

Plaintiff(Respondent) be declared the only rightful owner of the said plot.

3. After the inter-parties hearing wherein the Plaintiff(Respondent) gave evidence for himself and called one witness, and the Defendants(Appellants) gave evidence through **Kiokong Kedoki**, the 1st Appellant herein, the trial court found for the Plaintiff (Respondent herein) and held that *“the Plaintiff has proved his claim on a balance of probability and hereby enter Judgment for the Plaintiff as against the defendant as prayed in the plaint”*
4. The Appellants as the Defendants were aggrieved by the said Judgment of the trial court, and they consequently filed this Appeal vide **Memorandum of Appeal** dated **25th February 2025** drawn by **Nyabwocha & Oyori Law Advocates** in **ELCAPPEAL No E004 OF 2025**, and another Memorandum Of Appeal dated **10th March 2025**, drawn by **Kiptoo K,& Co advocates**. The two Appeals were consolidated, and the leading file is **ELCAPPEAL NO E004 OF 2025**.
5. The Grounds of Appeal are;
 - a) ***That the learned trial Magistrate erred both in fact and law by proceeding to hold that the suit property known as Plot No. 455 situated at Ntulele, Narok County belongs to the Respondent when no evidence was tendered to support such findings***
 - b) ***That the learned trial Magistrate erred both in fact and law by proceeding to hold that***

the Respondent had established a case against the Appellants when a look at the pleadings and responses filed by the Defendants show that the suit property clearly belongs to the 1st Appellant.

c) That the learned trial Magistrate erred in fact and law in making a determination against the 2nd Appellant whose participation amounted to a misjoinder of parties as the 2nd Appellant had nothing to do with the suit property.

d) That the learned trial Magistrate erred both in fact and law by declaring the Respondent the owner of Plot No.455 despite the Respondent not producing any evidence in support of the same and ignoring the documentary evidence showing that the 1st Appellant is the rightful allottee and owner of Plot No.455 situated at Ntulele having been in occupation since 2002 and having had the same developed.

e) That the learned trial Magistrate further erred in law and fact by failing to find that the evidence by the 1st Appellant was convincing and credible.

f) That the learned trial Magistrate erred both in law and fact by failing to note that there was serious conflict of interest as the author of evidence produced in favour of the Respondent was done by an officer at the

County Offices with a close relation to the Respondent

g) That the learned trial Magistrate misdirected himself on matters of both law and fact as to occasion a miscarriage of justice against the Appellants.

h) That the learned trial Magistrate erred in fact and law by failing to evaluate properly the evidence on record together with submissions and the cited authorities which clearly pointed out that the 1st Appellant had proven that he is the rightful owner of the suit property.

6. Consequently, the Appellants sought for the following orders;

a) That the Appeal be allowed;

b) That the judgment of the trial court delivered on 11th February 2025, be set aside, and be substituted with an order confirming that the suit property belongs to the 1st Appellant;

c) That the appellants be awarded costs of this Appeal and costs in the trial court.

7. Briefly, the facts of the case according to the Respondent as the Plaintiff before the trial court are; that at all material time, the Plaintiff(now Respondent) was the owner of **Plot No 455**, situated within **Ntulele** area of **Narok County**; further, that without any reasonable or probable cause, the Defendants(Appellants) moved into the Plaintiff's(Respondent) above named plot laid claim and

purported to take possession thereof; that as a result of the Defendants(Appellants) action, the Plaintiff has been deprived of the opportunity to **use, utilize** and **enjoy** his plot and has **suffered loss** and **damages;** that despite **demand** and **notice of intention** to **sue**, the Defendants(Appellants) have failed to move out, neglected and refused to vacate the Plaintiff's parcel of land, and thus the suit before the trial court.

