REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ELC APPEAL NO. E011 OF 2025

TESHONE GETACHEW BEZABINH ……..…….1ST APPELLANT

FAUZIAH IBRAHIM ……..……2ND APPELLANT

VERSUS

DAHIR ABDULLAHI ALI ……...……1ST RESPONDENT

ABDILATIF SAID SALIM ……..2ND RESPODNENT

AND

COUNTY GOVERNMENT OF ISIOLO ..……..…..1ST INTERESTED PARTY

NATIONAL LAND COMMISSION ……..…….2ND INTERESTED PARTY

THE ISIOLO LAND REGISTRAR …….……3RD INTERESTED PARTY

STEPHEN ELOTO EDOME ……..……..4TH INTERESTED PARTY

BAKWARO EDEN ……..……5TH INTERESTED PARTY

[Being an appeal from the judgment of Hon. M.A Odhiambo – SRM delivered on 28th February 2025 in Isiolo ELC Case No. 101 of 2018]

JUDGMENT

1. On 28th February 2025, the learned trial magistrate [Hon. M.A Odhiambo – SRM] rendered a Judgment wherein same found and held that the 1st respondent herein had proved and established his claim to and in respect of L.R No. Isiolo Township/Block 2/10 [hereinafter referred to as the suit property]. Having found and held that the 1st respondent had established his entitlement to and in respect of the suit property, the trial court

proceeded to and issued various reliefs in terms of the amended plaint dated 16th February 2022.

2. In particular, the learned trial magistrate declared that the suit property lawfully belongs to the 1st respondent and that the appellants herein, who were in occupation of the suit ground, namely; the ground complained of by the 1st respondent, were trespassers. Additionally, the learned trial magistrate granted an order of eviction and demolition of the various structures erected by the appellants. Finally, the learned trial magistrate granted an order of permanent injunction to restrain the appellants from remaining on, trespassing upon and or otherwise interfering with the 1st respondent's title to or rights over the suit property.

3. On the other hand, the learned trial magistrate found and held that the appellants herein had neither proved nor established the claims at the foot of the counterclaim dated 22nd November 2021. To this end, the counterclaim by the appellants was dismissed with costs to the 1st respondent.

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

5. The Appellants have highlighted various grounds at the foot of the memorandum of appeal dated 24th March 2025. The grounds are reproduced as hereunder;

    (i) That the learned trial magistrate erred in fact and in law by declining to grant the appellant the prayers sought in his

counterclaim despite of the overwhelming oral and documentary evidence tendered in the court record.

(ii) *The learned trial magistrate erred in law and in fact in failing to find that the learned in question was trust land and that the county council of Isiolo did not set apart of the land for allocation to the plaintiff/ respondent, hence an illegal title was acquired henceforth.*

(iii) *The learned trial magistrate erred in law and in fact in failure to find that the purported lease title was not issued by the county government of Isiolo and that the size of the land claimed substantially differed on the letter of allotment, arriving at a wrong conclusion.*

(iv) *The learned trial magistrate erred in law and in fact in failing to find that the registered proprietor of the title was challenged and that it was not sufficient to dangle the instrument of title as proof of ownership.*

(v) *The learned trial magistrate misdirected herself in finding the 2nd defendant was a trespasser when he took possession years before the impugned title was issued.*

(vi) *The learned trial magistrate erred in fact and in law in outsourcing extraneous evidence and assumptions against the evidence on record in the entirety of her judgment.*

(vii) *The learned trial magistrate erred in law and in fact in failing to consider the submissions of the appellant in the entirety of her judgment.*

(viii) *The learned trial magistrate erred by failing to appreciate that the plaintiff/respondent had failed to prove his case on a balance of probabilities.*

(ix) *The learned trial judge erred in fact and law by relying on the wrong provisions of law, hence arriving at a wrong opinion and or conclusion in her entire judgment.*

(x) *The judgment is against the weight of evidence of the appellant.*

6. The subject appeal came up for directions on 1st October 2025 and on 4th November 2025, respectively; whereupon learned counsel for the appellants intimated to the court that same had filed and served the record of appeal. Furthermore, learned counsel posited that the record of appeal [comprised of the maiden record of appeal and the supplementary record of appeal] are complete and thus the appeal is ready for hearing. To this end, learned counsel for the appellants sought directions as pertains to the hearing and disposal of the appeal.

