REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT ISIOLO

ELC APPEAL NO E016 OF 2025

PHILIP KANGETHE KAHORO LEMARASIA…….APPELLANT

VS

STEPHENE ELOTO……..1ST RESPONDENT

AKUYA NANOK……..2ND RESPONDENT

PETER LONOK…….3RD RESPONDENT

NICHOLUS MUSYOKA…….4TH RESPONDENT

JAMES LONGOLE EDOME…….5TH RESPONDENT

JUDGEMENT

[Being an appeal against the judgment and decree of M.A.ODHIAMBO -SRM

Dated and delivered 16.5.2025 arising from Isiolo ELC Case 72 of 2018]

1. The acquisition of property rights as pertains to immovable property and, in particular, land, is underpinned by known and established processes and procedures. Currently, the acquisition of property rights is guided by the provisions of **sections 7,9,12 and 13 of the Land Act, 2012 [2016].** Whichever way, a person can only approach a court of law to vindicate and protect property rights which have since been acquired in one of the prescribed manner. Suffice it to state that the mechanism that underpins the acquisition of land is stipulated in section 7 of the Land Act.

2. The subject matter brings into play whether a court of law can declare, nay, give property rights to a party. The subject under reference was succinctly articulated by the court of appeal in the case of **Nelson Kazungu Chai & 9 others v Pwani University College [2017] KECA 135 (KLR).**

3. The court stated thus –

> ***……..A right can only be protected when it exists in reality and not where it remains an illusion or a mere expectation. Right to property is not one of those rights that inheret to every human being upon birth. They are acquired in different ways after one comes into this world. One cannot***

acquire property rights over another's property other than in a manner prescribed in law. In this case, the appellants' claim to the suit property was in our view, merely aspirational or rhetorical.

4. Back to the subject matter. The appellant herein [*who was the plaintiff in the lower court*] approached the court vide plaint dated 24.5.2018. The appellant contended that same was lawfully allocated plots [a] and [b] by the Isiolo community integrated development program, which is a community-based organization. Besides, the appellant also contended that same[sic] purchased the plots known as plot 802 & 803 Chechelesi. The appellant ventured forward and posited that, despite being the lawful owner of the two plots, the respondents herein [*who were the defendants in the lower court*] entered upon and trespassed upon the suit plot.

5. Flowing from the forgoing, the appellant sought the intervention of the court. In particular, the appellant sought to be declared as the lawful owner and proprietor of plot numbers 802 and 803 Chechelesi. Moreover, the appellant also sought an order of permanent injunction and cost.

6. The respondents herein entered appearance and filed a statement of defence. In addition, the 4th and 5th respondents filed counter claim[s]. Where pertinent, the respondent disputed the claim by the appellant. The respondents denied that the appellant is the lawful owner of the plot. In addition, the respondents posited that the appellant was using his portfolio as Deputy County Commissioner to defraud the respondents of their pieces of land. The respondents invited the court to dismiss the appellant's claim.

7. The suit in the lower court was heard and disposed off vide judgment dated and delivered on 16.5.2025. The learned trial magistrate found and held that the appellant had neither demonstrated nor proved ownership of the suit property. In addition, the trial court found that the documentation that was being propagated by and on behalf of the appellant fell short of proving title to or ownership of the suit property. To this end, the trial court proceeded to and dismissed the appellant's suit.

8. It is the said judgment and the consequential decree that has aggrieved the appellant and thus provoked the subject appeal. The appeal is premised on the memorandum of appeal dated 28.5.2025. The grounds highlighted at the foot of the memorandum of appeal are:

(a)That the learned magistrate erred in law and in fact by failing to consider the right of the appellants' ownership of plot No 802 measuring 0.75 acres with PDP no ISL/117/16/279.

(b)The learned trial magistrate erred in law and in fact by failing to consider the evidence of ownership of plots 802 and 803 Chechelesi in Isiolo.

(c)That the learned trial magistrate erred in law and in fact by failing to consider that the respondents did not have the right of ownership to the suit property.

(d) The learned trial magistrate did not consider that the respondents did not follow the proper procedure in the acquisition of the suit property.