8. The brief facts according to the Defendants(Appellants herein) are; that at all material time, the 1st Defendant was the allottee of **Plot No 455, Ntulele Trading Centre**, and therefore he was a bona fide allottee of this **Plot No 455, Ntulele Trading Centre** having been issued with allotment letter in **1998**.
9. The 1st Defendant averred that he has been paying the requisite plot rents up and until the year **2011**, when a dispute arose touching on all the plots within **Ntulele Trading Centre**. The Defendants(Appellants) averred that the 2nd Defendant is the son to 1st Defendant, and that he has not been in occupation of the suit land, and the Plaintiff does not have any cause of action against him. They claimed that the plaintiff was nor entitled to the orders sought, and they urged the court to dismiss the Plaintiff's suit.
10. When the suit proceeded for hearing before the trial court, the Plaintiff(Respondent) gave evidence through **PWI Philip Lenina Ole Sironka**, who works at Narok County Government as a clerical officer. He referred to a register

and ledger, which had names of the persons who own plots at **Ntulele Trading Center**, which Plots were from **No.1** to **506**. According to him, **Plot No 455** belongs to **Stephen Lapiyion Ole Nchoe**. He testified that their record did not show that the 1st Defendant owned the said plot, and that the receipts for 1st Defendants were fake, since the County Government came into operation in **2013**.

11. PW1 alleged that the receipt by 1st Defendant was fake, because it showed that the same was issued by **Narok County Government**, instead of **Narok County Council**, and it was a receipt for payment from **1991-2011**, and it was not possible to pay in advance.
12. On cross examination, he testified that the plot belongs to the Plaintiff, and the receipt for payment was issued by **Narok County Government** on **8th January 2013**, and was issued to **Raiyion Nchoe**. However, the name **Raiyion** was cancelled and counter-signed to read **Stephen Lapiyion Ole Nchoe**, the Plaintiff. He also testified that the Ntulele plots were issued in **1991**, but he saw the **allotment letter** dated **5th October 2002**, from Narok County Council, and the said plot was allocated to **Kiokong Ole Mailoji Kedoki**. According to him, the plot is occupied by the Plaintiff, though the 1st Defendant was in possession of receipts showing payments for survey and showing fees.
13. According to **PW2**, the Plaintiff herein, he testified that this **Plot No 455**, was allocated to him on **8th January 2013**, and he paid the survey and showing fees in **2014**. That he

paid the amount for **2009** to **2014**, as there were some arrears, and he took possession, after being shown the beacons by the officials of the County Government of Narok. He further testified that though he was paying to the County Government, he had not paid since **2014**. He alleged that the 2nd Defendant started constructing on the suit property on **27th July 2018**, and the 2nd Defendant is the son to the 1st Defendant.

14. It was the evidence of PW2, that this suit property belongs to him as he was in possession of receipt for payment for **Plot No 455 Ntulele Trading Centre**, receipt for survey and showing and photographs.
15. Upon being cross examined, he testified that he was allocated the plot on **8th January 2013**, and he was given a receipt for survey and showing. Further, that he was not given any other documents, and neither was he issued an allotment letter, as there were no such letters issued for Ntulele Plots.
16. The case was adjourned on **11th May 2021**, after the Plaintiff's case and did not proceed for hearing due to various reason until **24th September 2024**, when it proceeded for Defence hearing before **Hon. H.M. Nyaberi(CM)** wherein **DW1, Kiokong Kedoki** gave his defence testimony.
17. In his evidence, DW1, testified that the Plaintiff is his neighbour at Ntulele, and he produced documents to show that he was the allottee of **Plot No 455, Ntulele**. Among the documents produced were **an allotment letter** in his

name for **Plot No. 455**, issued on **5th October 2002**, by the **County Council of Narok**, and receipts for payment dated **5th August 2000**, for rent and rates, further receipt dated **20th March 2005**, for rent from **1991** to **2011**. It was his testimony that he has lived on the suit land for **33 years** and he has built a house and other development. He produced photographs of his homestead as exhibits, and urged the court to dismiss the Plaintiff's case.