7. With the concurrence of learned counsel for the respondents, the court proceeded to and issued directions. In particular, the court directed that the appeal be canvassed and disposed of by way of written submissions. Additionally, the court ventured forward and circumscribed the timelines for the filing and exchange of the written submissions.

8. The appellants filed written submissions dated 21st November 2025 and wherein the appellants have raised and canvassed two [2] key issues, namely; whether the certificate of title issued in favor of the 1st respondent was lawful, valid and legitimate; and whether the letter of allotment in favour of the 1st respondent was valid or otherwise. Furthermore, learned counsel for the appellants has cited and referenced the decision in the case of ***Munyu Maina vs Hiram Gathiha Maina***

(2013) eKLR; and Dina Management vs The County Government of Mombasa & 5 others (2023) KESC.

9. *In a nutshell*, learned counsel for the appellants has submitted that the letter of allotment that was issued to and in favour of the 1st respondent and which has been relied upon to underpin the appellants' claim lapsed and stood extinguished for want of compliance with the terms/stipulations thereunder. In this regard, it was posited that the letter of allotment was therefore invalid and incapable of founding the 1st respondent's entitlement to the suit property.

10. Secondly, it has been submitted that in so far as the letter of allotment had lapsed, no certificate of title could therefore be issued therefrom. In any event, it was contended that the certificate of title relied upon by the 1st respondent is at variance with the letter of allotment as pertains to [sic] the acreage that was allegedly allocated to the 1st respondent.

11. In the premises, it has been submitted that the judgment of the learned trial magistrate and the consequential decree arising therefrom were arrived at and reached on the basis of misapprehension of the evidence on record and the law. The court has therefore been invited to set aside and or quash the judgment of the trial court and to dismiss the 1st respondent's suit in the lower court.

12. The 1st respondent filed written submissions dated 18th November 2025 and wherein same has highlighted three [3] key issues, namely: whether the firm of Ms. Otieno C and Co. Advocates are properly on record for the appellant or otherwise; whether the appeal is merited; and what reliefs, [if at all] ought to be granted.

13. Regarding the first issue; learned counsel for the 1st respondent has submitted that the appellants herein were represented by the law firm of Ms. Mwirigi Mbaya and Co. Advocates in the subordinate court up to and including the delivery of the judgment. In this regard, it was contended that the firm of Ms. Otieno C & Co. Advocates, who filed the appeal, could not have filed the appeal without complying with Order 9 Rule 9 of the Civil Procedure Rules, 2010. In particular, it was contended that the said advocates ought to have sought and obtained leave of the court before filing the appeal on behalf of the appellants.

14. In the premises, it has been submitted that the firm of Ms. Otieno C. & Co. Advocates were bereft of the legal capacity [Locus standi] to file and lodge the subject appeal. To this end, it has been submitted that the appeal is incompetent and ought to be struck out.

15. The second issue that has been canvassed by the 1st respondent touches on and concerns whether or not the appellants filed/lodged the certified decree appealed against within the prescribed timelines or at all. To this end, learned counsel for the 1st respondent has submitted that the appellant was enjoined to file/lodge the decree appealed against in accordance with Order 42 Rule 1 of the Civil Procedure Rules. However, it has been submitted that the appellants failed to file/lodge the said decree in accordance with the set timelines and hence the appeal is premature, misconceived and legally untenable.

