REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ELC APPEAL CASE NO. E029 OF 2024

SALOME NKIROTE WANYAMA ……..…….APPELLANT

VERSUS

PHILIP KANGETHE KAHORO ……..1ST RESPONDENT

NIMROD KAHORO ……..……..2ND RESPONDENT

[Being an Appeal from the Judgment of Hon. M.A Odhiambo – SRM dated 8th November 2024 in Isiolo ELC 8 of 2018].

JUDGMENT

1. The Appellant herein [*who was the Plaintiff in the subordinate court*] filed the Plaint dated **15th January 2012**; and wherein same sought various reliefs.
2. The reliefs sought at the foot of the Plaint are as hereunder;
    (a) Eviction of the defendant jointly and or severally from plot No. Chechelesi A/196 – Isiolo County and the plaintiff be put in occupation.
    (b) Permanent injunction restraining the defendant jointly and or severally by themselves, servants, agents, assigns, employees from interfering with the plaintiff's user and occupation of plot NO. Chechelesi A/196 situated in Isiolo County.
    (c) Costs of the suit.

3. The Respondents herein [*who were the defendants in the subordinate court*] duly entered appearance and filed a joint statement of defence. The

statement of defence was dated 20th May 2016, albeit filed in court on 24th May 2016. Instructively, the respondents denied the plaintiff's claim.

4. The suit in the subordinate court was heard and disposed of *vide* judgment dated 8th November 2024, whereupon the learned trial magistrate found and held that the appellant had failed to prove her case to the requisite standard. To this end, the court proceeded to and dismissed the appellant's suit.

5. It is the said judgment and the consequential decree arising therefrom which has aggrieved the appellant and thus precipitated the filing of the subject appeal.

6. The Memorandum of appeal dated 6th December, 2024; has highlighted the following grounds;

    (i) *That the learned senior resident magistrate misdirected herself and erred in law in casually stating in the judgment that she had considered the appellant's written submissions when in fact there was no analysis, appraisal, comments or consideration of the submissions, thereby occasioning injustice to the appellant's case.*

    (ii) *That the learned senior resident magistrate misdirected herself on the law and facts in failing to appreciate and consider that the documents relied upon the respondents had never been identified or even referred to in the sketchy general defence of denial, which were disclosed barely a year before the hearing of the suit giving rise to the inescapable inference that the documents were later day procurement specifically designed to counter the*

appellant's documentary evidence previously seen by the respondents, which misdirection occasioned prejudice and injustice to the appellants case.

(iii) *That it was an error and misdirection on the part of the senior resident magistrate to lean heavily in favour of the documents relied upon by the respondents but which were forgeries of doubtful authenticity and invalid in law, which error and misdirection occasioned injustice to the appellant.*

(iv) *That the conclusion by the senior resident magistrate that the sale agreement relied upon by the respondents did not confer a good title was a sufficient basis to conclude that the respondents lacked a better or earlier claim of entitlement to the disputed land.*

(v) *That the learned senior resident magistrate erred and misdirected herself on the law and facts in failing to reach a finding that the documents relied upon by the respondents in act referred to and related to a parcel of land away from that claimed by the appellant namely that the land to which the respondents associated himself with was located in Kambi Garba rather than Chechelezi area, two completely separate locations.*

(vi) *That it was a misplaced and erroneous conclusion by the learned senior resident magistrate that a part development plan constitutes a document of title or ownership.*

(vii) *That the learned senior resident magistrate erred in law and misdirected herself by putting more emphasis on a part development plan when trying to determine which party was first in time, granted that dates on part development*

plans relate to the time of their preparation and approval, which dates were subsequent to the time of acquisition or possession of the land in question.

(viii) That the learned senior resident magistrate erred and misdirected herself on the las and the facts in failing to appreciate that the disputed parcel of and falling under the administrative jurisdiction of the then county council of Isiolo, itself the only allocating authority, the dispute resolution of 2012 was sufficient to confer to the appellant a more superior entitlement to the disputed land more so in the absence of any challenge thereto by the respondents.

(ix) That the learned senior resident magistrate erred on the law and the facts in declaring invalid and inconsequential the land sale contract entered into between the appellant and PW 2 in disregard of the position that the contract constituted a binding and enforceable agreement crafted at a time when the disputed land was trust land governed by the trust land act possessed by PW 2 prior to being set apart for purposes of formal allocation.

(x) That the learned senior resident magistrate erred and misdirected herself in declaring that the respondent had been in continuous possession in the absence of any evidence to that effect and bearing in mind that the respondent was a trespasser from inception who had no legal rights whatsoever over the disputed property.

(xi) That on the basis of the appellant's evidence, both oral and documentary and given a proper evaluation of the case and the written submissions, the learned senior resident magistrate erred on the law and the facts in coming to a

conclusion that he appellant had not proved her case on a balance of probabilities.