18. Upon being cross examined, he testified that he was issued with the Allotment Letter on **5th October 2002**, by the Narok County Council, and he paid the land rates and rent. He confirmed one receipt was issued by **Narok County Council**, and the other was issued by **Narok County Government**, though **Narok County Government** came into operation in **2010**, and that the ones who issued the receipts made a mistake in stating the County Government dated **20th March 2005**. In re-exam, he said he made the payments in **2011**, and not **2005**, though he had not filed a counter-claim.
19. After the close of viva voce evidence, parties through their respective advocates filed written submissions before the trial court and on **11th February 2025**, the trial court delivered its Judgment, wherein he allowed the Plaintiff (Respondent) suit with costs. It is the above Judgment that aggrieved the Defendants (Appellants herein) and thus this Appeal.
20. After the Appeal was admitted, the court directed the parties to canvass the Appeal by way of written

submissions, which the parties herein have complied. The Appellants filed their written submissions through **Nyabwocha & Oyori Law Advocates** dated **29th October 2025**, and submitted on various issues. They urged the court to allow the appeal with costs to themselves.

21. The issues set out by the Appellants are;
 - i. Who is the registered allottee of PLOT No 455 Ntulele Trading Centre;**
 - ii. Who is in occupation of plot No 455, Ntulele Trading Centre?**
 - iii. Who has been paying land rent and rates for this suit plot No 455, Ntulele Trading Centre;**
 - iv. Is the 1st Appellant entitled to the reliefs sought in the Appeal;**
 - v. Who should bear costs of this appeal.**
22. On who is the registered allottees of this **Plot No 455, Ntulele Trading Centre**, the appellants submitted that they produced an allotment letter which clearly showed that the 1st Appellant was the **allottee** of the suit land from 1991. They also submitted that the Respondent did not produce any allotment letter before the trial court to back his claim for ownership.
23. For the above submissions, the Appellants relied on the case of **Kamau James Njendu vs Serah Wanjiru & Another (2017) ekr**, where the court held that where there is double allocation of land, the first allotment should prevail.

24. Further, that appellants submitted that mere receipts are not evidence of ownership of the suit plot as the Respondent did not explain how he acquired the suit plot without letter of allotment. Reliance was sought in **Article 40** of the Constitution and the cases of ***E.M Ngure vs District Land Adjudication and Settlement Nyandarua & 2 others (2017) eklr***; where the court held that the process of allotment of land include and is not limited to issuance of **letter of allotment**, which is an agreement/ contract between the lessor and lessee and binds the lessee to meet the conditions set therein;
25. Further reliance was sought in these cases of ***Mbau Saw Mills Ltd vs Attorney General ; Commissioner for Lands & 2 Others(2014) eklr***; ***Rukaya Ali Mohamed vs David Gikonyo Nambachia& Another Kisumu HCCA 9 of 2004***; ***M’Kiara M’rikanya & Another vs Gilbert Kabeere M’mbijiwe (1982-1988) 1 KAR 196***, where the court held; *once a parcel of land is allocated, the same becomes private property and is no longer available for allocation to another person, unless the first allocation is validly and unlawfully cancelled.*
26. On who is in occupation of plot **No 455 Ntulele Trading Centre**, the Appellants submitted that the 1st Appellants is an allottee of the suit plot vide allotment letter for 1991, and has been paying rents and rates towards in since allocation till 2011. They submitted that the 1st Appellant erected a fence and construction and semi-permanent building thereon, and he has been in occupation and possession since 1991 to date.