16. The third issue that has been canvassed by the 1st respondent touches on and concerns ownership of the suit property. In this regard, learned counsel for the 1st respondent has submitted that the 1st respondent tendered and produced assorted documents, including a certificate of lease confirming that the suit property lawfully belongs to him. Moreover, it has been submitted that the certificate of lease constitutes prima facie evidence of ownership of title. In this regard, learned counsel for the 1st respondent has cited and referenced the provisions of **sections 24, 25 & 26 of the Land Registration Act 2012.**

17. Other than the foregoing, it has been submitted that the appellants herein neither tendered nor produced any document to demonstrate ownership or entitlement to the suit property. In the absence of documents or any scintilla of deed of ownership, it was contended that the appellants have no lawful rights to and in respect of the suit property.

18. Flowing from the foregoing, learned counsel for the 1st respondent has invited the court to find and hold that the appeal before hand is premature, misconceived and legally untenable. In this regard, the court has been implored to dismiss the appeal with costs to the 1st respondent.

19. Having reviewed the record of appeal, the evidence tendered [*both oral and documentary]* and upon consideration of the written submissions filed by and on behalf of the designated parties, three [3] issues crystallize for the determination of the court. The issues are, namely: whether the appeal on behalf of the appellants is competent and legally tenable; whether the 1st respondent proved his title or entitlement to the

suit property or otherwise; and whether the appellants herein proved the claims at the foot of their counterclaim or otherwise.

20. What is before me is a first appeal. By virtue of being a first appeal, this court is vested with the mandate and authority to subject the entire evidence to fresh and exhaustive scrutiny and evaluation in an endeavor to discern whether the conclusions arrived at by the learned trial magistrate accord with the evidence. Moreover, the court is also seized of jurisdiction to arrive at an independent conclusion and, where appropriate, to depart from the findings or the trial court.

21. 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, or arbitrarily.

22. 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 judgment. 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."

23. With the foregoing principles in mind, it is now apposite to revert to the subject matter and to consider the issues which were highlighted elsewhere herein before. Firstly, I beg to address the issue as to whether the subject appeal is competent and legally tenable or otherwise. Two sub-issues do arise and merit consideration.

24. Learned counsel for the 1st respondent has impugned the competence and validity of the appeal on the basis that the law firm of Ms. Otieno C. & Co. Advocates who filed the memorandum of appeal, was divested of the requisite *locus standi*. In particular, it has been submitted that the suit on behalf of the appellants was prosecuted by Ms. Mwirigi Mbaya & Co. Advocates in the lower court up to and including the delivery of the judgment.

25. Arising from the fact that it was the law firm of Ms. Mwirigi Mbaya & Co. Advocates who were on record for the appellants in the subordinate court, it has been contended that the firm of Ms. Otieno C. & Co. Advocates could only take over and file the memorandum of appeal, subject to compliance with the provisions of **order 9 rule 9 of the civil procedure rules 2010.** In the absence of an order of the court granting leave, it was contended that Ms. Otieno C. & Co. Advocates did not have the legal capacity to file, maintain and or prosecute the appeal.

26. My answer to the contention by and on behalf of the 1st respondent is simple. An appeal constitutes a separate and distinct cause from the primary suit which births the appeal. Whereas an advocate is enjoined to seek leave of the court to take over the conduct of a matter from a previous advocate, the seeking of leave only applies if[and only if] the incoming advocate is taking over the conduct of the proceedings or the incidental proceedings [if any] in the primary suit, wherein the Judgment was delivered.

27. However, where an advocate is instructed to file or lodge the appeal, like in the instant case, such an advocate is not obligated to seek and obtain leave in terms of Order 9 Rule 9 of the Civil Procedure Rules 2010. That was not the intendment of the rules committee. Furthermore, that is not the letter and spirit of the provisions of Order 9, Rule 9 of the Civil Procedure Rules 2010.

