REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. E003 OF 2025

JOANINA TIRINDI …… APPELLANT

VERSUS

AMINA AHMED AMEDO ……...……1ST RESPONDENT

COUNTY GOVERNMENT OF ISIOLO ……..2ND RESPONDENT

[Being and appeal from the judgment of Hon. M.A Odhiambo – SRM delivered on 23/8/2024 in Isiolo Magistrate's court in ELC No. E018 of 2020]

JUDGMENT

1. The Appellant herein [*was the 1st defendant in the subordinate court*] and wherein same duly entered appearance and filed a statement of defence and counterclaim. *Vide* the counterclaim, the Appellant herein sought the following reliefs;
    (a) The Plaintiff's suit be dismissed with costs.
    (b) An eviction order be issued against the plaintiff to remove same from plot number 19 Isiolo Township zone D.
    (c) The plaintiff be ordered to pay all accrued rents and mesne profits for all the period she has not paid rent.
    (d) The Hon. Court be pleased to cause to be implemented and enforced the recommendations of the national land commission.
    (e) Costs of the suit be awarded to the 1st defendant.

2. The suit in the subordinate court was heard and disposed of *vide* Judgment dated 23rd August 2024. For good measure, the learned trial magistrate found and held that the 1st respondent herein [who was the Plaintiff in the subordinate court] did not prove her case to the requisite standard. To this end, the 1st respondent's suit was dismissed. Similarly, the learned trial magistrate found and held that the appellant had also not proved her claim as pertains to ownership of the suit property. In this regard, the appellant's counterclaim was equally dismissed.

3. It is the said Judgment and the consequential decree arising therefrom which has aggrieved the appellant and thus provoking the subject appeal.

4. The Appellant has highlighted the following grounds at the foot of the memorandum of appeal dated **18th February 2025:**

    (i) That the Hon. Magistrate erred in law and fact in holding that the appellant had not proved her case on a balance of probabilities.

    (ii) That the Hon. Magistrate erred in law and fact by selectively addressing appellant's evidence and not addressing all her documents submitted as evidence.

    (iii) That the Hon. Magistrate erred in law and in fact by failing to pronounce herself on all the prayers sought by the appellant in her counterclaim claim i.e, enforcement of the recommendations of the National Land Commission.

    (iv) That the learned trial magistrate erred in law and in fact by dismissing the appellant's evidence as not being authentic despite the plaintiff not challenging it.

5. The subject appeal came up for directions on 2nd July 2025; whereupon the parties confirmed that the record of appeal had been duly filed and served. Furthermore, it was confirmed that the record of appeal was complete. To this end, the parties sought to canvass and dispose of the appeal by way of written submissions.

6. Flowing from the foregoing, the court issued directions pertaining to and concerning the disposal of the appeal. In particular, the court ordered that the appeal be canvassed by way of written submissions. Moreover, the court also circumscribed the timelines for the filing and exchange of the written submissions.

7. The appellant filed written submissions dated 17th July 2025; while the 1st respondent filed written submissions dated 30th September 2025. The two [2] sets of written submissions are on record. In addition, I have perused the issues raised and highlighted by the respective parties.

8. Having reviewed the record of appeal, the evidence tendered [both oral and documentary]; the pleadings filed; and upon consideration of the written submissions on behalf of the respective parties, I come to the conclusion that the determination of the subject matter turns on one [1] salutary issue, *namely*; whether the appellant herein proved her claim to and in respect of the suit property or otherwise.

9. 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/re-evaluate/scrutinize 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.

10. 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.

11. 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:

"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."

12. Back to the issue for determination. It is common ground that the appellant herein had been sued by the 1st respondent pertaining to and concerning ownership of the suit property. Furthermore, upon being sued the appellant entered an appearance, filed a statement of defence and counterclaim, and wherein same laid a claim to ownership of the suit property. Suffice it to state that the counterclaim was dismissed.

13. The appellants' claim was premised on the fact that the suit property was previously allocated to one Peter Mukiti Murinyithi *vide* letter of allotment dated January 1993. In addition, it was contended that the said allottee entered into a sale agreement and thereafter sold the suit plot to and in favour of Felix Mwiti and Joanina Tirindi Mwiti [The appellant herein]. To this end, the appellant referenced a copy of the letter of allotment and the transfer form dated 29th July 1993.