27. It was their further submissions that nothing was produced by the Plaintiff(Respondent) to show his occupation or ownership of the suit property other than the mere rent receipts, which the court cannot take to be proof of ownership. Reliance was sought in the case of ***Gitwany Investment Ltd vs Tajmal Ltd & 2 others (2006) eklr***, where the court held that *“the first title in time prevails.*
28. On who has been paying land rent and rates for ***Plot No 455 Ntulele Trading Centre***, the appellants submitted that the 1st Appellant was allocated the suit land on ***18th December 1991***, and has been paying land rent and rates since then, and they gave chorology of such payments. Therefore, it was the Appellants submissions, that it is the 1st Appellant who has been paying land rent and rates for the suit plot, and such payment was one of the conditions set out in the letter of allotment to be fulfilled.
29. On whether the Respondent (as Plaintiff) was entitled to the relief sought in the Plaint, the appellants submitted that he was not entitled to such relief since the said entitlement was not supported by the evidence adduced. Further that the mere survey and showing receipts were not sufficient to prove the claim by the Plaintiff(Respondent). It was also submitted that to order that the Appellants be evicted out of the suit land went against the provisions of ***Article 40*** of the ***Constitution 2010***, and thus the Respondent is seeking to deprive the appellants of their rights to own their rightful and legal property.

30. In conclusion, the appellants submitted that this **Plot No 455 Ntulele Trading Centre** having been allocated to the 1st Appellant in **1991**, and the 1st Appellant having fulfilled the conditions set therein, then the plot was not available for allocation to the Respondent, and the Respondent payment of showing fees amounted to nothing, as there was no proprietorship to be accepted. Further, that payment of money could not cancel the first allocation.
31. The Appellants urged the court to allow the instant appeal as per the terms of the Memorandum of Appeal.
32. The Respondent filed his submissions dated **5th January 2026**, through **Ochengo Onduso & Co Advocates**, and urged the court to dismiss the Appellants appeal. The Respondents set out five issues for determination.
33. On whether the trial court erred in fact and law in holding that the Respondent had proved ownership of **Plot No 455 Ntulele Trading Centre**, despite the Appellants challenge to the authenticity of the Respondent's receipts and documents, the Respondent submitted that he had proved ownership of **Plot No 455 Ntulele Trading Centre** on a balance of probabilities, and the trial court approached that question with clarity as the Respondent had produced receipts issued by Narok County Government for survey and showing fees dated **8th January 2013**.
34. He also submitted that in contrast, the Appellants relied on the allotment letter issued in **2002**, referencing allocation of **1991**, and the receipt was to cover **1991** to **2011**.

Further that the trial magistrate carefully interrogated the documents produced and found glaring inconsistencies, such as Receipt issued on **20th March 2005**, issued by Narok County Government which was not in existence then.

35. It was further submitted that the trial court was entitled to conclude that the appellants' documents were unreliable, since it is settled law that ***an allotment letter*** does not confer proprietary rights unless the conditions set out thereon have been met. Reliance was sought in the case of ***Mbau Saw Ltd vs Attorney General & 2 others (Supra)***, where the court held;

“that compliance with the condition such as payment of stand premium and ground rent is essential before rights crystalize.”

36. He further submitted that the authorities relied on of ***Rukaya Ali Mohammed vs David Gikonyo Nambachia(supra) and Kamau James Njendu vs Serah Wanjiru & Another (supra)***, where the court stated that the first allotment should prevail in cases of double allocation are distinguishable because they are only applicable if the allotment is valid and perfected, and where conditions are unmet and the offers lapses, as the case herein, the land remains available for allocation.

37. The Respondent also submitted that he discharged his burden of proof as provided by ***Section 107*** of the ***Evidence Act***, and the trial court was right in finding and

holding that he was the rightful owner of the suit property. He urged the court to dismiss the instant Appeal.

38. On whether the trial court misdirected itself in treating the Appellants' **allotment letter** and receipts as doubtful, and that the 1st Appellant failed to comply with the express conditions of allotment, it was submitted that the trial court did not speculate, as it interrogated the Appellants' documents against their own terms, institutional timelines, admissions and applied settled law on allotment compliance. He gave example of allotment stamped **11th October 2002**, but referenced **18th December 1991**, which had imposed clear conditions; erect a building within 24 months, pay stand premium and ground rent within the prescribed period and accept the offer within time.
39. Relying on the case of **Mbau saw Mills Ltd vs Attorney General & 2 Others(supra)** the Respondent submitted that an allotment letter is not prove of ownership, and that compliance with the condition such as payment of stand premium and ground rent is essential before the right can crystalize. Further reliance was sought in the case of **E.M Ngure vs District Land Adjudication and Settlement Nyandarua & 2 Others (2017) eklr**, where the court held that allotment is a contractual process requiring fulfilment of conditions, the appellants receipts which were riddled with institutional impossibilities and inconsistent dates did not prove performance.
40. While distinguishing the case of **M' Kiara M' Rikanya & Another vs Gilbert Kabeere M'Mbijiwe (1982-1988) 1**