28. In the case of ***Tobias M. Wafubwa v Ben Butali [2017] KECA 142 (KLR),*** the Court of Appeal addressed a similar objection and rendered themselves in the following manner;

> ***The application of rule 9 is an issue that has incessantly recurred and vexed the courts, and in determining the issue, of whether or not compliance is mandatory, the courts have reached varied conclusions dependent on the circumstances and facts of each case. Needless to say that, in each case, the purport of these rules, their application, and the mischief that sought to be addressed requires to be taken into account.***
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> ***This case involved an appeal from the Principal Magistrate's court to the High Court, and it is with this in mind that we take cognisance of the apt observations of Sitati, J. in the case of Stanley Mugambi vs Anthony Mugambi [2005] eKLR where it was stated thus;***
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> ***"The issue for determination is whether commencing an appeal by an advocate other than the one who conducted the case in the lower court falls within the provisions of Order III Rule 9A. In my considered view, I do not think so. My reading of the provisions of Rule 9A is to the effect that such change or intention is restricted to a suit that is either going on or one that has been concluded. The rule does not apply to appeals. If the intention of the drafters was to include appeals under this rule it would have been so stated. To my mind, Rule 9A envisages a situation where after judgment has been entered, a new advocate desires to come on record for purposes of applying for stay of execution or to proceed with execution proceedings in that suit. If***

any other meaning were to be assigned to the rule, the High Court and the Court of Appeal would be inundated with time consuming applications by advocates wishing to file appeals on behalf of litigants who were represented by different advocates in the lower court. I would agree with Mr. C. Kariuki for the appellant/respondent that the aim of Rule 9A was only intended to prevent parties from throwing out an advocate after judgment with the aim of denying the advocate the fruits of their costs. I therefore find that this application is misplaced and misconceived. It would, in my view, be draconian to strike out the appellant's appeal on the ground raised in the application."

These observations were supported by Makhandia, J, (as he then was) in the case of <u>Martin Mutisya Kiio & Another vs Benson Mwendo Kasyali, Machakos High Court Misc. Application No. 107 of 2013</u> where in respect of order 9 rule 9 it was asserted that;

"… such submission has no legal basis, … that where a firm of Advocates has acted for a party in the lower court, those instructions are terminated and/or were spent or exhausted with the conclusion of the trial in the lower court. An appeal is different ball game; it can be filed by any other firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. In other words, an appeal is fresh proceedings which can be initiated by any other firm of Advocates on instructions of the Appellant without regard to the previous Advocates who acted in the trial court."

And echoed by Emukule J, in the case of <u>Kenya Pipeline Company Limited vs Lucy Njoki Njuru [2014] eKLR</u> who adopted the same approach when he stated;

"More importantly, unlike the ordinary trial or review, or other interlocutory applications within the same cause or matter, an appeal is a "different ball game". The proceedings are fresh or new, and are before a Superior Court, and a party, including both the Appellant or Respondent, are at liberty to change or instruct a new set of counsel to represent them."

We are of the same view, and would adopt the same approach in its entirety in matters concerning appeal. Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.

29. In my humble view, the reasoning of the court of appeal and the ratio decidendi espoused in the decision [supra] is apt and spot on. Simply put,

the objection underpinned by the provisions of **Order 9 Rule 9 of the Civil Procedure Rules 2010** is misconceived and premised on a misapprehension of the law.

30. The second sub-issue relates to the failure by the appellants to lodge or file the certified copy of the decree in accordance with the provisions of **Order 42 Rule 1 of the Civil Procedure Rules**. Notably, every appellant is obliged to file a copy of the decree or order appealed against alongside the memorandum of appeal. However, where the certified copy of the decree or order appealed from if not filed alongside the memorandum of appeal, the appellant is enjoined to file the certified decree or order as soon as reasonably practicable; or in accordance with the directions of the court.

