23. The jurisdictional remit of the first appellate court has been the subject of various court decisions. In the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited [2025] KECA 764 (KLR), the court of appeal stated as hereunder

‘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 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.”

24. Back to the issues for determination. I propose to deal with the issues sequentially. In this regard, I shall interrogate whether the respondent [who was the plaintiff in the subordinate court] duly established/ proved his claim as pertains to ownership of the suit property or otherwise.
25. It bears repeating that the appellant was enjoined to place before the trial court plausible, cogent and concrete evidence [both oral and documentary] to demonstrate that same had lawfully acquired rights and interests over the suit property. Put differently, it was incumbent upon the respondent to prove the assertions that same had made/placed before the trial court. See sections 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya.
26. It was the respondent’s contention that the same had purchased the suit property from George Kobia Nguthari vide sale agreement dated 19.3.2018. In this regard, the respondent posited that arising from the sale agreement same acquired a lawful rights over the property.
27. Additionally, the respondent tendered and produced before the court a copy of letter of allotment dated 12.1.1999 and a part development plan ISL/117/98/279 to underpin the contention that the suit property had been lawfully allocated to his predecessor. Moreover, the witness also adduced a copy of letter dated 12.5.2004.
28. The letter dated 12.5.2004 was tendered before the trial court in an endeavor to demonstrate that the county council of Isiolo [now defunct] had authorized the allotment of the suit property to George Kobia Nguthari. To this end, it is imperative to reproduce the contents of the letter under reference.
29. Same are produced as here under.

Re: Proposed residential plot- PDP No ISL/117/98/279 Isiolo

The council has no objection if George Kobia Nguthari of Id No 12875912 is allocated the plot as indicated on the above PDP ISL 117/98/279 and an allotment letter issued In his favor

Please see attached.

Yours faithfully

R. Satur

For: clerk to council

30. My reading of the letter under reference drives me to the conclusion that by 12.5.2004, the plot referenced as PDP ISL/117/98/279 had not been issued with letter of allotment. In fact, the contents of the letter are intimating to the Commissioner of lands [who is the addressee thereof] that the council of Isiolo has no objection if the office of the commissioner could proceed and issue a letter of allotment to the designated person.
31. Be that as it may, the respondent herein tendered and produced a letter of allotment, which is indicated to have been issued on 12.1.1999 and which letter references PDP ISL/117/98/279. The question that



does arise is how [sic] the letter of allotment could issue long before the no objection letter was issued by the council. I am afraid something is not adding up.

32. Other than the foregoing, it is not lost on me that by the time the respondent was entering into the sale agreement dated 19.3.2018, the vendor, namely; George Kobia Nguthari, had neither acquired nor accrued any title to the suit property. Suffice it to posit, no evidence was even tendered to show that the allottee in question had met/complied with the terms of the letter of allotment.
33. Can a letter of allotment, by and of itself, be the subject of a sale agreement? It is instructive to observe that a letter of allotment is merely an offer. The offeree [Allottee] is obligated to comply with the terms thereof within the prescribed timelines and upon such compliance to progress the allotment forward with a view to acquiring title. Moreover, it is old learning that title to land can only accrue upon issuance of letter of allotment, compliance with the terms thereof and issuance of title or certificate of lease [whichever applicable]. See *Wreck Motors vs Commissioner of lands* (1997) eKLR.
34. The other critical aspect that merits mention and a short address touches on whether a letter of allotment can be sold. What the respondent herein appears to have been buying was [sic] a letter of allotment with a PDP inscribed thereof. Unfortunately, a letter of allotment can neither be sold or purchased. Moreover, the purchase of such a letter of allotment does not bestow upon the purchaser any legal title; interests; or rights.
35. In the case of *Torino Investment Limited vs The Attorney General* (2023) KESC, the Supreme Court of Kenya [the apex Court] considered the question of whether a letter of allotment conferred any rights to the allottee; and stated thus:
 58. so, can an allotment letter pass a good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In *Dr Joseph NK Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others* CA 60/1997 [unreported]; and in *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows: "It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all" [Emphasis added].
 59. The pronouncement in *Gladys Wanjiru and Dr Joseph NK Arap Ng'ok* (supra) has been echoed in various Environment and Land Court decisions post the 2010 Constitution, including; *Lilian Wanjeri Njatha v Sabina Wanjiru Kuguru & another*, Environment and Land Case No 471 of 2010; [2022] eKLR; *John Elias Kirimi v Martin Maina Nderitu & 4 others*, Environment and Land Suit No 320 of 2011; [2021] eKLR; and *Kadzoyo Chombo Mwero v Ahmed Muhammed Osman & 11 others*, Environment and Land Case No 42 of 2021; [2021] eKLR, to mention but a few.
 61. While we agree with the general tenor of the learned Judge's foregoing pronouncement, we remain uncomfortable with his inference that the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title



to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapse.