7. The subject appeal came up for directions on 7th July 2025; whereupon learned counsel for the appellant confirmed that same had filed and served the record of appeal. Furthermore, it was posited that the record of appeal was complete and thus the appeal was ready for hearing. In addition, learned counsel sought for directions pertaining to the hearing and disposal of the appeal.

8. With the concurrence of learned counsel for the respondents, the court proceeded to and issued directions pertaining to the hearing of the appeal. In particular, it was directed that the appeal be canvassed by way of written submissions to be filed and exchanged by the parties. Moreover, the court also circumscribed the timelines for the filing of the written submissions.

9. The appellant filed written submissions dated 18th August 2025; and wherein the appellant has argued grounds 1, 2, 3 & 5 *en bloc*; grounds 6, 7 & 10 together and grounds 8 & 9 together.
10. Regarding the consolidated grounds 1, 2, 3 & 5 of the memorandum of appeal, learned counsel for the appellant has submitted that learned trial magistrate misapprehended the nature of the evidence that was tendered by the respondent and thereby failed to discern the material contradictions contained thereunder. In particular, it has been submitted that the learned trial magistrate failed to appreciate that the documents that were tendered by the respondents did not relate to or concern a plot located a Chechelesi area.

11. Additionally, it has been submitted that the documents which were tendered and produced by the respondents showed that the plot by the respondents is located at Kambi Garba and not Chechelesi. Moreover, it has been submitted that the document[s] by the respondents has also referenced plot C Isiolo township. In this regard, it has been contended that it was erroneous and a grave misdirection on the part of the learned trial magistrate to hold that the respondents demonstrated a clear and verifiable process of land acquisition.

12. On the other hand, it has been submitted that the learned trial magistrate ignored and disregarded crucial evidence that was tendered by the appellant and which evidence clearly demonstrated that the appellant was the owner of the suit property. In particular, learned counsel for the appellant has referenced and invited the Court to take cognizance of, inter-alia; the county council letter dated 27th October 2010 [exhibit 12]; dispute resolution by the county council committee made in 2012 [exhibit P 16; county council enforcement notice of 2012; and recognition of the appellant by the county council of Isiolo as a rate payer

13. According to counsel for the appellant, the foregoing documents clearly show/prove that the appellant is the lawful owner of the suit property. In this regard, it has been contended that had the learned magistrate appraised herself of the totality of the evidence on record, same would have arrived at a different conclusion.
14. In respect of grounds 6, 7 & 10 of the memorandum of appeal, learned counsel for the appellant has submitted that the learned trial magistrate

placed undue premium on the issue of a part development plan and misconstrued the legal import and tenor of a part development plan.

15. In particular, it has been submitted that the learned magistrate failed to appreciate that a part development plan [PDP] is merely a planning tool. Moreover, it was submitted that the learned trial magistrate failed to appreciate that a part development plan cannot be itself confer title on the bearer.

16. It was the further submission by learned counsel for the appellant that the learned trial magistrate also failed to appreciate that a letter of allotment would not have issued to the appellant in the first instance because the suit property had not been recorded. On the other hand, it was posited that the suit property was purchased from PW 2, in the year 1997, long before same could be recorded.

17. Based on the foregoing, it has been submitted that the learned trial magistrate adopted a slanted and skewed approach and therefore arrived at an erroneous conclusion.

18. Regarding grounds 8 & 9 of the memorandum of appeal, it has been submitted that the learned trial magistrate failed to appreciate that the dispute pertaining to ownership of the suit property had been resolved by the county council of Isiolo *vide* the dispute resolution committee. To this end, learned counsel has referenced the report/decision of the dispute resolution committee dated 4th July 2012.

19. In view of the foregoing, learned counsel for the appellant has invited the court to find and hold that the appeal beforehand is meritorious. In the premises, the court has been implored to set aside and vary the judgment

of the trial court; and in lieu thereof, enter judgment in favour of the appellant in terms of the Plaint dated 15th January 2012.

20. The respondents herein did not file any written submissions. On 30th September 2025, the court made an order to the effect that the window which had been granted to the respondents to file written submissions closed and stood extinguished. Moreover, the court proceeded to and set down the matter for judgment.

21. Having reviewed the record of appeal; the evidence tendered [both oral and documentary]; and upon consideration of the written submissions filed by the appellant, I come to the conclusion that the determination of the subject appeal turns on one key issue, *namely*; whether the appellant proved/established her claim as pertains to ownership of the suit property or otherwise.

22. 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.

23. 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.

24. 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."

25. Back to the issues for consideration and determination. The appellant herein is the one who approached the court contending that same is the owner of the suit plot. Moreover, the appellant contended that same bought/purchased the suit plot [plot number Chechelesi A/196] from one Daniel Muthinja M'Mwithirwa on 18th November 1997. In addition, the appellant referenced a sale agreement which is said to have been executed on even date.