31. Moreover, it is important to highlight that the appellate court is not obliged to consider whether to admit or to summarily dismiss the appeal, until and unless the certified order or decree appealed against has been lodged. **[See the provisions of section 79 B of the Civil Procedure Act, Cap 21 Laws of Kenya.**

32. In respect of this matter, it is not lost on me that the appeal went through the usual process and same was duly admitted for hearing. Furthermore, there is no gainsaying that the appeal was fixed for directions in accordance with the provisions of **Order 42 Rule 13 of the Civil Procedure Rules**, **2010;** whereupon the parties/advocates for the parties confirmed that the record of appeal was complete and that the appeal was ready for hearing. Notably, no objection as to jurisdiction or competence of the appeal was taken at the time of the directions.

33. In so far as the 1st respondent failed to raise or take out an objection as to jurisdiction [including competence of the appeal] at the time of directions, the issue now being raised is overtaken by the law and rendered redundant. Furthermore, I beg to state that having participated in the directions pertaining to the hearing of the appeal and having confirmed that the record of appeal was complete, the 1st respondent is prohibited and estopped from purporting to raise the issue on the competence of the appeal.

34. Additionally, I beg to underscore that learned counsel for the 1st respondent appears to be approbating and reprobating at the same time. Notably, one cannot be allowed to blow hot and cold at the same time. Such conduct constitutes an abuse of the due process of the court and same must be frowned upon.

35. Before concluding on this issue, I beg to highlight that the decree underpinning the appeal was duly filed and lodged *vide* the supplementary record of appeal and the appeal is therefore competent. In any event, the failure to lodge the certified copy of the decree in accordance with the provisions of Order 42 Rule 1 of the Civil Procedure Rules, is a procedural technicality that is curable by dint of Article 159 (2) (d) of the Constitution 2010. [**See also the decision of the Supreme Court in the case of *Moses Mwicigi & others vs IEBC & others (2016) eKLR at paragraphs 65, 66 & 67 thereof].***

36. Turning to the second issue, it is instructive to recall that the 1st respondent is the one who approached the subordinate court contending that same was the lawful, bona-fide and registered owner of the suit property. Furthermore, it is the 1st respondent who contended that the suit property was lawfully allocated unto him on or about the 3rd March 1997 and thereafter same complied with the terms of the letter of allotment, including acceptance; payment of the standard premium; payment of the rates to the county council of Isiolo [now defunct]; and thereafter procuring a certificate of lease in respect thereof.

37. Having made the foregoing assertion, it is common ground that the 1st respondent was charged/chargeable with the obligation of proving the assertions. Moreover, the assertions could only be proved *vide* plausible, cogent, concrete and credible evidence.

38. To start with, it was incumbent upon the 1st respondent to demonstrate that same applied to the county council of Isiolo [now defunct] to be allocated the plot now comprising of the suit plot; demonstrating that the application was considered; tendering before the court minutes of the council approving the application for allotment; placing before the court evidence of a letter of allotment; acceptance of allotment; payment of the standard premium and thereafter issuance of a certificate of title or lease [whichever is applicable].

39. In respect of the instant matter, the 1st respondent placed before the court a copy of the letter of allotment dated 22nd June 1998 relating to an unsurveyed residential plot – Isiolo Township. However, the 1st respondent did not place before the court any letter of acceptance

confirming acceptance of the letter of allotment within the prescribed 30-day period. For good measure, the letter of acceptance that was placed before the court is dated 7th March 2016; which is clearly outside the stipulated duration.

40. In the absence of a letter of acceptance of the allotment within the prescribed time, the question that does arise is whether the letter of allotment under reference remained in existence or same lapsed by operation of the law. Notably, a letter of allotment whose stands are neither complied with nor adhered to within the stipulated timeline lapses and stands extinguished by operation of the law. [see ***Joseph Muhoro Kimani vs Attorney General (2021) eKLR; Waterfront Holdings Ltd vs Kandie (2023) KECA and Torino Enterprises Ltd vs the Attorney General (2023) KESC,*** respectively.