(f)The learned trial magistrate did not consider the documentary evidence presented by the appellant.

9. The appeal came up for directions on 3.11.2025, when learned counsel for the appellant sought time to file and serve the record of appeal. The court granted indulgence and directed that the appeal be mentioned on the 18.11.2025. The appeal was mentioned on 18.11.2025, and whereupon learned counsel for the appellant intimated to the court that same had indeed filed and served the record of appeal. Moreover, learned counsel posited that the record of appeal was complete. In this regard, counsel sought directions as to the hearing and disposal of the appeal.

10. With the concurrence of learned counsel for the respondent[s], the court ventured forward and issued directions. The directions that were issued are: The appeal shall be heard before one judge sitting at Isiolo; The appeal shall be canvassed by way of written submissions; the appellant shall file and serve written submissions within 14 days from the date of the directions; the respondents shall be at liberty to file and serve written submissions within 14 days from date of service; the appellant shall be at liberty to file rejoinder submissions [If any] within 7 day[s] from the Date of service.

11. The appellant served written submissions dated 5.2.2026, wherein same has highlighted and canvassed four [4] issues. The issues canvassed are: the learned trial magistrate failed to appreciate the legality of the documents that were tendered by the appellant; the learned trial magistrate misconstrued the evidence and in particular that the appellant had purchased the suit property for the 1st to the 3rd respondents; the learned trial magistrate failed to take cognizance of the appellants proven continuous possession, use and developments of the suit property; and the learned trial magistrate misconstrued and misapplied the law as pertains burden of proof.

12. Regarding the first issue, learned counsel for the appellant submitted that the appellant tendered and produced before court assorted documents including a copy of sale agreement; copy of application for allotment; a copy of application for PDP; a copy of the letter of confirmation of ownership by the district surveyor and a copy of letter from the county council of Isiolo [now defunct], which showed that the appellant was the lawful owner of the suit plot. In this regard, it has been submitted that the documentation that was tendered on behalf of the appellant was sufficient to establish ownership.

13. The next issue that has been canvassed by learned counsel for the appellant relates to the existence of a lawful sale agreement. To this end, it has been submitted that the appellant tendered evidence to show the purchase of the suit plot from the 1st, 2nd, and 3rd respondents. Moreover, it was submitted that the respondents had duly signed the sale agreement. However, learned counsel submitted that the learned trial magistrate did not interrogate the sale agreement and appreciate that same had been signed by the respondents.

14. The third issue that has been canvassed by learned counsel for the appellant is to the effect that the learned trial magistrate failed to appreciate that the appellant had been in occupation of the suit plot between 2008 and 2015. Furthermore, it has been contended that the trial magistrate disregarded the evidence of occupation, including fencing, construction of a mabati house, a stone water tank, and the farming activities. It was contended that the evidence on record clearly demonstrated that the appellant was the lawful owner of the suit plot and thus warranted the reliefs sought before the court.

15. The last issue that has been highlighted on behalf of the appellant relates to the burden and standard of proof. It was contended that though the respondents failed to adduce any evidence in support of their denial, the learned trial magistrate failed to appreciate that the evidence by the appellant was not controverted. In addition, it has been submitted that the learned trial magistrate erred in shifting the burden of proof to the appellant, yet it is the 4th and 5th respondents who had raised counterclaims pertaining to portions of the suit plot.

16. Additionally, it has been contended that the learned trial magistrate also failed to appreciate the historical and legal context pertaining to community land allocation. In this regard, it has been submitted that the appellant showed that the land was previously community land and that same is the lawful owner.

17. Moreover, learned counsel for the appellant has thereafter invoked the provisions of section 24and 25 of the Land Registration Act, 2012 [2016]; as read together with article 40 of the Constitution, 2010. Thereafter, the Counsel posited that the appellant has established property right[s] to the suit plot.

18. Flowing from the foregoing, learned counsel for the appellant has submitted that the appeal before hand is merited. To this end, the court has been implored to allow the appeal, set aside the impugned judgment, and allow the appellant's suit in the lower court. The appellant has also sought for cost.