36. The learned chief magistrate took into account the letter of allotment dated 12.1.1999, and the sale agreement dated 19.3.2018 and thereafter arrived at a conclusion that the respondent herein had acquired lawful title to the suit land. For ease of reference, it is apposite to reproduce the conclusive finding[s] of the court.
37. Same states as here under:-
- “On his part, PW1 testified that he bought plot Number ISL/117/98/279 from PW2 and he adduced a copy of the sale agreement dated 19.3.2018. The validity of the sale agreement has not been contested. I find that the same confers the plaintiff’s interest to the plaintiff.
38. I am afraid the conclusions arrived at by the learned chief magistrate do not accord with the general principles of the Law; and in particular, the ratio decidendi in the case of Torino Investment Limited vs The Attorney General[supra].
39. My answer to issue number 1 is to the effect that the respondent neither proved nor established his entitlement to the suit property. Absent proof of entitlement; the decision by the learned chief magistrate is with respect, not legally tenable.
40. Turning to the second issue, namely; whether the appellant had proved her claim to plot Mwangaza 1276 or otherwise. The appellant’s case was to the effect that same applied to be allocated a plot at Mwangaza area within Isiolo town. In addition, the appellant contended that her application/ request for allotment of land was considered by the county council of Isiolo- now defunct; and same was thereafter approved. To this end, the appellant has referenced the minutes of works, town planning and marketing committee arising from the meeting on 6.5.1997. Furthermore, the appellant also tendered a copy of the letter of allotment issued on 5.1.1998 relating to surveyed residential plot 1276- Isiolo.
41. Other than the foregoing, there is also evidence that the appellant ventured forward and paid for a cadastral survey leading to the survey, demarcation and ultimate issuance of a beacon certificate dated 12.10.2017. Suffice it to state that the documentation underpinning the cadastral survey/ demarcation and the beacon certificate were neither controverted nor impugned. For good measure, the document[s] under reference were tendered as evidence without any objection by the respondent or his counsel.
42. Additionally, evidence was also tendered that it is the appellant who is in possession of the disputed property. This evidence is corroborated by the photograph which was tendered by the respondent. [See PEXB 9].
43. For brevity, the respondent is on record stating thus:
- “My Exhibit 9 is photos of the house freshly done. The lady appearing in the photograph is the defendant. I never demolished her house.”
44. To my mind, the totality of the documents tendered by the appellant and coupled with the evidence of occupation/possession of the disputed property demonstrates that the appellant has established rights to or interest over the disputed property.



45. Moreover, and in my humble view, this is an appropriate case to invoke the doctrine of seisin. The doctrine of seisin was expounded in the case of *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others* [2015] KECA 457; where the court of appeal stated thus:”.

In its pleadings, the 1st, 2nd and 3rd respondents aver that they have always been in possession of the suit land. It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seized prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths of ownership. As was stated by the Privy Council in *Ghana of Wuta-Ofei -v- Danquah* [1961] All ER 596 at 600, the slightest amount of possession would be sufficient.

46. In view of the foregoing, I come to the conclusion that the appellant placed before the court cogent; plausible; and credible evidence to underpin her entitlement to plot Mwangaza 1276. Consequently, and in this regard, I find a basis to warrant departing from the findings and conclusion[s] of the learned chief magistrate.

Final Disposition

47. Flowing from the analysis captured in the body of the Judgment, it must have become apparent that the appeal beforehand is meritorious. The same warrants the intervention of the court.

48. In the upshot and for the reasons already alluded to; the final orders that commend themselves to the court are as hereunder;

- a. The Appeal be and is hereby allowed
- b. The Judgment of the Learned Chief Magistrate dated 22.10.2024 be and is hereby set aside.
- c. In lieu thereof, the respondents' suit vide amended Plaintiff dated 31. 8.2020 be and is hereby dismissed
- d. Cost of the Appeal be and are hereby awarded to the appellant.
- e. Further, Judgment be and is hereby entered in favor of the appellant.
 - (i) An order of permanent injunction be and is hereby issued restraining the defendant [Respondent] either by himself agents, servant and /or anyone acting under his instruction from entering upon, trespassing onto, interfering with or in any other manner whatsoever from dealing with the suit property known as plot Number block/ Mwangaza/1276
 - (ii) The Cost of the counterclaim be and are hereby awarded to the Appellant.

49. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 30TH DAY OF OCTOBER 2025.

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

JUDGE

In the presence of –

C/A Hussein/Mukami

Kariuki for the Appellant

Mr. Caleb Mwiti for Respondent