KAR 196, it was submitted that where the conditions of the letter of allotment were not met, the trial court did not need cancellation letter to reach the conclusion as lapse flew from the terms and the failure to comply.

41. On whether the trial court erred on relying on the testimony of the clerical officer from the County Government of NAROK instead of the **Market Superintendent**, and whether such reliance was a miscarriage of justice, it was submitted that the court was entitled to rely on any competent witness who produce or speak official records. Reliance was sought in the case of **Mrao vs First American Bank of Kenya Ltd(2003) Klr 125**, where the court of Appeal defined a *prima facie case as one where on the material presented, a tribunal properly directing itself will conclude that there exists a right apparently breached*.
42. It was submitted that the PW1's evidence was grounded on the ledger, provided precisely that material and showed an apparent right in the Respondent which had been interfered by the Appellants. He argued that the trial court did not abdicate its duty of evaluation, but weighed PW1's evidence against the Appellants documents and found the later riddled with contradictions. He urged the court to uphold the trial court's reliance on PW1's, testimony and dismiss the appeal.
43. On whether the trial court erred in making orders against the 2nd Appellant, whose participation was a misjoinder, it was submitted that the trial court was correct in treating

the matter as one of substance rather than technicality. It was submitted that the 2nd Appellant had actively laid a claim to the plot and had attempted to commence construction in **2018**. His participation was not a mere accident of family relation as he was part of the interference of the Respondent's property.

44. On who should bear costs of the APPEAL and the trial court, reliance was sought in **Section 27(1)** of the **Civil Procedure Act**, where it states that costs follow the event, unless for good reasons, the court can order otherwise. The Respondent being the successful litigant should be awarded costs of the appeal and trial courts proceedings.
45. For the above submissions, reliance was sought in the case of **Supermarine Handling Services Ltd vs Kenya Revenue Authority (2010)eklr**, where the Court of Appeal held that costs are awarded to compensate the successful party for the trouble taken to defend or prosecute the suit. similarly, the Responded relied on the case of **R vs Minister for Agriculture exparte W' Njuguna (2006) eklr**, where the court held that costs are not a penalty, but recompense for expenses incurred in vindicating rights
46. While relying on the case of **Orix Oil (Kenya) Ltd vs Paul Kabeu & 2 Others (2014) eklr**, where the court held that a party who drags another through unnecessary litigation should bear costs of litigation, and this principle

applies herein he urged the court to award him costs of this Appeal.

47. Ultimately, the Respondent urged the court to dismiss the instant appeal with costs and uphold the Judgement of the trial court, which was delivered on **11th February 2025**, and award him costs, both at the trial court and for this Appeal.
48. The above are the Grounds of the Appeal as contained in the Memo of Appeal, the available evidence as contained in the Record of Appeal, the rival written submissions which this court has carefully considered and renders itself as follows;
49. This being a first Appeal, this court is bound to consider both facts and law as provided by **Section 65** of the **Civil Procedure Act**. Further **Section 78** of the same Act, mandates this court to **re- consider, re-evaluate, re-assess** and **re-analyse** the evidence as presented before the trial court, and then come up with its own independent decision, while taking into account that it never saw, nor heard the witnesses as did the trial court. See the case of **Equity Bank Limited v Mungai & 2 others [2025] KEHC 10891 (KLR)**
50. In the case of **Selle & Another vs Associated Motor Boat Ltd & Another(1968) EA 123**, the Court of Appeal held:-

“An appeal to this Court from a trial by the High Court is by way of a retrial and the

principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

51. As the court ***re-consider*** and ***re-evaluate*** the evidence before the trial court, it will give deference to the trial court’s determination, given that it is the said court that saw the ***demeanour*** of the witnesses, and also considering that the trial court has equal discretion to make determinations on matters before it, just like this court. This court will not set aside the trial court’s determination, just because it has been moved on appeal, or it would held otherwise. See the case of ***Mbogo vs Shah (1968) EA 93***.