19. The respondents filed written submissions dated 19.2.2026, wherein same have raised and canvassed three [3] key issues. The issues are, namely: The appellant was divested of the requisite locus standi to file the suit in the lower court; the appellant did not prove the root of his title to the suit plot; and the documentation produced by the appellant fell short of the established statutory threshold.

20. Concerning the first issue, learned counsel for the respondents has contended that the appellant laid the claim before the lower court on the basis that the suit plot[s] were owned by himself and his mother, namely, Teresia Wambui Kahoro [now deceased]. To the extent that it was contended that the suit plots were owned together with the deceased, it has been contended that the appellant herein could not file and prosecute the suit without the requisite grant of letters of administration.

21. It was submitted that the appellant did not demonstrate that he had acquired/ obtained the grant of letters of Administration. In this regard, it has been submitted that the appellant was divested of the requisite locus standi. Consequently, the court has been invited to find that the appellant's suit is therefore incompetent.

22. The second issue that has been canvassed relates to the root of the appellant's title. It has been contended that the appellant did not tender or produce any evidence to show that the Isiolo community integrated development program[CBO] owned the land in the first place. In addition, it has been posited that the CBO could not purport to sell land which it did not own. Furthermore, it has been submitted that even though the appellant contended that the 1st, 2nd, and 3rd respondents were members of the CBO, no evidence was placed before the court. In any event, learned counsel has contended that the 1st, 2nd, and 3rd respondents have denied ever being members of the said CBO.

23. The next issue that has been submitted relates to the status of the documents tendered by the appellants. It has been submitted that the documents which were produced before the court and relied on by the appellant are incapable of conferring ownership right[s] to and in respect of the suit plot. In particular, learned counsel for the respondents has submitted that a Part Development Plan [PDP] is a planning tool and does not confer title to property.

24. Furthermore, learned counsel has also submitted that the appellant did not tender any letter of allotment. It has been further submitted that even if a letter of allotment had been produced [*which is not the case*], such a letter does not by and of itself amount to title.

25. In view of the forgoing, learned counsel for the respondents has submitted that the appeal before the court is meritless. On the contrary, it has been contended that the decision of the trial magistrate was well-reasoned, well-grounded, and unassailable. The court has been invited to dismiss the appeal. They have also sought the cost of the appeal.

26. I have reviewed the record of appeal; the pleadings filed by/ on behalf of the parties, the evidence that was tendered [both oral and documentary]; the judgment of the trial court, and the written submissions filed by and on behalf of the parties. I come to the conclusion that the determination of the appeal turns on three [3] key issues. The issues are: whether the appellant was seized of the requisite locus standi to mount/ maintain the suit in the lower court and by extension the subject appeal; whether the appellant duly established/

proved ownership of the suit plot; whether the learned trial magistrate correctly appreciated and applied the law pertaining to ownership of landed property or otherwise.

27. Before venturing to address the thematic issues that have been isolated in the preceding paragraph, it is important to highlight that what is before me is a first appeal. By virtue of being a first appeal, this court is mandated to undertake a fresh and exhaustive scrutiny, review, and analysis of the totality of evidence tendered before the court of first instance. The court is obligated to review the evidence and determine whether the finding[s] and conclusion[s] arrived at by the trial magistrate accord with the evidence on record and the legal principles.

28. The court is seized of the authority and jurisdiction to arrive at an independent conclusion and to depart from the findings of the trial court. However, it is established that the appellate court can only depart from the factual finding[s] and conclusion[s] of the trial court where it is demonstrated; that the conclusions were based on no evidence; the conclusions are perverse to the evidence on record; the findings are based on misapprehension of the evidence and law; and that there is a demonstrable error of principle which vitiates the findings of the trial court.

29. Suffice it to state that barring the foregoing, the first appellate court is enjoined to defer to the findings and conclusions of the trial court. Notably, the jurisdiction of the first appellate court to interfere with the findings/conclusions of the trial court is circumscribed. The jurisdiction is not at large. Simply, the Appellate Court cannot depart from the Factual finding[s] and conclusion[s] at will; or for the mere asking by any Party.