41. On the other hand, a question does arise at to whether the purported letter of acceptance issued on 7th March 2016 was valid or otherwise. I beg to state that by the time the 1st respondent was issuing the impugned letter of acceptance [dated 7th March 2016] there was no letter of allotment in existence and capable of being accepted. The one dated 22nd June 1998 had died a natural death.

42. Other than the foregoing, the 1st respondent contended that same paid the standard premium to the commissioner of lands *vide* cheque dated 7th March 2016. Two questions arise, namely; whether the office of the commissioner of lands was in existence as at 7th March 2016 and thus capable of receiving any payments. Surely, it is common knowledge that the office of the commissioner of lands ceased to exist immediately upon

the enactment of and assent to the **National Land Commission Act 2012;** and which was assented to on or about 6th May 2012. In this regard, there is no way the impugned bankers' cheque could have been issued in favour of the commissioner of lands.

43. The other question that does arise relates to whether there was any letter of allotment capable of being paid for. I have pointed out that the letter of allotment stood extinguished upon lapse of 30 days from the date of post postmark. In this regard, any payments or activities that were taken by the 1st respondent were in vain. [see the decision in the case of ***S.S Syedna Bhurhundin Saheb & another vs Benja Properties Ltd (2007) eKLR***].

44. Furthermore, it is also important to underscore that the receipt of the money [if at all] by the Ministry of Lands or National Land Commission, whoever may have received same does not constitute waiver, acquiescence or operate as estoppel. [**See the decision of the Court of Appeal in the case of *Henry Muthee Kathurima v Commissioner of Lands & another [2015] KECA 892 (KLR)***

45. There is another issue that touches on the impugned letter of allotment which has been relied upon by the 1st respondent to underpin his claim to the suit property. The letter of allotment indicates that what was [sic] being allocated measured 0.0370 ha. However, the certificate of lease which the 1st respondent tendered and produced before the court and which traces its root to the letter of allotment, shows that the suit property measures 0.370 ha. Quite clearly, there is a disconnect between the letter of allotment and the certificate of lease.

46. In my humble view, the certificate of lease which is relied on by the 1st respondent, does not trace its roots to the impugned letter of allotment. The question that begs the answer is how and from which letter of allotment does the certificate of lease spring or arise from? The question under reference was never answered by the 1st respondent. Furthermore, the question under reference was also not addressed by the trial court.

47. To my mind, the finding and holding by the trial court that the 1st respondent had tendered evidence to establish a clear chain of title to the land, was based on misapprehension of the documents that were placed before the court. Had the learned trial magistrate appreciated and internalized the evidence on record, including but not limited to the lapse of the letter of allotment; the variance in acreage; and the legal implication or failure to comply with the terms of the letter of allotment; same would have arrived at a different conclusion.

48. Additionally, it is common ground that by the time the certificate of lease was being issued on 25th May 2016, there was no letter of allotment. The impugned certificate of lease was issued in *vacuum*. Same is therefore illegal, unlawful and invalid.

49. In the case of ***Waterfront Holdings Limited v Kandie & 2 others (Civil Appeal 88 of 2019) [2023] KECA 1223 (KLR) (6 October 2023) (Judgment),*** the Court of Appeal considered and addressed a scenario where a certificate of lease/title was issued long after the letter of allotment lapsed.

50. For coherence, the court stated thus;

> *(57) In the matter before us, the 1st Respondent failed to discharge the burden of proving that Lemiso, from whom he claimed his title, met the conditions in the letter of allotment and that by the time the process of re-allotment to the Appellant commenced, he had done so.* ***Accordingly, the re-allotment of and issuance of title of the subject property to the Appellant cannot be faulted and the subsequent issuance of the Certificate of Lease to Lemiso was inconsequential. That title was not based on any letter of allotment, a prerequisite for allotment of un-alienated government land. It follows that the 1st Respondent could not acquire a valid title from Lemiso.***

51. I am afraid that the 1st respondent did not prove the root of his certificate of title or entitlement to the suit property. Absent proof of the root of the title or entitlement, the 1st respondent could not procure a declaration of being the lawful and legitimate owner of the suit property. [**See the decision of the court of appeal in *Presbyterian Foundation vs Kibera Siranga Self-Help Nursery School (2023) KECA].***

52. Finally, there is the issue as to whether the appellants proved their entitlement to the portions of land wherein same were in occupation of or otherwise. Notably, the appellant's claim is stated to have arisen from the purchase of the portions of land from Peter Edome [DW 4] and James Longle Edome (DW 5).