“[A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.”

52. Being guided as above, the court finds that the issues for determination are;-

i. Whether the trial court erred in law and fact in finding and holding as it did, and whether the judgement of 11th February 2025, by the trial court should be set aside;

ii. Who should bear costs of this Appeal and the proceedings at the trial court.

53. From the available evidence, it is evident that the trial court did uphold the Respondent's claim(Plaintiff) and allowed the eviction of the Appellants from the suit property. It is also evident that the bone of contention is **Plot No 455 Ntulele Trading Centre**, wherein the Respondent(Plaintiff) has averred that it was allocated to him on **8th January 2013**, by the Narok County Government.

54. On the other hand, the Appellants denied the Respondent's claim, and contended that this suit property was allocated to the 1st Appellant(Defendant) in **1991**, by the County Council of Narok, and he paid all the necessary charges, and took possession thereon.

55. The Respondent and Appellants relied on various documents specifically receipts to show different payments, and at the end of the trial, the learned trial Magistrate believed the Respondent's side of the story, and rejected the Appellants assertion that this suit Property **No. 455 Ntulele Tading Centre** belong to 1st Appellant.

56. It is on the above background that this Appeal is predicated on. The question for determination is whether the trial court erred in finding and holding as it did, and whether the impugned Judgment should be set aside and/or overturned.
57. To answer the above question, this court will scrutinize the documents produced as exhibits and evidence in support, consider them, **re-consider** the findings and holding of the trial magistrate, and come up with its own independent determination, while taking into consideration, the relevant laws and the principles of double allocation.
58. As correctly held by the trial court, *he who alleges must prove* as provided by **Section 107** of the Evidence Act. The Respondent herein as the Plaintiff before the trial court is the one who had alleged, and the **onus** of prove was upon him to call sufficient evidence and prove his case on the required standard of balance of probabilities. See the case of **Abdul Vs. Mokuu (Civil Appeal E077 of 2023) [20225] KEHC 4105 (KLR)**.
59. Having **re-considered** and **re-analysed** the available evidence before the trial court, did the Respondent herein (Plaintiff thereon) meet the above threshold?
60. The Respondent(Plaintiff) had averred and adduced evidence to the fact that he was allocated **Plot No 455 Ntulele Trading Centre** by the County Government of Narok on **8th January 2013**. He produced a receipt even dated for **ksh 10, 000/=** to confirm that he indeed paid for survey and showing fees. A scrutiny of this receipt shows

that it was issued to Raiyan **Nchoe**, and later the name **Raiyian** was cancelled and substituted with the name **Stephen Lapiyion Nchoe**, the Respondent herein.

61. During cross examination, the witness from the **County Government of Narok, PW1**, confirmed that the signatures of the person who issued the said receipt, and who counter-signed are not similar. Who counter- signed the said receipt? Who paid this amount of money? Was it **Raiyian Nchoe** or **Stephen Lapiyion Nchoe**? Why was the name of **Raiyian** cancelled?
62. PW1, was not able to fill the above gaps. Though PW1, testified that the records held at the County Government of Narok shows that this **Plot No 455 Ntulele Trading Centre** belongs to the Respondent(Plaintiff) as per the ledger he referred to, that ledger or record was not produced as exhibit in court. Without that record or ledger, the evidence of PW1, remained mere allegations. See the case of **Evans Otieno Nyakwara vs Cleopas Bwana Ongaro (2015)eKLR**.
63. As the court observed earlier, the burden of proof was upon the Respondent, who had alleged and he filed the suit before the trial court. It was the evidence of PW1, that after the promulgation of the Constitution 2010, **Allotment letters**, were not necessary, but only evidence of payment of survey fees was necessary. Was this the official position? No evidence to that effect. The Receipt produced by the Respondent is dated **8th January 2013**,

issued by Narok County Government. When did the County Governments come into operation?