30. The jurisdictional remit of the first appellate court, while undertaking its mandate as pertains to the first appeal, has been the subject of various court decisions. In the case of **Odera t/a AJ Odera & Associates v Machira t/a Machira & Co Advocates [2013] KECA 208 (KLR), t**he Court of Appeal expounded on the scope of the jurisdiction. The court stated thus

> ***46. We also wish to be guided by the reasoning of this court in the case of Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934 thus:-"Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the house of Lords in Sottos Shipping versus Sauviet Sohold, The Times, March 16,1983."It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said" Again in Peters versus Sunday Post Limited (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir***

Kenneth O' Conner, P said at page 429: "It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses

31. Recently, the court of appeal revisited the jurisdictional remit in the case of **Kenya Urban Roads Authority & another v Belgo Holdings Limited [2025] KECA 764 (KLR).** The Court of Appeal 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 circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it***

is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

32. Bearing in mind the principles enunciated in the decisions [supra],it is now apposite to revert to the issues for determination. I shall address the issues sequentially. I shall start with the first issue.

33. Concerning the first issue, it is important to recall that the appellant filed the suit in the lower court in his own capacity. The appellant posited that though the plots in question originally belonged to the Isiolo community integrated development program [CBO], the land was subdivided, and thereafter the appellant was given four plots. The appellant posited that the four plots were initially marked as a, b, c, and d, Chechelesi B. In addition, the appellant contended that the sub-divisions and in particular, plot[s] a and c belonged to him, while b and d belonged to his mother, namely; Teresia Wabui Kahoro [deceased]

34. Additionally, he [Appellant] contended that he is the owner of plots 802 and 803 Chechelesi. It is these two plots that the appellant sought to be declared as the ones lawfully belonging to him. It is the two plots that underpinned the suit and proceedings before the lower court.

35. My reading of the plaint that was filed by the appellant drives me to the conclusion that the appellant is suing in his personal capacity. The appellant's suit relates to the named plot, which is contended to belong to him. The appellant's suit does not concern or relate to the plots [if at all] which belonged to Teresia Wambui Kahoro[deceased].

36. Insofar as the appellant's claim touches on and concerns his entitlement to and ownership of the suit plot, the appellant was not obligated to procure and obtain any grant of letters of administration before filing the suit. Suffice it to state that the grant of letters would only arise if [and only if] the appellant approached the court in a representative capacity. That is not the case.

37. I am afraid that learned counsel for the respondent[s] has misapprehended and misconceived the capacity in which the appellant approached the lower court. Similarly, I beg to state that learned counsel for the respondents has mischaracterized the appellant's suit and, by extension, the cause of action.

38. Other than the foregoing, there is yet another aspect that merits consideration. The aspect concerns the fact that the issue of locus standi of the appellant [if at all] was neither captured in the pleadings that were filed by and on behalf of the respondent[s]. In addition, the issue of locus standi was never canvassed in the lower court. It was not a point for determination, nor was it determined by the lower court.

39. Can the respondents now wake up and seek to propagate the plea of locus standi? It is my humble position that the respondents were obliged to implead the question of locus standi. Insofar as it was not impleaded, the respondent cannot now seek to litigate by surprise and ambush. Such kind of endeavor is frowned upon by our legal system. Furthermore, Litigation by ambush contravenes the right to Fair Hearing. [See the doctrine of departure- order 2 rule 6 of Civil Procedure Rule].

40. Additionally, it is important to take cognizance of the holding of the Court of Appeal in **Ouko & another (Suing as the Personal Representatives and Administrators of the Estate of Jason Atinda Ouko (Deceased)) v Kageni (Sued as the Personal Representative and Administrator of the Estate of Samuel Muhika Kageni (Deceased) [2025] KECA 2126 (KLR.**

41. The Court stated thus**:**

> ***32.We have painstakingly gone through the entire record, and we note that the issue of the respondent's capacity was not raised in the pleadings and only arose during the cross-examination of the respondent. Even in the appellants' list of issues dated 29th May 2016, appearing at pages 227 and 228 of the record of appeal, this issue was not raised. In Ann Wairimu Wanjohi vs. James Wambiru Mukabi [2021] KECA 476 (KLR), the Court, when confronted with issues not raised in pleadings, held that: "We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties. In accordance with the Civil Procedure Rules, the parties should also either provide a list of agreed issues, or if there is no agreement, each provide their own list of issues so that the***

court can settle the issues. Although it is desirable that where necessary the pleadings should be amended to bring in all the issues, Odd Jobs vs Mubia (supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court. However, such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings."