53. What I hear from the appellants is that the portions of land which same entered upon and took possession of belonged to and formed part of Turkana Community Land. Furthermore, it has been posited that the land claimed by the appellants were previously under the occupation of DW 4 and DW 5.

54. Moreover, there is evidence that the appellants herein indeed entered and took possession of their respective plots. Instructively, the 1st respondent acknowledges and confirms that it is the appellants who are actually in occupation and possession of the disputed grounds. Though the appellants have not placed before the court any document [Deed] of title, but I hear their claim to be stemming from the persons who had been in occupation and possession of what comprises of suit property from time immemorial. For good measure, DW 5 tendered evidence that he was born on what now constitutes the suit land and that he acquired same in 1984. The evidence under references was neither controverted nor impeached.

55. To my mind, the occupation and possession of what now comprises the suit property would no doubt bestow upon those occupants some color of rights or and interests. In any event, the doctrine of seisin denotes that possession is 9/10 ownership. To my mind, the circumstances surrounding the ownership of the suit property can be resolved and addressed by invoking and deploying the doctrine of *seisin.*

56. In the case of ***Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] KECA 457 (KLR),*** the Court of appeal highlighted and expounded on the doctrine of Seisin.

57. For coherence, the Court 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 seised 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 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.*

58. In my humble view, the appellants herein who trace their claim through the persons who had hitherto been in occupation of what now comprises the suit property appear to hold a better title to the suit property or better still, the disputed ground in contrast to the 1st respondent, whose root of title smacks of illegalities.

59. Flowing from the foregoing, and taking into account the principles established in the case of ***Peters vs Sunday Post Ltd (1958) E.A; Ephantus Mwangi Vs Duncan Mwangi Wambugu. [1984] KECA 13 (KLR) and Mwanasokoni vs Kenya Bus Service Ltd (1985) eKLR***, I come to the conclusion that the findings of the learned trial magistrate were based on no evidence or, better still, on misapprehension of the evidence on record.

60. In this regard, I respectfully depart from the findings and holdings of the trial court.

FINAL DISPOSITION.

61. For the reasons that have been highlighted in the body of the Judgment, it must have become crystal clear that the Judgment of the learned trial magistrate is wrought of and fraught with errors and thus same is amenable to be set aside or varied.

62. Consequently, and in this regard, I am minded to and do hereby allow the appeal.

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

(i) The Appeal be and is hereby allowed.

(ii) The Judgment of the learned trial magistrate dated 28th February 2025; and the consequential decree be and is hereby set aside in its entirety.

(iii) In lieu thereof, there be and is hereby issued an order dismissing the 1st respondent's suit *vide* amended Plaint dated 16th February 2022.

(iv) Furthermore, the counterclaim by the appellants dated 22nd November 2022; be and is hereby allowed as prayed.

(v) The Costs of the Appeal be and are hereby awarded to the appellants and same shall be borne by the 1st respondent.

(vi) The Appellants are also awarded the costs of the suit and the counterclaim in the subordinate court.

64.It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 27TH DAY OF NOVEMBER 2025.

OGUTTU MBOYA, FCIArb, CPM [MTI].

JUDGE.

In the presence of:

Hussein/Mukami – Court Assistants

Mr. Otieno C. for the Appellant

Ms. Jepkosgei holding brief for Mr. John Abwuor for the 1st Respondent.

No appearance for the 2nd Respondent

No appearance for the interested parties.