64. It is evident that the County Governments in Kenya officially started after the **4th March 2013**, General Election, which established the 47 County Governments as mandated by the Constitution of Kenya 2010. Therefore, it is doubtful whether on **8th January 2013**, there were receipts being issued by the County Government of Narok, before it was started. If there was, such evidence should have been availed in court by a witness from the said County. The Respondent did not do so, and this raised doubt on the authenticity of the said receipt.
65. The suit before the trial court was filed in **2018**, when the Respondent(Plaintiff) alleged that the Appellants (as Defendants) had encroached on his **Plot No 455 Ntulele Trading Centre**. In his evidence in Court, the Respondent through Pw1 produced receipts for payment dubbed Miscellaneous Income dated **8th January 2013**, for **ksh 10,000/=** and another dated **20th November 2014**, for **ksh 9,000/=** indicating the payment was for Plot rent for **2009- 2014**. During cross examination, the Respondent testified that he has not paid any other amount since **2014**. If the Respondent(Plaintiff) had not paid any other charges since **20th November 2014**, how could he claim that he was up to date with the payments of land rent and rates?
66. Further, this receipt dated **20th November 2014**, was also in the name of the **Raiyian Nchoe**, and the name **Raiyian**

was cancelled. What is the relationship between **Raiyian** and the Respondent herein? This **Raiyian** would have been a useful witness, to link the **nexus** between himself, the receipt in question and the Respondent. Without calling him, the court will presume that his evidence would have been adverse to the Respondent's case. See the case of **Bukenya v Republic [1972] EA 548**.

67. Has the Respondent ever been in possession of the suit plot **No 455 Ntulele Trading Centre**? Such evidence was never availed before the trial court, and this court would find it difficult to hold that the plot which was paid by **Raiyain Nchoe**, and whose receipt was cancelled to read **Stephen Lapiyion Nchoe**, was at any given time in possession of the Respondent herein. The circumstances under which the receipts were cancelled, were not brought out before the trial court, and the person who counter-signed after cancelling the name Raiyain and inserting the name of the Respondent was not called as a witness.
68. The Respondent, being the person who bore the burden of proof did not adequately discharge it. The trial court found and held that the suit plot belonged to the Respondent because in its view, the documents produced by the 1st Appellants were not genuine.
69. The Appellants were the ones who had been sued before the trial court, and the 1st Appellants averred that he was allocated the suit plot in **1991**, by the Defunct Narok County Council. He produced a letter of allotment dated **5th October 2002**, to support his claim. There was no

evidence called from Narok County Government to dispute that the said letter of allotment was not issued by the **Defunct Narok County Council**. Therefore, the evidential burden of prove never shifted to the Appellants herein. See the case of **Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR)**.

70. The 1st Appellant was allocated plot **No 455 Ntulele Tading centre** as is evident from the letter of allotment produced as exhibit by the 1st Appellant. There were conditions to be met, and the said letter shows that the plot was allocated to the 1st Appellant from **1991**.
71. The 1st Appellant testified that he paid for **survey** and **showing** fees for **Plot No 455** on **5th August 2000**. The trial court doubted the genuineness of this receipt and also held that since the 1st Appellant did not meet the conditions stipulated on the letter of allotment, then the said plot automatically reverted to the County Council of Narok/ County Government and was available for allocation to other persons, the Respondent included. However, this court has noted that the alleged receipts relied upon by the Respondent were not initially issued to him, and it is not clear how the said receipts were cancelled from **Raiyian** to the Respondent herein. The trial court relied on the case of **Mbau Saw Mills Ltd vs The Attorney General & 2 Others, Nyeri ELC No. 59 of 2007**, in arriving at the decision he arrived at, but that authority was distinguished by the appellants herein.
72. Further, even though the letter of allotment indicated that the plot would automatically be forfeited in the event of