33.We associate ourselves with the cited decision and therefore find no error in the learned Judge's appreciation of the import of Order 1 Rule 9 and Order 31 rules 1 & 2 of the Civil Procedure Rules and his conclusion on the question as to whether the respondent's claim was defective. We agree that the issue was raised late in the day and could not be the basis for striking out the respondent's suit.

42. To my mind, the question/issue of locus standi is borne out of misapprehension, misconception, and mischaracterization of the capacity that was deployed by the appellant while approaching the lower court. In the premise[s], the issue of locus standi is legally untenable.

43. My answer to issue number One [1] is that the appellant was seized of the requisite locus standi [capacity] to mount and maintain the suit in the lower court; and by extension the subject appeal.

44. The next issue that falls for consideration is whether the appellant proved/ established his claim to and in respect to the suit plots. It is worth recalling that the appellant had contended that same is the owner of plots number 802 and 803 chechelesi. However, the manner in which the appellant contends to have acquired the suit plot[s] is somehow contradictory and confusing.

45. The contradictory and confusing nature of the appellant's claim shall be unraveled shortly. However, before embarking on the journey to unravel the contradiction, it is apposite to underscore that the burden of proof [both evidential and legal] lies on the shoulders of the appellant. It is the appellant who had contended that same is the owner of the suit plot[s].

46. The law as pertains to burden and standard of proof in civil matters was highlighted in the case of **James Muniu Mucheru v National Bank of Kenya Limited[2019] KECA 1058 (KLR).**

47. The Court of Appeal stated thus

17. On matters evidence, *Madan, JA* (as he then was) in *CMC Aviation Ltd v. Crusair Ltd (No1) [1987] KLR 103* stated: *"…Proof is the foundation of evidence.*

As stated in the definition of "evidence" in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven...."

18. The Evidence Act is clear enough upon whom the burden of proof lies. ***Section 107*** **provides as follows:** ***"1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.2. When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person. "Section 109*** **of the same** Act **further provides:** ***"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 law that the proof of that fact lie on any particular person."***

19. In ***Karugi & Another v Kabiya & 3 Others [1987] KLR 347,*** **this Court held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.**

48. Did the appellant prove ownership of the suit plots? Firstly, the appellant contended that what comprised the suit plot was created out of or subdivided from land which originally belonged to Isiolo Community Integrated Development Program [CBO]. The appellant further contended that upon subdivision of the said land, the appellant was given four plots. The appellant added that of the four plots, a & c belonged to him.

49. What I hear the appellant to be saying is that his plots a and c were allocated to him by the Isiolo community integrated development program. However, it is not lost on me that the appellant did not tender any evidence to show that the said CBO ever owned the land. In the absence of ownership, it is common ground that the Isiolo community integrated development program [CBO] could not allocate or pass any title to the appellant.

50. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] KECA 816 (KLR** the Court of Appeal considered the legal import and tenor of the doctrine of nemo dat quod non habet.

51. The Court stated thus:

69. ***It is our finding that as between West End and Arthi, no valid Title passed, and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore, KMAH, Yamin, and Gachoni cannot purport to have purchased the disputed land or portions thereof***.

52. In the circumstance[s], and to my mind, the aspect of the appellant's claim that touches on the allocation of plot a & c was not proven.

53. The other limb of the appellant's Claim touches on the purchase of what constitutes the suit plot. The appellant contended that he purchased the suit plot and paid to the defendants the requisite consideration. The appellant posited that he paid a total of Ksh 360,000/= only. [See paragraph 5 of the Plaint].