26. In so far as the appellant contended that same bought/purchased the suit property from Daniel Muthinja M'Mwithirwa [PW2] it was incumbent upon the appellant to establish that the vendor who sold the land to her was seized of the requisite title; rights and or interests thereto. Suffice it to state that a sale agreement by and of itself cannot be deployed to confer interests over a plot or parcel of land, unless it can be shown that the vendor held title over the land in question beforehand.

27. As pertains to the suit property, the appellant merely tendered and produced a copy of the sale agreement dated 18th November 1997. However, the appellant did not tender any evidence to show that the vendor held any document of title to the land which was being sold. Moreover, it is not lost on me that the sale agreement does not reference the suit plot. Simply put, the sale agreement relates to an undefined and un-disclosed piece of land.

28. I am unable to connect the sale agreement dated 18th November 1997 to the suit property. Moreover, evidence abound that PW 2, who is said to have sold the land to the appellant, held no document of title.

29. For ease of reference it is important to reproduce the evidence of PW 2 [the Vendor] while under cross-examination.

30. The same stated thus;

> *"I bought the land in 1990. I sold her 50 by 120 ft. we had an agreement. I was not chased from Ewaso Nyiro. I do not have any documents to the land"*.

31. While under re-examination, PW 2 stated as hereunder;

> "I do not any document. We have agreement. The land had no document when I was buying it".

32. What is discernible from the testimony of PW 2 is to the effect that same had no document evidencing title/entitlement to the land. The question that arises is whether PW 2 could sell or convey unto the appellant any rights/interests to [sic] the land at the foot of the sale agreement. I am afraid that the vendor had no interest capable of conveyance.

33. Other than the contention by the appellant that same had purchased the suit property from PW 2, the appellant also premised a claim to the suit property on the basis of allocation. In this regard, it suffices to reference paragraph 13 of the Plaint.

34. For good measure, paragraph 13 of the Plaint states thus;

"For the purposes of clarity, plot number Chechelesi A/196 was initially known as ISL/117/99/16 during the allocation and physical planning stage".

35. It appears that the appellant is also contending that the suit property was subjected to physical planning and thereafter allocation. Moreover, the appellant herein proceeded to and tendered before the court a copy of a part development plan and assorted letters from the district physical planning officer; district commissioner and land officer, respectively.

36. Be that as it may, two things stand out from the documents that have been referenced in the preceding paragraph. Firstly, it is apparent that the part development plan relied upon by the appellant does not have a part development plan number. In this regard, the said part development plan is invalid in the eyes of the law. [See the holding of the Supreme Court in the case of ***Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment – paragraphs 104 – 108 thereof).***

37. Secondly, the letters which were tendered and produced by the appellant were merely seeking comments from the respective office holders. In particular, it is apparent that the letter dated 29th March 1999; by the District Commissioner alludes to no objection if the applicants are to be allocated with plots. Notably, the appellant herein was listed as applicant No. 16 on the face of the letter under reference.

38. The appellant has failed to tender any evidence of a letter of allotment. In the absence of a letter of allotment, there is no gainsaying that the part

development plan [which I have found to be invalid] and the letters alluded to cannot vest/ confer any lawful rights in the appellant.

39. I beg to remind myself of the legal position that he who asserts is called upon to prove. In this regard, the appellant bore both the legal and evidential burden of proof. [See Sections 107 and 109 of the Evidence Act Cap 80, Laws of Kenya].

40. The law as pertains to the burden of proof was aptly and succinctly expounded by the Supreme Court of Kenya in the case of ***Dr. Samson Gwer & 5 others vs Kemri (2020) eKLR***.

41. For coherence, the apex court stated as hereunder;

> *49.Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."*
>
> *50.This Court in Raila Odinga & others v. Independent Electoral & Boundaries Commission & others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:*

…a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden…."

51.In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

42. To my mind, the appellant did not demonstrate ownership of the suit property. In this regard, I come to the inevitable and inescapable conclusion that the subject appeal is *devoid* of merits. On the contrary, I return a finding that the impugned judgment is sound; solid; and well-grounded.

FINAL DISPOSITION.

43. Flowing from the analysis highlighted in the body of the Judgment, it must have become evident that the subject appeal is meritless. To this end, the appeal courts dismissal.

44. In the end 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 and consequential decree of the subordinate court be and is hereby <u>affirmed.</u>

(iii) No orders as to costs in so far as the Respondents failed to file written submissions either within the prescribed timelines or at all.

45.It is so ordered.

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

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

JUDGE

<u>In the presence of:</u>

C/A Hussein/Mukami

Mr. Mwirigi Mbaya for the Appellant

No appearance for the Respondents