14. Additionally, the appellant contended that following the sale of the suit plot to and in favour of Felix Mwiti and herself, the transfer of the suit property was placed before the works, town planning and markets committee – Isiolo County Council and thereafter same was approved. In this regard, the appellant tendered and produced a copy of the minutes, which was marked exhibit D4.

15. It was the appellant's position that the minutes of the works town planning and markets committee held on 13th August 1997 were thereafter placed before the Full council [County Council of Isiolo] for purposes of adoption and that same were duly adopted. To this end, the appellant tendered and produced before the court exhibit D6.

16. Other than the foregoing, the appellant also contended that the dispute pertaining to ownership of the suit property was also addressed and determined by National Land Commission. In particular, the appellant referenced the decision of the alternative dispute committee report relating to the suit property which pitted Felix Mwiti and Joanina Tirindi on one hand; and Amina Ahmed Medo, on the other hand.

17. Premised on the foregoing evidence, the appellant sought to be declared as the lawful owner of the suit property. However, the learned trial magistrate was not persuaded and same held that the appellant had not tendered authentic, credible, concrete and valid evidence to underpin her claim to ownership of the suit property. Notably, the learned trial magistrate held that the letter of allotment, which the appellant had relied upon, was ineligible and appeared to have been altered. In addition, the learned trial magistrate also found that there was no

evidence that the impugned letter of allotment had been duly accepted and paid for within the prescribed timelines.

18. Furthermore, the learned trial magistrate also found and held that the authenticity of the letter of allotment had not been confirmed. In particular, the learned trial magistrate posited that without calling a witness from the allocating authority [ministry of lands], the appellant herein failed to establish and prove the validity of the letter of allotment.

19. Flowing from the findings and conclusions, which are enumerated at the foot of paragraph 18 of the judgment, the learned trial magistrate held that the appellant did not discharge her burden of prove. To this end, the counterclaim was dismissed.

20. I have reviewed the totality of the evidence that was tendered by the appellant. On my own account, I find and hold that the appellant did not discharge the burden of proof. To start with, it is common ground that the letter of allotment which underpins the appellant's right to and or in respect of the suit property was evidently altered. Suffice it to highlight that the impugned letter of allotment has several handwritings superimposed on the typings; and hence the authenticity thereof is doubtful. Moreover, the impugned letter of allotment is also not signed. For good measure, what has been affixed thereto is a name stamp and which name stamp is not affirmed by any signature.

21. Other than the foregoing, it is also important to underscore that by the time the allottee, *namely*; Peter Mukiti Murinyithi was entering into the purported sale agreement in favour of the appellant, the vendor [Peter Mukiti Murinyithi] had neither acquired nor accrued title to the suit property.

22. The question that does arise is whether the vendor had any rights capable of being sold on the basis of the impugned letter of allotment or otherwise.

23. It is important to outline that a letter of allotment by and of itself does not vest in the allottee any legal title; rights; and or interests capable of being sold or disposed of. In this regard, I am afraid that the appellant herein acquired and accrued no legal rights to the suit property.

24. In the case of ***Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment),*** the Supreme Court of Kenya [the apex Court] considered the legal implications of a letter of allotment whose terms had lapsed and stated thus:

> *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.*

60. Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass a valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter. In Peter Wariire Kanyiri v Chrispus Washumbe & 2 others, Environment and Land Court Case No 603 of 2017; [2022] eKLR, Kemei, J held as follows:"[15].In the case at hand, in the absence of any title registered in the name of the plaintiff, the court is

*unable to hold that the plaintiff is the registered proprietor of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences" [*Emphasis added].

61.<u>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 a valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not, therefore, that the allotment letter has not lapsed.</u>

62. Back to the facts of this case, the allotment letter issued to Renton Company Limited was subject to payment of stand premium of Kshs.2,400,000.00, annual rent of Kshs.480,000.00, amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.

25. Guided by the dictum in the decision [supra], what becomes apparent is that the vendor, *namely*; Peter Mukiti Murinyithi had no title capable of being sold to or transferred in favour of the appellant. By parity of reasoning, the appellant acquired no title. For good measure, the doctrine of *nemo dat quod non habet* is apt and applicable.