54. It is worth recalling that the appellant produced a copy of the sale agreement as PEXB 1. However, the sale agreement under reference did not allude to any parcel number or plot number. The question that does arise is how the sale agreement correlates to the suit property. The appellant did not demonstrate the nexus. It was his obligation to do so. The failure impacts on his claim.

55. Other than the foregoing, it is also important to highlight that the appellant contended that the sale agreement was between him and the respondents. It is the respondents who sold the land to him. Nevertheless, it suffices to state that the respondents herein did not have the title to the land. They could therefore not sell what they did not own.

56. Similarly, the limb of the appellants' claim that he bought/ purchased the suit plot from the respondent is equally built on quicksand.

57. The next aspect that was canvassed by the appellant to underpin his claim of ownership of the suit plot was to the effect that the same were allocated to him. The appellant thereafter contended that a letter of allotment was issued. However, it bears repeating that when the appellant was being cross-examined by Learned Counsel for the Respondents, he conceded that he did not tender/ produce the letter of allotment.

58. It is the appellant who sought to persuade the learned trial magistrate that he had an allotment letter for the plot. He did not produce the allotment letter. Surely, the appellant cannot be heard to stake a claim to ownership of the suit plot based on [sic] a non-existent letter of allotment.

59. In any event, there is no gainsaying that a letter of allotment by and on itself does not confer ownership to land. On the contrary, a Letter of allotment is an Offer and same is contigent to the issuance of a Lease. Moreover, Title to landed property only arise[s] upon issuance of a Letter of allotment; compliance with the terms thereof; and upon ultimate issuance of Certificate of Tile or Lease [whichever is the case]. [**See Wreck Motors Enterprises Limited vs. Commissioner of land& others 1997 eklr; Dr. Joseph arap Ngok vs. Justice Moijo Ole Keiwua & 5 Others, civil Appeal No. Nai 60 of 1997; and Torino Enterprises Limited vs AG 2023 KESE.]**

60. The last limb of the appellants' case was predicated on the basis of application for PDP; the Part Development Plan[PDP]; and a purported letter of confirmation of ownership by the district surveyor, namely, Peter K. Wachira. It is instructive to observe that neither an application for PDP nor a PDP can confer/bestow ownership rights on the bearer. It is elementary learning that a PDP is a planning tool whose purport was clearly stipulated in section 3 of the Physical Planning Act, Chapter 296 laws of Kenya [now repealed]. The said Act is what was in place at the time when the impugned PDP was being prepared/ signed.

61. In addition, it is worthy to point out that a letter by a district surveyor, by and of itself, cannot confer ownership. It is important to underscore that ownership documents, and in particular, for land falling under the County Government; and which has not been registered, can only be authenticated by the designated officer of the county government. Moreover, the documentation to underpin such ownership is well known.

62. Be that as it may, I wish to observe that here at Isiolo, the District Surveyor; and his Counter-part the County Physical Planner; have hatched a scheme whereby same generate, nay write certain Letters [Letters of Confirmation of Ownership of Land] and which Letters are magically used in Court to [sic] confirm ownership of Land. I am afraid that the named Officers cannot confirm Ownership of Land. Their Offices are technical in nature. Moreover, the scope of their office[s] is defined in Law. Surely, when a Surveyor purports to confirm Ownership of Land, something has gone wrong.

63. For the sake of posterity, it is important to remind ourselves that a Suerveyor's mandate is prescribed under the provisions of the Survey Act, Chapter 299, Laws of Kenya. The mandate relate[s] to inter-alia: Undetaking Survey exercise; preparation of Mutation; procuring approval of the Mutation/ Scheme of Sub-division; and addressing boundary issue[s]. The surveyor does not confirm ownership of Land. That is the mandate of the Land Registrar in terms of the Provisions of the Land Registration Act, 2012 [2016]; or the Community Land Registrar in terms of the provisions of the Community Land Act, 2016.

64. Regarding the role of the County Physical planner/ Director of Planning, it is important to state that their role is prescribed under the provisions of the Physical and Land Use Planning Act [PLUPA] 2019. Their role entails: Preparation of the Part Development plan; the Master Plan; Scheme Plan; and related Documents. The Directorate of Physical Planning and his designate[s] do not involve themselves in Land Registration. The same cannot therefore confirm ownership of Land.