non-fulfilment of the conditions, was the said plot ever forfeited? Pw1, was not clear on that aspect, and there was no evidence availed from the County Government of NAROK to confirm that indeed this **Plot No. 455 Ntulele Trading Centre** was forfeited from the 1ST Appellant, back to the County Council of Narok, and was later allocated to the Respondent. This could have been proved by calling witnesses from the County Government of Narok or even availing minutes of the relevant County Government Department that forfeited and allocated this plot.

73. The Appellants produced several receipts confirming payments of plot rent specifically the one dated **20th March 2005**, which the trial court alleged was not genuine. The 1st Appellant testified that it was an error on the person who drew the receipt. There was no witness called from the Accounts Department of the **Narok County Government** to prove and/or dispute that the 1st Appellant never paid the stated amount of money. The burden of proof was not upon the Appellants, but upon the Respondent, and so he could have called evidence to disapprove the assertion made by the 1st Appellant. That was not done, and this court finds and holds that the trial court **erred** in finding and holding that the receipts produced by the 1st Appellant were not genuine. Why did he believe the receipts produced by the Respondent which were cancelled, without any explanation and not the receipts produced by the 1st Appellant.

74. Why balancing the available evidence and the exhibits produced before the trial court, this court finds that the 1st

Appellant produced documentary evidence to prove that he was allocated the suit **Plot No 455 Ntulele Trading Centre** by the **Defunct County Council of Narok**. He alleged that he took possession of the said plot in **1998**, and has been in possession since then.

75. On the other hand, there was no sufficient evidence to prove that this plot was forfeited from the 1st Appellant, and was later allocated to the Respondent. The Respondent did not produce any **letter of allotment**, and it was indeed not clear whether from **2013**, letters of allotment never issued. The receipts relied on by the Respondent do not prove that the said plot was allocated to him. These two receipts were issued to **Raiyian Nchoe**, and later cancelled to reflect the name of the Respondent. This **Raiyian** was not a witness, and the circumstances under which the cancellations were done was not clear.
76. Therefore, with the above analysis, this court cannot hold and find that the Respondent did prove his case before the trial court on the required standard of balance of probabilities. For these reasons, this court finds and holds that the trial court erred in finding that the Respondent had proved his case on the required standard of balance of probabilities.
77. On who should pay costs of this Appeal, the court will be guided by the provisions of **Section 27** of the **Civil Procedure Act**, which states that costs are awarded at the discretion of the court. Further, it is evident that costs follow the event, and are awarded to the successful litigant, unless there are circumstances that would warrant

the court to depart from that position. This court finds none. See the case of ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR.***

78. Given that no circumstances exist to warrant this court not to award costs to the successful litigant, the court finds that the Appellants being the successful litigants are awarded costs of this Appeal, and costs at the trial court's proceedings.
79. Having carefully considered the available evidence as contained in the Record of Appeal, the rival written submissions and cited authorities, the court finds that the trial court ***erred*** in finding and holding that the Respondent (Plaintiff) had proved his case on the required standard of balance of probabilities. For the above reasons, this Court in its appellate jurisdiction allows this Appeal in terms of the ***Memorandum of Appeal*** dated ***25th February 2025***, in terms of prayers ***Nos (a), b) and (c)*** of the Memorandum of Appeal and proceeds to set aside the Judgment of the trial court dated ***11th February 2025***.
80. For avoidance of doubt, the Respondent is barred from evicting the Appellants from the suit ***Plot No 455 Ntulele Trading Centre.***

Appeal is allowed accordingly.

Dated, signed and delivered virtually at Narok this 12th day of February 2026.

***L. Gacheru
Judge***

Delivered Online in the presence of

Elijah Meyoki - Court Assistant
Mr. Oyori for Appellants
Ms Ochengo for Respondent

L. Gacheru
Judge
12/02/2026