26. The other document that was relied upon and referenced by the Appellant was the decision of the alternative dispute committee – National Land Commission – Isiolo County. According to the appellant, the said dispute resolution committee found and held that the Appellant is the rightful owner of the disputed plot.

27. To my mind, the resolutions being relied upon and or invoked by the appellant are nullity and incapable of conferring title upon the Appellant. Instructively, the mandate and jurisdiction of National Land Commission is circumscribed. [See Section 14 of The National Land Commission Act, 2012]. Notably, National Land Commission was not mandated to entertain a dispute between two private individuals or parties and thereafter purport to determine ownership rights. In this regard, there is no gainsaying that the impugned decision is/was invalid ab initio.

28. In ***Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R.*** 1169; the the Privy Council [per Lord Denning MR] stated as hereunder:

> *"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."*

29. Finally, the appellant herein referenced and relied on the minutes of the works, town planning and markets committee dated 13th August 1997; the minutes of the full council dated 20th September 1997; and a bundle of payment requests relative to the suit property. It is important to posit that the minutes of the council and the payment request, which were relied upon do not by themselves confer title to property.

30. Pertinently, an applicant can only acquire and or accrue title upon the issuance of a valid letter of allotment; compliance with the terms thereof; and ultimate issuance of title. See ***Dr. Joseph N.K Arap Ngok vs Justice Moijjo Ole Keiwua (1997) eKLR***; and ***Wreck Motors Enterprises vs the commissioner of lands (1997) eKLR,*** respectively.

31. In my humble view, the appellant herein did not tender and or produce credible or plausible evidence to vindicate her claim pertaining to ownership of the suit property. In any event, there is no gainsaying that the documents which were tendered on behalf of the Appellant were incapable of underpinning the appellant's claim. In addition, it is not lost on me that the letter of allotment dated 1st January 1993, which the appellant [sic] purchased, was itself altered and thus questionable.

32. All in all, I come to the same conclusion as the learned trial magistrate that the appellant herein did not discharge the burden of proof as pertains to ownership of the suit property. Moreover, it is critical to state that the mere production of a document does not by itself denote that the document automatically attracts legal weight and probative

value. Instructively, proof of a document and the probative value, if any, is dependent on the legal import and tenor of the document. [See the decision in ***Kenneth Nyaga Mwige vs Austin Kiguta [2015] eKLR].***

33. Finally, there is one incidental issue that requires mention and a short discussion. The issue herein touches on whether the subject appeal was filed within the prescribed timelines. It is important to point out that the judgment underpinning the appeal was rendered on 23rd August 2024. The appeal beforehand was not filed until the 18th of February 2025. It is clear that by the time the appeal was being filed, the prescribed timeline had lapsed. [See Section 79G of the Civil Procedure Act].

34. In my humble view, the appeal beforehand was filed out of time and without leave. For good measure, the Appellant did not indicate whether Leave was granted. Neither is the granting of Leave referenced at the foot of the Memorandum of Appeal. To this end, there is no gainsaying that the appeal was ex-facie a nullity. [See the decision in ***Pentagon Communications Limited v National Land Commission (Civil Appeal E035 of 2022) [2025] KECA 1304 (KLR) (18 July 2025) (Judgment).***

35. The foregoing issue is germane. However, I remind myself of the position that in so far as the issue was not canvassed by the parties,

same cannot be deployed in disposing of the appeal. [See the decision of the Court of Appeal in the case of ***Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] KECA 293 (KLR)].***

FINAL DISPOSITION.

36. Flowing from the analysis highlighted in the body of the Judgment and taking into account the established principles espoused in the case of ***Jabane vs Olenja (1986) eKLR***, I come to the conclusion that the subject appeal is meritless.
37. Same courts dismissal.
38. In the upshot, and for the reasons alluded to; 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 August 2024; and the consequential decree arising therefrom be and is hereby affirmed.

    (iii) Costs of the Appeal be and are hereby awarded to the 1st respondent only.

    (iv) **The Costs in terms of clause [iii] shall be agreed upon; and in default same to be taxed in the conventional manner**.

39. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 23RD DAY OF OCTOBER 2025.

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

In the presence of:

Hussein/Mukami – Court Assistants

Mr. Sandi for the Appellant

Mr. Jarso for the 1st Respondent

No appearance for the 2nd Respondent