65. Nevertheless, here in Isiolo, these Officer[s] enjoy a field day. The same engage themselves in writing; generating; and disseminating Letter[s], which are produced before the Lower Courts for purposes of proving Land Ownership.

66. It is time that the said Officers be advised appropriately.

67. Back to the issue at hand. I beg to point out that the appellant did not produce any credible document to demonstrate ownership of the suit plot. The Land Confirming ownership of Land by the District Surveyor had/ has no probative value. The said Letter was merely ornamental. In short, the appellant therefore failed to discharge the burden of proof in the manner stipulated under the law.

68. The last issue for consideration is whether the learned magistrate correctly appreciated and applied the law pertaining to landed property. It is imperative to state that the learned trial court took cognizance of the documentation that had been propagated by the appellant. The trial court appraised the sale agreement; and observed that the land could not have been purchased from an organization that did not own the land in the first place. The trial court expounded on the doctrine of *nemo dat quod non habet*.

69. Additionally, the learned trial magistrate also appraised the application for PDP and the PDP which were being applied for by the appellant. Thereafter, the trial magistrate cited and referenced the decision in **Dina Management Limited vs County govt of Mombasa & 5 others 2023 KESC.**

70. I do not wish to belabor the point. It suffices to reiterate that the Supreme Court of Kenya held that a PDP is a facilitative/ planning tool which is prepared by the designated office and approved by the commissioner of land/ the Cabinet Secretary. In any event, it was clarified that a PDP is a facilitative document that authenticates whether or not the land/plot intended to be allocated is available. The Part Development Plan cannot guarantee title to Land.

71. Quite clearly, and I agree with the trial magistrate, the application of the PDP and the PDP could not/ cannot bestow title to the appellant.

72. Finally, the learned trial magistrate addressed her judicial mind to the legal import and tenor of the letter of allotment. The trial magistrate found that no such letter of allotment was produced before the court. More importantly, the trial magistrate found that even if such a letter of allotment had been produced, [which was not the case] the same by and of itself does not confer title.

73. To my mind, the learned trial magistrate correctly appreciated and applied the law as pertains to proof of ownership of land. It suffices to reiterate that ownership of land must be based on known and credible documentation. It cannot be claimed based on [sic] any collection/piles of papers.

Conclusion

74. Having reviewed and addressed the three thematic issues that were highlighted in the body of the judgment, it is apparent that the appellant did not produce before the trial court any document or legal instrument capable of underpinning ownership of land. The documents that were tendered were incapable of proving ownership.

75. Moreover, it must have become apparent that the learned trial magistrate appreciated, understood, and applied the relevant legal principle[s] in arriving at the conclusion that the appellant did not prove his case. The Judgment of the trial magistrate was well grounded; well reasoned; and unassailable.

76. Bearing in mind the principles highlighted in **Ephantus Mwangi vs Duncan Mwangi Wambugu [1984] ekl; and Jabane Vs Olenja 1986 Eklr**, I find no basis to depart from the findings and conclusion of the trial court. Further, and in any event, I come to the same conclusion.

77. In short, I affirm the findings and conclusion[s] of the Learned Trial Magistrate.

Final Orders-

78. Flowing from the forgoing the final orders that commend themselves to the court are:

I. **Appeal be and is hereby <u>dismissed.</u>**
II. **The judgement of the learned trial magistrate dated 16.5.2025 and the consequential decree be and are hereby <u>affirmed.</u>**
III. **The Appellant shall bear the cost of the appeal.**
IV. **The Cost in terms of clause [iii] shall be agreed upon and, in default, be taxed in the conventional manner.**

79. It is so ordered.

DATED SIGNED AND DELIVERED AT ISIOLO THIS 4TH DAY OF MARCH, 2026

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

JUDGE

IN THE PRESENCE OF-

Court Assistant: Mukami.

Mr. Kevin Nyenyire- Learned counsel for Appellant

Mr. Mwirigi – Learned for Respondents